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THE  
FEDERAL REPORTER.

VOLUME 87.

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CASES ARGUED AND DETERMINED  
IN THE  
CIRCUIT COURTS OF APPEALS AND CIRCUIT  
AND DISTRICT COURTS OF THE  
UNITED STATES.

PERMANENT EDITION.

JULY—AUGUST, 1898.

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# AMENDMENT TO RULES.

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## UNITED STATES CIRCUIT COURTS OF APPEALS.

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### Sixth Circuit.

#### 3.<sup>1</sup>

Paragraph 4 of rule 3 is amended to read as follows:

At other than calendar sessions, except the June and July sessions, the court will hear any case upon the docket in which the record has been printed and briefs for both parties filed, provided that there has been also filed in the clerk's office on the Monday preceding the first day of such session the written consent of counsel for both parties that such hearing may be had.

As amended July, 1898.

<sup>1</sup> For rule as originally adopted in the Sixth circuit, see 21 C. C. A. lxxiii., 78 Fed. lxxiii.



## FEDERAL REPORTER, VOLUME 87.

# JUDGES

OF THE

## UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

### FIRST CIRCUIT.

Hon. HORACE GRAY, Circuit Justice..... Washington, D. C.  
Hon. LE BARON B. COLT, Circuit Judge..... Bristol, R. I.  
Hon. WILLIAM L. PUTNAM, Circuit Judge..... Portland, Me.  
Hon. NATHAN WEBB, District Judge, Maine..... Portland, Me.  
Hon. EDGAR ALDRICH, District Judge, New Hampshire..... Littleton, N. H.  
Hon. THOMAS L. NELSON, District Judge, Massachusetts.<sup>1</sup>..... Worcester, Mass.  
Hon. FRANCIS C. LOWELL, District Judge, Massachusetts.<sup>2</sup>..... Boston, Mass.  
Hon. ARTHUR L. BROWN, District Judge, Rhode Island..... Providence, R. I.

### SECOND CIRCUIT.

Hon. RUFUS W. PECKHAM, Circuit Justice..... Washington, D. C.  
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Hon. E. HENRY LACOMBE, Circuit Judge..... New York, N. Y.  
Hon. NATHANIEL SHIPMAN, Circuit Judge..... Hartford, Conn.  
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Hon. ALFRED C. COXE, District Judge, N. D. New York..... Utica, N. Y.  
Hon. ADDISON BROWN, District Judge, S. D. New York..... New York, N. Y.  
Hon. CHARLES L. BENEDICT, District Judge, E. D. New York.<sup>3</sup>..... Brooklyn, N. Y.  
Hon. ASA W. TENNEY, District Judge, E. D. New York.<sup>4</sup>..... Brooklyn, N. Y.  
Hon. EDWARD B. THOMAS, District Judge, E. D. New York.<sup>5</sup>.. 29 Liberty St., New York.  
Hon. HOYT H. WHEELER, District Judge, Vermont..... Brattleboro, Vt.

### THIRD CIRCUIT.

Hon. GEORGE SHIRAS, Jr., Circuit Justice..... Washington, D. C.  
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Hon. GEORGE M. DALLAS, Circuit Judge..... Philadelphia, Pa.  
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Hon. ANDREW KIRKPATRICK, District Judge, New Jersey..... Trenton, N. J.  
Hon. WILLIAM BUTLER, District Judge, E. D. Pennsylvania..... Philadelphia, Pa.  
Hon. JOSEPH BUFFINGTON, District Judge, W. D. Pennsylvania..... Pittsburgh, Pa.

<sup>1</sup> Deceased November 21, 1897.

<sup>2</sup> Commissioned January 10, 1898.

<sup>3</sup> Resigned June 5, 1897, to take effect on appointment of successor.

<sup>4</sup> Confirmed July 8, 1897. Deceased December 10, 1897.

<sup>5</sup> Commissioned February 15, 1898.

<sup>6</sup> Confirmed May 11, 1897.

## FOURTH CIRCUIT.

Hon. MELVILLE W. FULLER, Circuit Justice..... Washington, D. C.  
 Hon. NATHAN GOFF, Circuit Judge..... Clarksburg, W. Va.  
 Hon. CHARLES H. SIMONTON, Circuit Judge..... Charleston, S. C.  
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 Hon. THOMAS R. PURNELL, District Judge, E. D. North Carolina.<sup>2</sup>..... Raleigh, N. C.  
 Hon. ROBERT P. DICK, District Judge, W. D. North Carolina.<sup>3</sup>..... Greensboro, N. C.  
 Hon. HAMILTON G. EWART, District Judge, W. D. North Carolina.<sup>4</sup>..... Hendersonville, N. C.  
 Hon. WILLIAM H. BRAWLEY, District Judge, E. and W. D. South Car... Charleston, S. C.  
 Hon. ROBERT W. HUGHES, District Judge, E. D. Virginia.<sup>5</sup>..... Norfolk, Va.  
 Hon. EDMUND WADDILL, Jr., District Judge, E. D. Virginia.<sup>6</sup>..... Richmond, Va.  
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 Hon. JOHN J. JACKSON, District Judge, West Virginia..... Parkersburg, W. Va.

## FIFTH CIRCUIT.

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 Hon. HARRY T. TOULMIN, District Judge, S. D. Alabama..... Mobile, Ala.  
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 Hon. WILLIAM T. NEWMAN, District Judge, N. D. Georgia..... Atlanta, Ga.  
 Hon. EMORY SPEER, District Judge, S. D. Georgia..... Macon, Ga.  
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 Hon. JOHN B. RECTOR, District Judge, N. D. Texas.<sup>7</sup>..... Dallas, Tex.  
 Hon. EDWARD R. MEEK, District Judge, N. D. Texas.<sup>8</sup>..... Ft. Worth, Tex.  
 Hon. THOMAS S. MAXEY, District Judge, W. D. Texas..... Austin, Tex.

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 Hon. HORACE H. LURTON, Circuit Judge..... Nashville, Tenn.  
 Hon. JOHN WATSON BARR, District Judge, Kentucky..... Louisville, Ky.  
 Hon. HENRY H. SWAN, District Judge, E. D. Michigan..... Detroit, Mich.  
 Hon. HENRY F. SEVERENS, District Judge, W. D. Michigan..... Kalamazoo, Mich.  
 Hon. AUGUSTUS J. RICKS, District Judge, N. D. Ohio..... Cleveland, Ohio.  
 Hon. GEORGE R. SAGE, District Judge, S. D. Ohio..... Cincinnati, Ohio.  
 Hon. CHARLES D. CLARK, District Judge, E. and M. D. Tennessee... Chattanooga, Tenn.  
 Hon. ELI S. HAMMOND, District Judge, W. D. Tennessee..... Memphis, Tenn.

<sup>1</sup> Deceased February 19, 1897.<sup>2</sup> Confirmed May 5, 1897.<sup>3</sup> Resigned January 12, 1898, to take effect on appointment of successor.<sup>4</sup> Commissioned July 13, 1898.<sup>5</sup> Resigned March 4, 1898.<sup>6</sup> Commissioned March 22, 1898.<sup>7</sup> Deceased April 9, 1898.<sup>8</sup> Commissioned July 13, 1898.

## SEVENTH CIRCUIT.

Hon. HENRY B. BROWN, Circuit Justice.....	Washington, D. C.
Hon. WILLIAM A. WOODS, Circuit Judge.....	Indianapolis, Ind.
Hon. JAMES G. JENKINS, Circuit Judge.....	Milwaukee, Wis.
Hon. JOHN W. SHOWALTER, Circuit Judge.....	Chicago, Ill.
Hon. PETER S. GROSSCUP, District Judge, N. D. Illinois. 4259 Grand Boulevard, Chicago.	
Hon. WILLIAM J. ALLEN, District Judge, S. D. Illinois.....	Springfield, Ill.
Hon. JOHN H. BAKER, District Judge, Indiana.....	Goshen, Ind.
Hon. WILLIAM H. SEAMAN, District Judge, E. D. Wisconsin.....	Sheboygan, Wis.
Hon. ROMANZO BUNN, District Judge, W. D. Wisconsin.....	Madison, Wis.

## EIGHTH CIRCUIT.

Hon. DAVID J. BREWER, Circuit Justice.....	Washington, D. C.
Hon. HENRY C. CALDWELL, Circuit Judge.....	Little Rock, Ark.
Hon. WALTER H. SANBORN, Circuit Judge.....	St. Paul, Minn.
Hon. AMOS M. THAYER, Circuit Judge.....	St. Louis, Mo.
Hon. JOHN A. WILLIAMS, District Judge, E. D. Arkansas.....	Little Rock, Ark.
Hon. ISAAC C. PARKER, District Judge, W. D. Arkansas. <sup>1</sup> .....	Ft. Smith, Ark.
Hon. JOHN H. ROGERS, District Judge, W. D. Arkansas. <sup>2</sup> .....	Ft. Smith, Ark.
Hon. MOSES HALLETT, District Judge, Colorado.....	Denver, Colo.
Hon. OLIVER P. SHIRAS, District Judge, N. D. Iowa.....	Dubuque, Iowa.
Hon. JOHN S. WOOLSON, District Judge, S. D. Iowa.....	Mount Pleasant, Iowa.
Hon. CASSIUS G. FOSTER, District Judge, Kansas.....	Topeka, Kan.
Hon. RENNELAER R. NELSON, District Judge, Minnesota. <sup>3</sup> .....	St. Paul, Minn.
Hon. WM. LOCHREN, District Judge, Minnesota. <sup>4</sup> .....	Minneapolis, Minn.
Hon. ELMER B. ADAMS, District Judge, E. D. Missouri.....	St. Louis, Mo.
Hon. JOHN F. PHILIPS, District Judge, W. D. Missouri.....	Kansas City, Mo.
Hon. ELMER S. DUNDY, District Judge, Nebraska. <sup>5</sup> .....	Omaha, Neb.
Hon. WILLIAM D. McHUGH, District Judge, Nebraska. <sup>6</sup> .....	Omaha, Neb.
Hon. W. H. MUNGER, District Judge, Nebraska.....	Omaha, Neb.
Hon. ALFRED D. THOMAS, District Judge, North Dakota. <sup>7</sup> .....	Fargo, N. D.
Hon. CHARLES F. AMIDON, District Judge, North Dakota. <sup>8</sup> .....	Fargo, N. D.
Hon. ALONZO J. EDGERTON, District Judge, South Dakota. <sup>9</sup> .....	Sioux Falls, S. D.
Hon. JOHN E. CARLAND, District Judge, South Dakota. <sup>10</sup> .....	Sioux Falls, S. D.
Hon. JOHN A. MARSHALL, District Judge, Utah.....	Salt Lake City, Utah.
Hon. JOHN A. RINER, District Judge, Wyoming.....	Cheyenne, Wyo.

## NINTH CIRCUIT.

Hon. STEPHEN J. FIELD, Circuit Justice. <sup>11</sup> .....	Washington, D. C.
Hon. JOSEPH McKENNA, Circuit Justice. <sup>12</sup> .....	San Francisco, Cal.
Hon. JOSEPH McKENNA, Circuit Judge. <sup>13</sup> .....	San Francisco, Cal.

<sup>1</sup> Deceased November 17, 1896.<sup>2</sup> Commissioned December 15, 1896.<sup>3</sup> Resigned May 16, 1896.<sup>4</sup> Commissioned May 13, 1896. Confirmed same date.<sup>5</sup> Deceased October 28, 1896.<sup>6</sup> Resigned.<sup>7</sup> Deceased August 8, 1896.<sup>8</sup> Commissioned August 31, 1896. Confirmed February 18, 1897.<sup>9</sup> Deceased August 9, 1896.<sup>10</sup> Commissioned December 15, 1896.<sup>11</sup> Resigned December 1, 1897.<sup>12</sup> Commissioned January 21, 1898.<sup>13</sup> Resigned.

Hon. WM. W. MORROW, Circuit Judge. <sup>1</sup> .....	San Francisco, Cal.
Hon. WILLIAM B. GILBERT, Circuit Judge.....	Portland, Ore.
Hon. ERSKINE M. ROSS, Circuit Judge.....	Los Angeles, Cal.
Hon. JOHN J. DE HAVEN, District Judge, N. D. California. <sup>2</sup> .....	San Francisco, Cal.
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Hon. HIRAM KNOWLES, District Judge, Montana.....	Helena, Mont.
Hon. CORNELIUS H. HANFORD, District Judge, Washington.....	Seattle, Wash.
Hon. THOMAS P. HAWLEY, District Judge, Nevada.....	Carson City, Nev.
Hon. CHARLES B. BELLINGER, District Judge, Oregon.....	Portland, Ore.
Hon. JAMES H. BEATTY, District Judge, Idaho.....	Boise City, Idaho.
Hon. ARTHUR K. DELANEY, District Judge, Alaska. <sup>3</sup> .....	Juneau.
Hon. CHARLES S. JOHNSON, District Judge, Alaska. <sup>4</sup> .....	Sitka.

<sup>1</sup> Commissioned May 20, 1897.

<sup>2</sup> Commissioned June 8, 1897.

<sup>3</sup> Removed.

<sup>4</sup> Commissioned July 28, 1897.

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# CASES

## ARGUED AND DETERMINED

IN THE

## UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

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CARR v. KANSAS CITY et al.

(Circuit Court, W. D. Missouri, W. D. May 16, 1898.)

**REMOVAL OF CAUSES—JOINT CAUSE OF ACTION—RIGHT OF NONRESIDENT DEFENDANT.**

Kansas City, Mo., Charter, art. 17, § 11, provides that whenever the city shall be sued for liability growing out of the wrongful act, negligence, etc., of any person or corporation, and such person or corporation is also liable to the same action, the plaintiff may, on motion, be compelled to make such person or corporation a joint defendant. *Held* that, where the city and a corporation are jointly sued for personal injuries resulting to plaintiff by reason of the wrongful failure of both the city and such corporation to do an act incumbent on each of them, such corporation is not entitled, by reason of its nonresidence, to a removal of the cause on the ground of a separable controversy.

This action was brought by Anna E. Carr against Kansas City, Mo., the Barber Asphalt Paving Company, and others, to recover for personal injuries resulting from a fall on a sidewalk. The Barber Asphalt Paving Company removed the cause into the federal court, and it is now heard on motion to remand.

L. A. Laughlin, for plaintiff.

Lathrop, Morrow, Fox & Moore, for defendant Barber Asphalt Paving Co.

PHILIPS, District Judge. The question in this case is whether or not the action against the Barber Asphalt Paving Company presents a controversy between it and the plaintiff wholly separable from that of the other defendants. The plaintiff's cause of action is based upon the negligent condition in which the step in question was left, so elevated above the ground, in an insecure position, that, when the plaintiff stepped upon it, it gave way, whereby she was precipitated to the ground, and injured. The cause of action against the city springs from its duty to the public to keep its sidewalks in a reasonably safe condition. Its liability in this case is alleged to have been its failure to repair this imperfect sidewalk after it had knowledge

of the defect, or after it could have discovered its condition by the exercise of due care. This omission of duty on the part of the city may be called "nonfeasance"; that is, an omission to do that which it should have done.

The liability of the Barber Asphalt Company arises, if at all, from its failure, after completing the work of paving, to shore up or properly repair the step of the sidewalk, which is alleged to have been left in such an insecure condition that, when stepped upon, the end tipped over, whereby the plaintiff was thrown down. No fault is imputed to the asphalt company as to the manner of constructing the pavement. Presumably, the grade of the street had been established by the city, and the pavement was put upon the grade as thus established. Therefore it becomes apparent that the liability of the paving company arises, if at all, just as against the city, from an act of nonfeasance; that is, in not repairing the sidewalk and restoring the status that existed at the time it began the work of paving. Thus, it also appears that the liability of the defendant city and the paving company springs from a like wrongful act in neglecting to repair the sidewalk after the improvement was made. The neglect in both cases is one of nonfeasance, that is, an omission to perform a duty, or a neglect of duty, as contradistinguished from an act of misfeasance, which is not doing a lawful act in a proper manner, or omitting to do it as it should be done, or from an act of malfeasance, which is the doing of an act wholly wrongful in itself.

It is somewhat difficult to exactly understand what is the predicate of the cause of action against J. Lindley Coates, Arthur C. Coates, and Laura C. Reed. As to them, the petition charges that the steps in question were originally constructed either by them or their ancestor; and, if constructed by the ancestor, exactly how a liability is claimed to devolve upon the defendants is not apparent, unless it can be assumed by the court that the steps were in the nature of sour grapes, and the childrens' teeth were set on edge by reason of the ancestor's having eaten the grapes. The petition further alleges that the sidewalk was placed in an elevated position above the street by said defendants or their ancestor, for the purpose of making their property more attractive and valuable, and it was not necessitated by the topography of the street. Whether this was done with or without the knowledge or consent of the city is not averred; and, if any liability was thereby incurred by the last-named defendants, it would be because the injury to the plaintiff resulted from the original construction of this sidewalk by the last-named defendants, and therefore there would be entirely wanting any co-operation in the wrongful act by the defendant the Barber Asphalt Paving Company; and, as between said defendants, there would be a separable cause of action. It is true that in another part of the petition it is alleged that the Barber Asphalt Company paved the street under contract with the defendants J. L. Coates, A. C. Coates, and Homer Reed, and that in doing the work said Barber Asphalt Company loosened and made the bottom step leading from the sidewalk in question insecure. Whether or not the Barber Asphalt Company, as to the Coateses and Reed, sustained the relation of an independent contractor, or whether

it is intended to hold the Coateses and Reed liable as masters, is not clear. But, for the purpose of this motion, the liability of the defendants the Coateses and Reed may be entirely eliminated from consideration. To entitle the defendant the Barber Company to a removal of the case from the state court into the federal court, the cause of action as to it must be wholly separable from that of all the resident defendants.

By section 11 of article 17 of the charter of defendant Kansas City, whenever the city shall be sued for liability growing out of the unauthorized or wrongful act, or growing out of the negligence, carelessness, or unskillfulness, of any person or corporation, and such person or corporation shall also be liable to an action on the same account by the party injured, it (the city), on motion, may compel plaintiff to bring in such other party or corporation as a joint defendant. Under the averments of this petition, the plaintiff has a cause of action against the Barber Asphalt Company, the same as against the defendant city, for the negligent condition in which the sidewalk in question was left, arising from the failure of each of said defendants to repair the sidewalk after the work of paving was done. In this respect the case at bar is differentiated from the cases cited by defendants. It results that the motion to remand must be sustained, and it is so ordered.

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#### CENTRAL TRUST CO. OF NEW YORK v. HUBINGER.

(Circuit Court, S. D. Iowa, E. D. April 9, 1898.)

Eq. No. 302.

#### 1. JUDICIAL SALE OF PROPERTY AND FRANCHISE—SALE AS ENTIRETY—DESTRUCTION OF ENTIRETY PENDING APPEAL—REMEDY ON REVERSAL.

In foreclosure proceedings in a state court, plaintiff procured a decree in its favor as trustee for \$85,000, which was found to be a first lien on property therein described, which included all the rights, privileges, franchises, and property of a street-railway company, which was ordered to be sold as an entirety. At the commissioner's sale, defendant bought the property as an entirety, for \$10,000; and, over the objections of plaintiff and others, the sale was confirmed, and the \$10,000 paid into court, and applied on fixed costs and claims found to be liens thereon superior to plaintiff's. Defendant conveyed the property to a corporation of which he was the active and absolute manager. He procured the repeal of the exclusive franchise granted to said street-railway company, and the grant of a like one to said corporation. Defendant and said corporation took up portions of the track, changed the lines, laid new tracks on other streets, removed engines, dynamos, and machinery from the power house, removed motors, changed the application of the motive power, etc., so as practically to destroy the identity of the property as an entirety as it was delivered to defendant at the time of the sale. Upon appeal from the order confirming the sale, which was without supersedeas, the order and sale were set aside. *Held*, in an action in personam against defendant for destroying said property as an entirety, plaintiff is entitled to recover the value thereof at the time it was turned over to defendant, less the amount of the claims which were superior liens to that of plaintiff.

#### 2. SAME—DESTRUCTION OF IDENTITY—OFFER TO RETURN.

A purchaser at judicial sale of all the property, rights, and franchise of a street-railway company, as an entirety, who, pending appeal from the order confirming the sale, surrenders the exclusive franchise granted to

the company, and procures the grant of one to a corporation to which he conveys the property, when sued for the value of the property upon the reversal of such order, cannot successfully plead his willingness to return the property itself.

8. **SAME—IMPROVEMENTS BY OCCUPYING CLAIMANTS—ACTION FOR VALUE OF PROPERTY.**

Statutes relating to allowances for improvements and betterments to good-faith occupying claimants of property purchased at judicial sales have no application in an action in personam to recover the value of property purchased at judicial sale, and alleged to have been so changed pending appeal as to be practically destroyed.

4. **SAME—GOOD-FAITH PURCHASES—REVERSAL OF DECISION.**

A purchaser of property at judicial sale, who is made a party to an appeal from the order confirming the sale, and who pending the appeal, which is without supersedeas, conveys the title to the property, and so deals with it as practically to destroy its identity, is not protected from a suit in personam for its value, upon reversal of the order, by Code Iowa 1873, § 3199, which provides that property acquired in good faith under a judgment subsequently reversed shall not be affected by such reversal.

Upon June 1, 1892, the Gate City Electric Street-Railway Company (which is hereinafter called the "Street-Railway Company") duly executed, upon its entire street-railway plant and property, situated in the city of Keokuk, Iowa, its certain trust deed, in favor of the plaintiff herein, the Central Trust Company of New York (which is hereinafter called the "Trust Company"), to secure the payment of bonds issued by said Street-Railway Company, of the face value of \$85,000, and interest thereon. Default occurring in said payment, said Trust Company, upon January 2, 1894, filed its petition for foreclosure of said trust deed in the superior court of the city of Keokuk, Iowa; and, upon application of said Trust Company, a receiver was appointed for, and took possession of, the said street-railway plant and property. In such foreclosure suit a large number of parties intervened or were made parties defendant, who presented claims for labor or material furnished said Street-Railway Company, as equitably entitled to priority over the lien of said trust deed. Such proceedings were had in such suit as that, upon March 21, 1894, decree was duly entered in said foreclosure suit. Of said claims it was therein decreed that an aggregate of (about) \$10,840 was entitled to precedence, and to be paid before said payment of the \$85,000, which was therein decreed to be the amount due to said Trust Company, under its said trust deed.

In said decree appears the following: "The court further orders, each and every party to this controversy agreeing to this provision, and further agreeing that this court has complete and ample jurisdiction to make the provision hereinafter made, that the sale herein provided for shall be without the right of redemption; and such sale shall convey all the interests of all the parties, both complainants, defendants, and interveners, in fee simple, to the purchaser at such sale. It is therefore ordered, considered, and adjudged, each and every party hereto agreeing, that A. J. Hardin be, and he is hereby, appointed as a commissioner to advertise at public sale. [Then follow directions as to advertisement for sale, and description of property.] The said commissioner is authorized and directed to sell said property at public outcry. \* \* \* the said commissioner to report the result of said sale to this court for its approval, it being agreed by each and every party hereto that the deed made and executed by said commissioner, and approved by this court, shall convey to the purchaser at such sale all the right, title, and interest in fee simple, without the right of redemption, of the defendant street-railway herein, and of each

and all of the parties hereto, both plaintiff, defendants, and interveners, free and declared from all right, title, or interest of any parties to this controversy." In an earlier portion of said decree is found the following: "The court further finds that the property described in said mortgage or deed of trust, taken as a whole, constitutes the plant of the Gate City Electric Street-Railway Company; that said property, as described in said mortgage or deed of trust, constitutes the plant of the Gate City Electric Street-Railway Company, which is operated and used as a street railway; that owing to the character of the property, with its appurtenances and franchises, same would be greatly depreciated in value, and its value destroyed, unless same should be sold as an entirety. The court therefore finds that it is of the character of property that should be sold as one entire plant; that such sale should be without redemption, statutory or otherwise, and, in the sale that is hereinafter ordered, such sale is to be of the entire property and plant of the said defendant company, as described in said mortgage, and such sale is to be without right of redemption, statutory or otherwise."

Upon April 28, 1894, said commissioner offered said plant and property at public sale, as by said decree directed. At said sale, defendant John C. Hubinger bid the sum of \$10,000, and said plant and property was struck off to him therefor. When said commissioner presented to said superior court, pursuant to the directions in said decree, his report of said sale to said Hubinger, said Trust Company and various other parties to said suit filed objections to the confirmation of said sale. Among the objections so filed was the objection that the bid was not sufficient to discharge the adjudged prior liens and taxed costs. Thereupon said Hubinger offered to increase his bid by the amount required to pay off the incumbrances by said decree made prior to the lien of said trust deed. The superior court overruled said objections, and confirmed said sale by said commissioner to said Hubinger, ordered conveyance to be executed accordingly, and that, upon the payment by said Hubinger of the amount of his said bid, to wit, \$10,000, the receiver of said plant and property should turn the same over to said Hubinger. This amount was so paid in, and said plant and property accordingly turned over to said Hubinger, upon May 10, 1894. This amount, as applied by said superior court, was sufficient to discharge all costs and established prior liens, except the lien established in favor of the Illinois Steel & Rail Company. On this lien there yet remained unpaid about \$828 or \$840. Thereupon said Hubinger purchased and now holds the same. When said plant and property was so turned over to said Hubinger, or very soon thereafter, said Hubinger turned the same over to J. C. Hubinger Company, a corporation organized under the laws of the state of Iowa, with principal place of business at Keokuk, Iowa, and of which said John C. Hubinger was the active, if not the sole, manager. At this time the street-railway line was greatly out of repair, in some blocks the rails having been torn out by the city in its paving of its streets, and extensive repairs were required to place the railway in successful operation. For some five months the line had not been in operation. Said Hubinger thereupon began extensive repairs. He also applied to the city council of the city of Keokuk for a franchise for a street railway. At that time there was in force in said city an ordinance, known as "Special Ordinance No. 60," of date May 7, 1892, granting for the period of 30 years, to the said Gate City Electric Street-Railway Company, the exclusive right to operate an electric street railway over the streets of said city of Keokuk. By the said commissioner's deed to said Hubinger, said franchise passed to him as a part of the plant and property of said Street-Railway Company. Upon June 4, 1894, the city council of said city of Keokuk passed an ordinance, at the request of said Hubinger, granting to said J. C. Hubinger Company the "exclusive right to lay down, construct, and operate," for the period of 25 years, an electric street railway in the streets of said city. This ordinance is known as "Special Ordinance No. 73," and by its terms attempts the repeal of said "Special Ordinance No. 60," which had granted said Gate City Electric Street-Railway Company the right to operate an electric street railway in said city. Special Ordinance No. 73, by its terms, was not to become effective until accepted by J. C. Hubinger Company, in the manner therein provided. This acceptance was duly given according to the terms of the ordinance. Appeal from the order confirming said sale to said Hubinger was duly taken to the supreme court of Iowa, which, upon January 23, 1896, rendered

its decision, reversing the action of said superior court in confirming said sale. Said Hubinger having filed a petition for rehearing, action was not had by said supreme court thereon, until in the June following, when petition for rehearing was overruled, and writ of procedendo issued from said supreme court, and was filed in said superior court on June 10, 1896. Pending action on said petition for rehearing, said J. C. Hubinger, on April 10, 1896, conveyed with full covenants of warranty, to said J. C. Hubinger Company, the plant and property which had been conveyed to him by the commissioner's deed. After said filing in said superior court of said procedendo, said Trust Company tendered to said John C. Hubinger the amount by him paid on his said purchase, to wit, \$10,000, and demanded restoration of the plant and property turned over to him by said receiver, under his said purchase as above stated. Said Hubinger failing and refusing to so restore same, the Trust Company began this action, viz. on September 14, 1896.

James C. Davis and W. J. Roberts, for plaintiff.

John E. Craig and J. H. Anderson, for defendant.

WOOLSON, District Judge (after stating the facts). This is an action in personam. The petition does not in any wise seek to interfere with the status of the plant and property conveyed to defendant Hubinger, by the deed executed in his favor by the commissioner of the superior court. The petition recognizes and asserts that after the plant and property of the Street-Railway Company had been turned over to said Hubinger, upon confirmation of sale to him, and before procedendo issued on the judgment of reversal in the supreme court of Iowa, said Hubinger had so dealt with said plant and property, so changed its situation and condition and its legal title, in short had so destroyed the plant and property as to its entirety, as that plaintiff was thereafter powerless to expose same again to sale on any execution that might be issued under and in accordance with the decree of the superior court as entered in the foreclosure suit. The Trust Company therefore ask herein, against said Hubinger, judgment for the value of the plant and property so turned over to him, less the \$10,000 by him paid into the superior court, and which was to be applied in discharge of liens, etc., which had been established as having priority to the lien of the trust deed of said Trust Company.

The pressure of imperative official duties will not permit any extended attempt to present the grounds and arguments on which the decision herein is based. Counsel have presented this case orally and by briefs, with the care and completeness which its importance justly demands. I have given much time to the consideration of the views thus presented, and to an examination of the cases cited as controlling authorities or precedents. Counsel, in behalf of each party, have furnished me with lengthy findings of fact, which I am requested to find. So far as I have deemed them sustained by the evidence and in any wise proper to be stated as such, I have given findings on the points requested, perhaps with a fullness of detailed statement not altogether necessary, and of doubtful propriety to be contained in such fact findings. It has, however, seemed due to counsel and clients that, so far as I could, I should embody in such findings the facts as, in my judgment, the evidence has proven them on each of the points requested. Counsel on either side may regard their requests for findings as refused.

The discussion of the legal propositions presented by counsel deserve more than passing notice. Except for the imperative demands which other duties press upon me, I should have given the reasons impelling me to the conclusions reached on each of the important legal propositions presented. The comparative novelty, as well as the importance, of some of the questions presented for determination, and the ability and force with which counsel have presented them, would abundantly justify a somewhat extended consideration. I deeply regret that I may not attempt this. But I recognize, as urged by counsel on submission of the case, that the situation of the parties with regard to the property involved will not permit delay in decision, except as delay becomes unavoidable. I therefore present the findings and conclusions as briefly as I am able.

I delay, however, to quote a sentence from brief of counsel for defendant, which presents on one point the position of defendant. On page 31 of defendant's brief it is said:

"Defendant concedes there was, in fact, no sale of the property, and that his possession of the property was under the superior court, and that he holds what he bought subject to the order of the court, to be delivered upon payment to him of the amount he paid and the improvements he put in the property, which were necessary to put it in shape to earn something."

But defendant, at the commencement of this action, held none of the plant and property which had been turned over to him by the receiver, upon confirmation by the superior court of the sale to him. In the April following the adverse decision of the supreme court (which decision was reached in January, 1896), the defendant aliened the entire plant and property. He holds the legal title to none of it. The municipal franchise which he bought at the sale under the foreclosure decree he surrendered as part consideration for the franchise granted, at his request, to J. C. Hubinger Company. Many blocks of road which he received he has removed,—destroyed as a part of the railway. If otherwise practicable, a resale of the car and track property described in the decree, and which was turned over to him by the receiver, must be on a mere junk basis, because the franchise to operate the same on the streets of the city has been repealed at his instance. Unless bought by the holder of the franchise, granted at his instance to J. C. Hubinger Company, that property could not be operated as a street railway. Giving to this franchise repeal full force, it results that whoever—except, alone, the holder of the J. C. Hubinger Company franchise—bought the tracks must remove them from the streets. The tracks would have no status there as such, and might not be operated, with the J. C. Hubinger Company exclusive franchise outstanding. With the evidence so conclusively showing his inability to restore, defendant may not with success present a statement of his willingness.

Among other points forcibly urged on behalf of defendant Hubinger are included references to certain statutes of Iowa, which perhaps should be noticed. At some length, counsel for defendant have presented their view of the statutes of Iowa relating to allowances to

good-faith occupying claimants for improvements and betterments of property purchased at judicial sale. In my judgment, these statutes have no application to the present action. If this action proceeded against the property described in the decree, and attempt was made to take possession thereof, there would be great force in the position of counsel. But since this action is purely personal, seeks only a money judgment, and does not attempt to disturb either title to or possession of the property, these occupying claimant statutes have no application to the present action.

It is urged that section 3199 of the Code of 1873 of Iowa, in force at date when decree in foreclosure suit was entered, and continuously since, is a protection to defendant herein. The section provides:

"Sec. 3199. Property acquired by a purchaser in good faith under a judgment subsequently reversed shall not be affected by such reversal."

The argument proceeds on the theory that defendant Hubinger was a purchaser in good faith at the commissioner's sale, and that the reversal by the supreme court of the confirmation of such sale may not, under the provisions of the section quoted, affect such property in his hands.

It may not be disputed that in one respect plaintiff Trust Company assumed the risks as to condition of property, pending appeal. Had it promptly filed a supersedeas, we may assume that there would have been no sale under the foreclosure decree, and the property would not have been turned over to defendant. But a supersedeas was not made, by statute, a prerequisite to a valid appeal. Now, since such bond was not essential to an appeal, plaintiff might elect to give or to decline to give it. Had the supersedeas been given (I assume for the argument that the order of confirmation of sale was properly subject to supersedeas on appeal), the property, then idle, would have remained in the receiver's hands, and probably without being put into operation, and would have been subject largely to rapid deterioration. Therefore, when decision was had on the appeal, the property would probably have been of much less value than at the time of the sale to which the appeal related. If, however, the property passed into the hands of the purchaser, the probabilities were that it would be preserved, and substantial value remain until decision on the appeal was obtained. Besides, the road, in active operation, would have preserved or added a value to its franchise not obtainable had the road remained idle. Thus, it may be concluded that the situation, at time of appeal, was not such as to make, under then existing circumstances, the failure to file a supersedeas count heavily against the Trust Company on its appeal from the order confirming said sale.

But the judgment under which the property in question was sold was not reversed. It stands to-day as valid as on the day it was rendered. Not a word or syllable of its contents has been changed by the decision of the supreme court had on the appeal against defendant Hubinger. Indeed, Hubinger was not and is not a party to the action in which said judgment was rendered. Had he so desired, he could not have appealed from such judgment, nor could he properly have been a party to an appeal therefrom. So that, since he was appellee in the hearing in the supreme court,

the appeal could not have been from the judgment under which the property was sold. What, then, was the nature of the appeal? Upon such appeal there were ranged on one side the plaintiff Trust Company, the mortgagor Street-Railway Company, the holders of the bonds, and some of the parties in whose favor the judgment had decreed liens as precedent to that of the trust deed. In the foreclosure suit these parties had held relations antagonistic to each other. On this appeal their interests lay together. Upon the opposite side of the appeal was defendant Hubinger. The opinion filed by the supreme court in rendering decision of reversal shows that no portion or provision of the judgment and decree, rendered in the foreclosure suit, was attacked in the appeal. The entire subject of the appeal related to the order which confirmed the commissioner's sale to defendant Hubinger. The appeal was not, therefore, from a "judgment subsequently reversed." Nor was nor is the property which was turned over to defendant Hubinger, under said order of confirmation of sale, "property acquired by a purchaser in good faith under a judgment subsequently reversed." Defendant Hubinger was not a stranger to said appeal. The "purchaser in good faith" generally occupies such position. Here defendant Hubinger was the active resistant—the only person resisting—on said appeal. He alone reaped advantage and benefit if the appellate court should affirm the order of confirmation and the sale remain undisturbed. This appeal related only to a portion of the doings of the commissioner appointed in the foreclosure decree, with reference to the enforcement of said decree. As to such doings and the order of court thereon, defendant Hubinger was not a purchaser in good faith, under said section 3199, as construed by the supreme court of Iowa. And whether the question be solved by holding that the section only applies to reversals of judgments which are the foundation or authority for the sales under which the property was acquired, or that such section only relates to purchasers in good faith, with reference to the matter appealed from, the same result must follow,—the section does not apply to the situation as disclosed by the evidence in this action. Besides, as heretofore stated, this action is purely in personam. No attempt is herein made to affect the present condition, possession, or title of the property which the defendant acquired under the sale by the commissioner.

Upon the question of the value of the property, I deem it proper to make a few suggestions. The evidence introduced touching the value of this street-railway plant in May, 1894, is exceedingly contradictory, but perhaps not greatly more contradictory than might be expected when we consider the differing standpoints from which the various witnesses arrive at its value, and also the peculiar condition at that date of this plant, as to its roadbed, overhead construction, motive power, and rolling stock. The months in which the railway had been without operation produced seeming depreciation greatly beyond that actually occurring. But the evidence plainly indicates that disuse produces a more rapid depreciation of value than operation, with the repairs ordinarily connected there-

with, would have produced. This street-railway plant is shown to have had a somewhat peculiar history. In 1891 and 1892 it was largely reconstructed, and then mortgaged. The bonds (\$85,000) for which the present plaintiff is trustee were issued with reference to the value of the road as then estimated by parties having general familiarity with such values. The fact now plainly appears, however, that the road, considered without reference to the value of its municipal franchise, was then of an actual value, much less than the face of the bonds issued. After 1891, and up to 1894, the road experienced a varied existence, all of which tends to establish the fact just stated. In the introduction of evidence relating to value in May, 1894, the court permitted to both parties a wide range. The value of the plant in 1892 (at the time when plaintiff's trust deed was executed), the nature and value of the improvements thereafter placed on the plant up to the date of transfer to the defendant, and the improvements made thereto by defendant, were given upon both sides with fullness of detail, as also the elements which were claimed on either side as constituting deterioration in condition and depreciation in value. Any attempt at harmonizing this evidence, and giving the exact grounds on which I base the value at which I have arrived, will subserve no useful purpose, and other pressing duties forbid the attempt. The pleadings filed in said superior court upon August 12, 1896, and verified upon August 11, 1896, by the oath of defendant Hubinger, state that after the transfer, by the receiver, to said Hubinger, of this street-railway plant, there had been expended, for improvements and repairs in putting the plant in operative condition, the sum of \$1,560, and said Hubinger, in such pleading, names that amount as the sum which he therein claims should be repaid on account of such improvements. In another pleading, filed August 12, 1896, in said superior court, on behalf of J. C. Hubinger Company, and verified August 11, 1896, by the oath of J. C. Hubinger, the value of the "betterments and improvements" made is stated at \$4,138. This seeming inconsistency in these two verified statements is perhaps to be explained by the fact that, in the pleading last above described, the value of certain track appropriated is stated at \$2,600. If this \$2,600 is taken from the \$4,138, there is left \$1,538 as net value remaining of improvements so made, which brings the two pleadings in substantial accord as to value of improvements so made after the plant passed into the defendant's hands. By an amendment to the last-named pleading, verified by J. C. Hubinger on October 15, 1896, and filed on same date in said superior court, there are stated as made, "to the cars and electrical appliances, improvements and repairs not set out in original petition," which are given as of the value of \$2,160.32. Thus far the said improvements would aggregate, on statement of defendant, to \$3,720.32. Perhaps the additional statement should be made that in said amended pleading an interlineation follows the extract above given that "value of improvements and betterments to said 39 blocks so repaired was \$106 per block, or \$4,134 in all." But this is so inconsistent with the above-given statements, as contained in said original pleadings,

that I cannot reconcile same, and therefore accept the values of improvements claimed as that originally given, viz. the aggregate claimed as made after road passed into defendant's hands, as being \$3,720.14. If this \$4,134 was added, the aggregate would be \$7,854.32, and I fail to find anywhere in the evidence that which substantiates such an aggregate.

Upon April 10, 1896, the defendant J. C. Hubinger, by deed with full warranty covenant, conveyed this plant, in its thus improved condition, to J. C. Hubinger Company, at an expressed consideration of \$100,000. While it might be unjust to defendant to hold this expressed consideration as the actual market value which the defendant then placed on this plant at the date of his said conveyance, yet it is not unjust to him to hold that this conveyance abundantly proves that, at its date, he regarded the plant as of large value. To hold otherwise would, in effect, be to declare that defendant intended such expressed consideration to be a deceptive or fraudulent consideration. He had expended for such plant as follows:

Paid on transfer to him.....	\$10,000 00
" balance Illinois Steel, etc., Co. claim.....	828 50
" in betterments and repairs.....	3,720 33
<b>Total expended .....</b>	<b>\$14,548 83</b>

And, in his said conveyance, defendant conveys, with full warranty of title, this very plant for the expressed consideration of \$100,000. This conveyance, it may be noted, was so executed by him after the supreme court of the state had reversed the order of confirmation of sale of the plant to him. And no facts appear in the evidence which would justify the court in finding that outside or surrounding circumstances had given to this plant such greatly increased value. Indeed, the evidence introduced would compel the contrary finding.

We may note, also, that the supreme court of Iowa (65 N. W. 982) had the question of value of this plant under consideration on the appeal hereinbefore spoken of. That court was determining whether the confirmation of the sale, by the commissioner of said superior court, of this railway plant, to defendant, Hubinger, for \$10,000, should be sustained. While the opinion of the court does not expressly determine that such purchase price was so grossly inadequate as to shock the conscience, yet the court had under special consideration, upon evidence formally presented by either side, the value of the plant, and the opinion states:

"This property cost some \$60,000 or upward, and the showing preponderates that it is now of three times the value of the present bid, or more."

On this appellate hearing, the present defendant was the appellee, and opposed to him were "the plaintiff [plaintiff in the present action], the defendant street-car company, all of the bondholders, and some others, including interveners." It may therefore be safely assumed that the question of value of plant, at date same was turned over to defendant Hubinger, was fully presented, since the

decision of that question was to control the supreme court in affirming or reversing the confirmation of the sale to defendant Hubinger.

Under the evidence submitted, I find as follows:

Findings of Fact.

(1) Plaintiff, the Central Trust Company of New York, now is, and at the commencement of this action was, a corporation organized under the laws of the state of New York, and a citizen of said state; and defendant John C. Hubinger then was, and now is, a citizen of the state of Iowa.

(2) The Gate City Electric Street-Railway Company, which was a corporation organized under the laws of the state of Iowa, had, prior to the foreclosure suit hereinafter mentioned, duly executed, in favor of plaintiff herein, as trustee, its certain trust deed, upon the plant and property situated in the city of Keokuk, Iowa, of said Street-Railway Company, to secure the payment of the bonds and coupons executed by said Street-Railway Company, and in said trust deed described.

(3) On the 2d day of January, 1894, plaintiff instituted in the superior court of the city of Keokuk, Iowa (which was a court of record and of full jurisdiction therefor), a suit to foreclose said trust deed, and to obtain, by the sale of said Railway Company property, the payment of the amount due and unpaid on said bonds and coupons. To said suit said Street-Railway Company was made defendant. Different lienholders were made parties to said suit, either as defendants or as interveners on their own petitions.

(4) During said foreclosure proceedings, a receiver of the said property of said Street-Railway Company was by said superior court appointed, who took possession of said property.

(5) Such proceedings in said foreclosure suit were duly had as that upon March 21, 1894, decree was by said superior court entered therein, finding then due and unpaid on said outstanding bonds the sum of \$85,000; that the lien of said trust deed was a first lien upon all the property in said trust deed described, to wit, all the property, buildings, electric light plant, steam plant, machinery, engines, boilers, dynamos, electrical machinery, electrical lamps, and other electrical appurtenances, poles, wires, lines, together with all and singular the privileges, appurtenances, and franchises thereto belonging, and all personal property, of whatever kind and description, and wherever situated, and all the rights, privileges, and franchises, of the said Street-Railway Company, the description of said property embracing and intending to embrace therein, and subject to the lien of said trust deed, all the estate, property, and franchises that were owned by said Street-Railway Company at the date of said trust deed, and all such as was thereafter acquired by said Street-Railway Company, and also lot 10 in block 200 in said city of Keokuk, being occupied by said Street-Railway Company for its power house. The said description in said decree included all the rights, privileges, franchises, and property, of whatsoever description and wheresoever situated, which, at the date when said decree was entered, was owned by said Gate City Elec-

tric Street-Railway Company. Said first lien of said trust deed, as by said decree established, was, however, by said decree, made subject to the lien in said decree declared for the claims of certain of said parties to said suit, and the taxable and fixed costs in said suit, which costs and claims, as in said decree so established, amounted in the aggregate to about \$10,840.

(6) Said decree appointed a commissioner to make sale thereunder, and report such sale to the said superior court for its consideration. Said sale was ordered to be made of said property as an entirety, and without redemption, statutory or otherwise.

(7) Upon April 28, 1894, said commissioner duly exposed said plant and property to sale, pursuant to the terms of said decree. At such sale, John C. Hubinger, defendant herein, bid for said property the sum of \$10,000, and the same was struck off to said defendant for the amount of his said bid.

(8) Said sale to said defendant was thereupon by said commissioner duly reported to said superior court; whereupon objections to the approval thereof were filed by the plaintiff herein, as said trustee, by the American Loan & Trust Company, as holder of certain of said bonds, and by others. But, after due hearing, said sale was by said superior court confirmed, and said commissioner directed to execute deed for said property to said Hubinger upon the payment by him of said \$10,000, which amount was so paid, and deed so executed, on May 10, 1894, and said deed approved by said superior court, and said receiver was ordered to turn over said plant and property to said Hubinger, which was accordingly done; and upon said May 10, 1894, said Hubinger took possession of said plant and property thereunder, and said receiver was by said superior court discharged.

(9) Said approval of said sale was duly excepted to by the said parties so filing objections, and thereafter notices of appeal to the supreme court of Iowa from order confirming sale were served on said Hubinger, viz. by W. J. Roberts, on June 27, 1894, and by plaintiff herein and said American Loan & Trust Company on August 25, 1894. Upon January 23, 1896, said supreme court (the opinion relating thereto being reported in 65 N. W. 982) reversed the action of said superior court in confirming the sale of said property to said Hubinger. Said Hubinger, within the period prescribed therefor by the rules of said supreme court, filed in said court his petition for a rehearing in said case, which petition was, to wit, about June, 1896, by said supreme court, denied; and thereafter, to wit, on the 9th day of June, 1896, writ of procedendo from said supreme court, in the matter of said appeal, was forwarded to said superior court, with directions to said superior court for "further proceedings to be had in said court not inconsistent" with the opinion of said supreme court.

(10) The \$10,000 paid into said superior court on confirmation of said sale to said Hubinger was applied to payment of the liens which by decree, as aforesaid, were, with the costs of said suit, established as superior to the lien of said trust deed. and such liens were paid and wholly discharged thereby, save a lien due to the

Illinois Steel & Rail Company, on which last-named lien was paid \$401.69. The remaining (unpaid) portion of said lien, to wit, about \$828.50, was purchased, and is now held by said Hubinger. Save as affected by said balance of said claim of said Steel & Rail Company, the said trust-deed lien held by plaintiffs thereby became and is the first and prior lien as determined and established by said decree.

(11) Shortly after said plant and property was by said receiver turned over to said Hubinger, as hereinafter found, said Hubinger turned the same over to J. C. Hubinger Company, which was a corporation organized under the laws of the state of Iowa, and engaged in the operation of an electric light plant in said city of Keokuk, and of brickworks in or near said city. Said J. C. Hubinger Company was controlled by said J. C. Hubinger. The entire business of said corporation, and what was to be done by said corporation, was determined by defendant J. C. Hubinger, who was the active and absolute manager thereof. No conveyance or other transfer in writing of said property was executed by said J. C. Hubinger for nearly two years, and not until after the supreme court of Iowa had reversed the order of said superior court which confirmed said sale to defendant Hubinger, to wit, not until April 10, 1896, at which date said J. C. Hubinger formally executed conveyance of said property, with full warranty covenant, to J. C. Hubinger Company, for the consideration therein expressed of \$100,000.

(12) When said suit for foreclosure was instituted, as above stated, and for some months prior thereto, and at the time when said property was so turned over to said Hubinger upon said confirmation of said sale, the street-railway line of the said Gate City Electric Street-Railway Company was not in operation. For a distance of some blocks, the rails were out of place, the same having been taken up by the city authorities in the progress of paving of the streets. And said railway system could not then be operated successfully except with the relaying of said blocks and the making of extensive repairs to different parts of its system.

(13) About May, 1892, by an ordinance known as "Special Ordinance No. 60," there was granted by the city council of the city of Keokuk, to the said Gate City Electric Street-Railway Company, the exclusive franchise or right and privilege to construct and operate an electric street railway in the streets of said city for the period of 30 years from said date. This franchise or right to construct and operate was included as a part of the property described in said trust deed, and, on sale under said decree of foreclosure, passed to the purchaser thereat, the same being a part of the property by said decree ordered to be sold as an entirety. At the time of the said attempted sale of said property by said commissioner, said franchise, right, and privilege, to wit, the ordinance granting same, remained unrepealed, and same was turned over to said J. C. Hubinger by said receiver, with the other property then so turned over, to wit, May 10, 1894. At the date of the passage of said Special Ordinance No. 60 there was in force, and has continuously since

said date remained in force, section 335 of the Revised Ordinances of said city of Keokuk (Roberts' Revision of 1887), as follows:

"Sec. 335. All ordinances, resolutions or other acts of the city council of Keokuk hereafter to be passed, adopted or done, whereby special privileges or immunities shall be granted to or conferred upon any person or persons, or contracts made with them, shall, unless the contrary be expressed on the face thereof, be subject to amendment or repeal at all times; and all such grants, unless the contrary be expressed, shall be taken to be made and accepted with reference to these provisions, and all rights which it declares and reserves to the city."

(14) After said plant and property had been turned over to defendant Hubinger, said Hubinger applied to said city of Keokuk for a franchise or right and privilege to operate an electric street railway on the streets of said city; and on June 4, 1894, said city, by ordinance known as "Special Ordinance No. 73," granted to said J. C. Hubinger Company, for a period of 25 years from said date, "the exclusive right to lay down, construct, and operate a street railway on all the streets of the city of Keokuk, with single or double track standard railway tracks," "with electric or other practicable motor power other than animal or steam power." Said ordinance contains, as a part of section 9 thereof, the following:

"This ordinance shall not interfere with any vested rights or privileges heretofore granted by the city of Keokuk to any person or corporation."

Section 18 of said ordinance provided that such ordinance should not take effect until accepted and agreed to by J. C. Hubinger Company in writing, filed with the city clerk. Such written acceptance was executed by J. C. Hubinger Company, and filed with the said clerk, within the time provided in said ordinance. Said section 18 also provided as follows:

"All ordinances or franchises given to street railway companies in the city of Keokuk, that conflict with this franchise are hereby repealed: provided, that none of the rights of the city of Keokuk under special Ordinance No. 60, under any other ordinance or agreement or under the laws of the state of Iowa, or any right existing prior to the passage hereof to make the cost of any paving heretofore ordered a lien or charge on or against the property formerly held by the Gate City Electric Street-Railway Company are in any way waived or forfeited by granting of this franchise or the passing of this ordinance or by any of the terms hereof."

(15) At the time said property was by said receiver turned over to said J. C. Hubinger, the system of tracks of said street railway had four terminal points. After said Special Ordinance No. 73 had been accepted by said J. C. Hubinger Company, and had taken effect, and before the supreme court of Iowa had reversed the order of the superior court which confirmed the sale to J. C. Hubinger, important changes were made in said system of tracks. "Plat A," which is filed herewith, as a part hereof, correctly shows, by red lines thereon, the line of tracks of said street railway as the same existed when this property was by said receiver turned over to said Hubinger. This plat includes the (about five) blocks on whose streets the rails had been taken up in the progress of paving the streets by the city, as stated in paragraph 12 of these findings, and track had been made inoperative for street cars. "Plat B," filed herewith, and as a part hereof, correctly shows the line of tracks

as same existed after the changes above referred to had been made, and as said system of tracks was in existence when said procedendo from said supreme court was filed, as hereinbefore stated, in said superior court. The track had been by said defendant Hubinger taken up and removed from some of the blocks or streets, and new lines put down on other streets. Thus, the locality of the tracks and the line of street-railway travel were changed in some places, and extended in others.

(16) During the period included in the last paragraph, important changes were made by defendant Hubinger, or by his direction, in the motive power and cars connected with said street-railway system. The engines, dynamos, generators, shafting, and all the other machinery constituting power plant in the power house of said street railway, except two boilers, were taken out of said power house, and removed to the power house owned and used by J. C. Hubinger Company, in the operation of its system of street lighting in said city of Keokuk. From some of the cars so by said receiver turned over to said J. C. Hubinger, the motors were removed, and other motors substituted, with a view to economy in the use of electricity as the motor power; and one car was stripped and disabled for use in the passenger traffic. Meanwhile the roadbed of the street railway and the overhead trolley system, which in many places were in very poor condition when the property was turned over to defendant Hubinger, were repaired, to a large extent reconstructed, and the entire system brought into an effective, good-working condition of roadbed, trolley system, motive power, and cars.

(17) The changes noted in the two preceding paragraphs with regard to the line of track, power-house equipment, motors, roadbed, etc., were made after the property was turned over by J. C. Hubinger to J. C. Hubinger Company, but long prior to the conveyance executed by the former to the latter. This turning over by the former to the latter appears to have been substantially for the purpose of bookkeeping merely. J. C. Hubinger was the active part of J. C. Hubinger Company. The same is also true as to the procuring of the franchise to J. C. Hubinger Company from the city of Keokuk. In his amendment to answer filed herein, said J. C. Hubinger states that "the said John C. Hubinger made application to the city of Keokuk for a franchise to operate an electric street railway in the city of Keokuk; and said city, on the 4th day of June, 1894, granted to the said John C. Hubinger a franchise, being Special Ordinance No. 73," etc. **In his original answer filed herein, in its fourth paragraph, said J. C. Hubinger states that "defendant \* \* \* shows that he expended large sums of money in improvements and betterments to said road, and by putting the same in condition that cars might run upon its tracks, and that the value of said improvements in the 39 blocks which were so improved was of the value of four thousand one hundred and thirty four dollars, and he alleges said sum should have been tendered him."** etc. In his pleading, entitled "Answer of J. C. Hubinger to the Application of W. J. Roberts, Intervener," filed in the said superior court August 12, 1896, said J. C. Hubinger states that "no notice was filed

or given to the said J. C. Hubinger of appeal to the supreme court until he had expended large sums of money in repairing and improving said property." There are blended in the pleadings such relations and actions of J. C. Hubinger and J. C. Hubinger Company as that the court is justified on these pleadings in finding the changes in the property, as found above, were made by defendant J. C. Hubinger.

(18) No supersedeas was given by any of the appellants in the matter of said appeal from the order of said superior court, confirming said sale of said street-railway property to said J. C. Hubinger.

(19) After said procedendo had been filed in said superior court, and before the institution of this action in this court, plaintiff herein tendered to defendant Hubinger the sum of \$10,000, and demanded a return and restoration by him of the property by said receiver turned over to said Hubinger, under said order of said superior court upon confirmation by said court of said sale to said Hubinger. Said Hubinger failed and refused to return and restore said property, and demanded that there be tendered to him, in addition to said purchase price of \$10,000, the further sums which had been expended, under direction of said Hubinger, in changing, altering, repairing, and putting into condition for active operation said street railway and its lines of track and other sundry and varied property.

(20) At the date when said decree of foreclosure was entered by said superior court, said Gate City Electric Street-Railway Company was insolvent, and its entire assets and property consisted of said street-railway plant and property described in said decree of foreclosure, which said entire plant and property were by said receiver turned over to said J. C. Hubinger under order of said superior court, as hereinbefore found; and said Gate City Electric Street-Railway Company ever since said entry of said decree has been, and now is, utterly insolvent.

(21) The property described in said trust deed to plaintiff from the Gate City Electric Street-Railway Company was of such a nature, and so situated and related in its entirety as a street-railway plant, as that its value largely depended on its being held together as an entirety. Such plant was an entire property. It was ordered to be sold as an entirety in said decree of foreclosure, was offered for sale as an entirety by said commissioner in said decree appointed to make sale thereof, and was by said receiver turned over as an entirety to defendant J. C. Hubinger, by whom it was attempted to be conveyed as an entirety to J. C. Hubinger Company.

(22) The changes and repairs in roadbed, line of track, trolley overhead construction, and other parts of said street-railway line, were made by defendant Hubinger in good faith, and in the belief that he was the owner, under his said purchase at said commissioner's sale, of said property, and after said sale had been confirmed by said superior court.

(23) When said procedendo from said supreme court was received by said superior court (which said procedendo is dated June 9, 1896,

and was filed in said superior court on June 10, 1896), J. C. Hubinger Company held the legal title to that part (which was then in existence) of the street-railway plant and property which, under the order of said superior court, had by said receiver been turned over to said Hubinger, upon said confirmation of said commissioner's sale to him. And to no part of said street-railway property which had been so turned over to said Hubinger did said J. C. Hubinger, to wit, in June, 1896, hold the legal title; nor has he since said date held such legal title, so far as shown herein by the evidence.

(24) By the destruction of the said municipal franchise, which at date of commissioner's sale was held by said Gate City Electric Street-Railway Company, and by the changes and alterations in line of track, in power house, and other changes, the plant and property turned over as aforesaid by said receiver to said J. C. Hubinger had been so destroyed as to its entirety, as in said decree of foreclosure adjudged to be subject to plaintiff's lien, and as bid in by said J. C. Hubinger, and confirmed to him by said superior court, and by said receiver turned over to said Hubinger, as that the property so decreed, confirmed, and turned over as aforesaid was not in existence as an entirety, but said existence as an entirety had, by or under the direction of said J. C. Hubinger, been destroyed, and existed only in partial or fragmentary parts, as related to said entirety on which was fastened said lien of plaintiff, as established in said decree of foreclosure. And the plant and property described in and ordered sold by said foreclosure decree was not in existence, and could not be restored, as an entirety, at date when said procedendo was filed in said superior court, nor since said date, nor, as an entirety, could same be placed under the operation of said foreclosure decree, nor sold as an entirety thereunder; whereby said plant and property, as described in and conveyed by said trust deed, was greatly damaged, its value greatly depreciated, and the security created by said trust deed, and established by said decree in said foreclosure suit, practically destroyed and rendered valueless.

(25) Said plant and property of said Gate City Electric Street-Railway Company, which was turned over, on the said order of said superior court, to said J. C. Hubinger, under said confirmation of sale to him, was, at the date when the same was so turned over to him, of the fair market value of \$33,600.

#### Conclusions of Law.

1. The plaintiff, Central Trust Company of New York, by virtue of the execution of said trust deed to it by said Gate City Electric Street-Railway Company, and the judgment and decree of foreclosure entered thereon by the superior court of the city of Keokuk, Iowa, had a first and paramount lien upon the property and plant of said Street-Railway Company for the sum of \$85,000, subject only to the amount of \$10,840, being the amount which by said decree was fixed and determined as the aggregate of the liens entitled to have, and in said decree given, precedence to the said lien of said trust deed.

2. Said precedent liens having been paid off and discharged out of said \$10,000 by defendant Hubinger paid into said superior court (excepting the balance of \$828.50, remaining due and unpaid on the claim now held by said defendant of the Illinois Steel & Rail Company after said \$10,000 had been applied by said superior court to the discharge of said precedent liens, etc.), the said lien in favor of plaintiff, Central Trust Company of New York, now is the paramount and only lien remaining under said decree.

3. As the trustee in said trust deed and the complainant in the decree so entered thereon in said superior court, said Central Trust Company, plaintiff herein, has the right to have and maintain this action, and to recover for any injury, damage, or appropriation done to the property upon which said decree is a lien, to the amount of its interest therein, not exceeding the amount specified in the said decree of said superior court.

4. The said property and plant of said Gate City Electric Railway Company having been mortgaged as an entirety, and ordered sold as an entirety under said decree, and having been as an entirety turned over to defendant Hubinger on order of said superior court upon confirmation of sale under said decree, and same having been dealt with, appropriated, and aliened by said J. C. Hubinger, as found in the foregoing finding of facts, said Hubinger is responsible in this action to said Central Trust Company of New York for the fair market value of said property as it was on May 10, 1894, when he took possession of same, less the said amount of said prior liens thereon, as fixed and established in said foreclosure decree, to wit, less the sum of \$10,840.

5. Plaintiff herein is entitled in this action to judgment against defendant John C. Hubinger in the sum of \$22,760, with interest thereon at the rate of 6 per cent. from the 10th day of June, 1896, that being the date when writ of procedendo from the supreme court of Iowa was filed in the superior court of said city of Keokuk.

Let judgment be entered accordingly against said defendant, and for costs of this action.

To each of which findings of fact and conclusions of law plaintiff and defendant duly and severally except.

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COMMONWEALTH TITLE INSURANCE & TRUST CO. v. BELL, Clerk  
of Court.

(Circuit Court, E. D. Pennsylvania. May 3, 1898.)

**RECORDS OF FEDERAL COURTS—RIGHTS OF EXAMINATION.**

Act Aug. 1, 1888, requires clerks of courts of the United States to keep in their offices indices of the judgment records of such courts, and that such indices and records shall be kept open to inspection and examination of the public. *Held*, that one engaged in the business of furnishing certificates and making insurance with respect to the existence of liens upon real estate has a right to make examinations of such indices and records, at such times and under such circumstances as will not interfere with the proper conduct of the business of the office, for the purpose of ascertaining whether or not

there are incumbrances on properties which his present customers are intending to purchase.

This case comes up on demurrer to a bill filed by the Commonwealth Title Insurance and Trust Company, charging that the defendant, Samuel Bell, clerk of the circuit court for the Eastern district of Pennsylvania, wrongfully denies to its representatives access to the indices, records, and papers of his office.

John G. Johnson, for plaintiff.

James M. Beck, for defendant.

DALLAS, Circuit Judge. By section 2 of the statute of August 1, 1888, entitled "An act to regulate the liens of judgments and decrees of the courts of the United States" (25 Stat. 357; Rev. St. Supp. p. 602), it is provided:

"That the clerks of the several courts of the United States shall prepare and keep in their respective offices complete and convenient indices and cross-indices of the judgment records of said courts, and such indices and records shall at all times be open to the inspection and examination of the public."

The plaintiff is a corporation engaged in the business of giving certificates and making insurances with respect to the existence of liens upon real estate, etc. It alleges that it has applied to the defendant, who is the clerk of the circuit court for this district, requesting him to give to its representatives access to the indices, cross-indices, records, and papers in his office, at such times and under such circumstances as would not interfere with the proper conduct of the business of the office, for the purpose of ascertaining whether or not there were incumbrances against properties intended to be purchased by its customers. This request the clerk, it is alleged, has declined to accede to. It will be observed, and, in view of certain decisions, it should be noted, that the plaintiff's demand does not extend beyond the assertion of a right to make examinations for the specific purpose of ascertaining the existence or non-existence of incumbrances upon properties which its actual present customers are intending to purchase. It is, therefore, this restricted right which is denied by the sixth ground assigned as cause of demurrer, but, in my opinion, congress has expressly conferred it by enacting that "such indices and records shall, at all times, be open to the inspection and examination of the public." This question was before Judge Caldwell in the case of *In re Chambers*, 44 Fed. 786, and, after fully considering and discussing the whole subject in a manner which is quite satisfactory, he arrived at the conclusion which I, also, have reached, and which seems to be the only possible one. The other causes of demurrer assigned need not be now considered. The plaintiff may, if it should be so advised, move for leave to amend its bill; and the defendant will have leave to answer *sec. reg.*, and he may, by answer, again present any of the questions presented by this demurrer, other than that which has now been considered and disposed of. Subject to this reservation, the demurrer is overruled.

## SOUTHERN PAC. CO. v. BOARD OF RAILROAD COM'RS et al.

(Circuit Court, N. D. California. April 25, 1898.)

No. 12,129.

**1. TAXATION OF RAILROAD PROPERTY—VALUATION—RETURN—ESTOPPEL—EVIDENCE.**

The return by a railroad company of a valuation of a part of its property to the board of equalization does not constitute an estoppel, in an aggregate valuation of the whole property, made up in part by county assessors, but is nevertheless competent evidence of the value of such part of the property, to be considered in arriving at the valuation to be placed upon the whole property for the purpose of fixing rates of transportation.

**2. PROCEEDINGS OF RAILROAD COMMISSIONERS—REDUCTION OF RATES—INTENTION OF COMMISSIONERS.**

In a suit to enjoin the board of railroad commissioners from enforcing resolutions alleged to have been adopted reducing rates of transportation, the court will consider what the board did in reference to the disposition of such resolutions, but not what it or its members intended or threatened to do.

Mr. Herrin (J. C. Martin, J. E. Toulds, E. S. Pillsbury, and John Garber, of counsel), for complainant.

W. F. Fitzgerald, Atty. Gen. of Cal. (Robt. Y. Hayne and W. W. Foote, of counsel), for defendants.

**MORROW**, Circuit Judge (orally). This is a suit in equity brought by the complainant against the board of railroad commissioners to enjoin the board from enforcing certain resolutions reducing the rates of transportation on grain and other freight on the lines of railroad operated by the complainant in the state of California. The complainant interposed 50 exceptions to the answer of the defendants, and 1 additional exception after the report of the master had been filed, making 51 exceptions in all. The exceptions were referred to Hon. A. C. Freeman, master pro hac vice, who has submitted an able report upon the issues involved in the bill of complaint, and the pertinence and materiality of the matters alleged in the answer, to which exceptions have been taken. To the report of the master the complainant has filed 13 exceptions; and the defendants, 6 exceptions. The exceptions of the complainant refer mainly to the allegations contained in the answer respecting the valuations placed upon the railroad property returned to the board of equalization. The answer sets up the provisions of the constitution and the law of the state, under which returns are made by the various railroad corporations in the state to the board of equalization concerning the actual value of the roadway, roadbed, rails, and rolling stock owned by such corporations, and, in accordance with such requirement, the returns of the complainant, fixing the valuation of the roadway, roadbed, rails, and rolling stock of the various lines of road leased to the complainant. There is also an averment respecting the assessments made by the county assessors of the various counties through which the lines of road pass, fixing the value of the depots, stations, shops, buildings upon the right of way, water tanks, telegraph lines, sheds, signal apparatus, steamers, terminal yards, and all the railroad property not included under the designa-

tion of roadway, roadbeds, rails, and rolling stock; but, with respect to such assessments, it is not alleged that any returns were made by the complainant to the county assessors, upon which such assessments were based.

The valuation placed upon the roadway, roadbed, rails, and rolling stock by the board of equalization, and the valuation placed upon all the other property belonging to the railroads by the county assessors, constitute the aggregate valuation of the railroad property in the state for assessment purposes. Take, for instance, the case of the Central Pacific Railroad Company, one of the lines of road leased to the complainant. The state franchise, roadway, roadbed, rails, and rolling stock of this company are valued by the board of equalization, upon the return of the complainant, at \$8,702,671 for the year 1894; and the value of its steamers in the state of California was at said time \$224,139. The other property of the company, consisting of depots, stations, shops, sheds, water tanks, telegraph lines, yards, terminals, and all other property not included under the designation of "roadway, roadbed, rails, and rolling stock," is valued by the county assessors of the counties through which the road passes at \$5,292,569 for the same period; making a total of the assessed value of the property of the company, \$14,219,569. But it does not appear from the answer that the complainant made returns as to the value of the property upon which the county assessors based their valuation of \$5,292,569. The claim of the answer is that the Central Pacific Railroad Company and the complainant, and each of them, are estopped from claiming that said valuation so given in and to said board of equalization was not the true value of said property, and that the complainant is estopped from having its rates of charges fixed upon any other basis. It does not appear to me that the return of the complainant of a valuation of a part of its property to the board of equalization constitutes an estoppel as to the valuation of that property in an aggregate valuation of the whole property made up in part by the county assessors. Such a return is, however, evidence of the value of the roadway, roadbed, rails, and rolling stock, to be considered in arriving at the actual valuation of the whole property. It is not to be excluded from the case because it does not amount to an estoppel. It is evidence that may be introduced in support of the allegations of the answer denying the valuation now placed upon the property by the complainant for the purpose of fixing rates for charges.

The exceptions interposed by the defendants to the master's report involve a consideration of the two resolutions of the board of railroad commissioners relating to a reduction of freight charges. It appears there were two resolutions offered and considered by the railroad commissioners. One provided for a reduction of rates on grain to the extent of 8 per cent.; the other, for a general reduction on all merchandise other than grain of 25 per cent. The first resolution was adopted; the second was not. In the bill the two resolutions are referred to in such a way as to appear as substantially one resolution. The answer sets out the proceedings relating to the two resolutions; showing that the first was adopted, and the other was not. It also alleges the intention of the railroad commissioners with respect to the second

resolution. The proceedings of the board in dealing with the resolutions appear to be, under the circumstances, relevant and material, but I cannot see how the intention of the board can be considered relevant. The court will consider what the board did, but not what it or its members intended or threatened to do in the future.

Without referring to the other exceptions, it will be sufficient to say that the report of the master is confirmed, for the reasons therein stated. The effect will be, in disposing of the various exceptions, as follows: The court will overrule exceptions numbered 1, and 11 to 13, inclusive, and sustain exceptions numbered 2 to 10, inclusive. That is on the exceptions taken by the complainant. The defendants have filed six exceptions to the report of the master. In respect to those, the court overrules exceptions numbered 3, 4, 5, and 6, and sustains exceptions numbered 1 and 2. As this does not indicate clearly the disposition made of the answer, because of the fact that there are some exceptions to portions of this answer that involve other exceptions,—there being also exceptions that were not pressed, and exceptions that were admitted and not resisted,—I find it necessary to make a general order with respect to the answer. The effect of the disposition of the report of the master will be as follows: That the exceptions to the answer numbered 3 to 11, inclusive, 13, 16, 21, 23 to 27, both inclusive, and 29 to 50, inclusive, will be sustained, and that exceptions numbered 1, 2, 12, 14 (except as sustained in exception 13), 15, 17, 18, 19, 20, 22, and 28, will be overruled. There was an exception filed after the report of the master (that is, exception 51), and that will be sustained. The direction of the court will be that an order be prepared in accordance with this memorandum, confirming the report of the master.

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CENTRAL TRUST CO. OF NEW YORK v. LOUISVILLE TRUST CO. et al.

(Circuit Court, D. Kentucky. March 21, 1898.)

**1. EQUITY—JURISDICTION.**

A bill in equity against mortgagees for compensation of a trustee in foreclosing the mortgage, and for costs and attorneys' fees, under a contract of indemnity, may be maintainable as to the costs and attorneys' fees even if the mortgagees are not liable for the trustee's compensation.

**2. DEMURRER—QUESTIONS CONSIDERED.**

On demurrer to a bill by a trustee under a mortgage for attorneys' fees and costs, which were allowed in the foreclosure suit, the question whether or not the adjudication as to the attorneys' fees was an allowance only against the mortgaged property, or whether it was a personal liability against the trustee, will not be considered where that case is not a part of the bill.

**3. CONTRACT OF INDEMNITY—EQUITY JURISDICTION.**

A majority of the bondholders directed the trustee, under the mortgage securing the bonds, to declare them matured, and foreclose the mortgage, and, in accordance with a provision in the mortgage, agreed "to indemnify and hold harmless the said trustee from any loss or damage on account of costs, counsel fees, or other expenses of such litigation under this request." *Held*, that a court of equity has jurisdiction to enforce the contract of indemnity by requiring the bondholders to pay costs and attorneys' fees for which the trustee became liable, though it had not yet paid the same.

Humphrey & Davie, for complainant.  
Bullett & Shields, for Louisville Banking Co.  
Theo. Harris, Thos. W. Bullett, and St. John Boyle, for defendant  
Louisville Trust Co.

BARR, District Judge. It appears from the bill in this case that the complainant is a trustee in a mortgage executed by the Richmond, Nicholasville, Irvine & Beattyville Railroad Company of its property, to secure the sum of about \$2,300,000 of coupon bonds; that there was a provision in the mortgage that, upon default of payment in the interest for six months, a majority of the bondholders could elect to have the trustee precipitate the maturity of the bonds, and take possession of the mortgaged property, and have a foreclosure and sale through the court. The mortgage provided that the trustee should not be required to do this until the trustee had been indemnified by the bondholders, making such a request, against costs, counsel fees, and other expenses of the litigation; and, under this provision, the defendants in this case (except Richards & Baskin), who were bondholders under the mortgage holding more than a majority of said bonds, requested the complainant to mature the coupon bonds, and institute foreclosure proceedings, and in the request the holders of said bonds agreed "to indemnify and hold harmless the said trustee from any loss or damage on account of costs, counsel fees, or other expenses of such litigation under this request." The complainant matured the bonds, and instituted in this court a foreclosure procedure, which resulted, after much litigation, in a foreclosure of the mortgage and a decree of sale, which decree of sale was appealed from, and in part reversed. After the case returned from the court of appeals, a final decree was entered. It is alleged in the bill that the liens which were adjudged superior to the mortgage are so greatly in excess of the whole value of said property that the sale of said property will not bring enough to satisfy the claims prior to said bonds, and nothing will be realized to your orator out of said property. While it is not alleged, it is a fact, however, that the mortgaged property has been sold since filing of bill, and nothing will be realized to the bondholders represented by the complainant. It is alleged in the bill that the court allowed the complainant \$1,000 as a reasonable compensation for its services as trustee, and that the complainant was compelled to pay expenses amounting to the sum of \$581.71, and became bound to pay counsel fees of counsel employed by it in a reasonable sum for their services. It is also alleged that the fees of the defendants Richards & Baskin, surviving partners of Richards, Weisinger & Baskin, which were allowed by the court, were, first, \$15,000 for their services rendered in the trial court, and, subsequently, \$2,500 for services rendered in the circuit court of appeals; and that the defendants, signers of said paper and agreement, have failed and refused, and still fail and refuse, to pay the expenses of your orator, and the allowance made to your orator for compensation and the counsel fees to Richards, Weisinger & Baskin, or any part thereof. The prayer of the bill is "that the amount due, owing, and unpaid for the compensation, expenses, and counsel fees may be charged and determined, and

that the payment of so much thereof as shall be due by the said defendants, or any of them, may be decreed by this court, and that your orator may be indemnified and saved harmless from any loss, expenses, and counsel fees aforesaid; that the signers of the agreements aforesaid may be compelled to pay off and discharge the expenses, compensation, and counsel fees aforesaid, so that your orator may be relieved from any obligation thereon or liability therefor."

The demurrer raises the question of whether or not there is any cause of action stated, and, further, whether, if there is, it is cognizable in equity. Before considering the main question, we may state that the compensation to the complainant is not covered by the terms of the indemnity sued on, and it may be that the defendants are not liable in this action even to the proportion which their bonds bear to the entire number, for said compensation. But this fact does not prevent the bill being maintainable for the attorney's fee which has not been paid and the costs which have accrued, for which the complainant is liable, if the suit is properly filed in equity; nor should we on this demurrer consider whether or not the adjudication as to the amount of the attorneys' fees which have been allowed in the foreclosure suit to the attorneys who brought said suit is an allowance only as against the mortgaged property then in the custody and control of the court, or whether it is a general allowance against the complainant, making it personally liable therefor. That case is not made a part of the bill and we must therefore take the bill as true in that regard. Taking the allegations for true, the amount has been ascertained by the adjudication in the very case which complainants were requested to bring.

The question presented by the demurrer is one almost entirely without direct authority. Mr. Story (Story, Eq. Jur. § 850) states the law thus:

"Courts of equity will decree the specific performance of a general covenant to indemnify, although it sounds in damages only, upon the same principle that they will entertain a bill *quia timet*; and this not only at the instance of the original covenantor, but of his executors and administrators. Thus, where a party has assigned several shares of the excise to A, and the latter covenanted to save the assignor harmless in respect to that assignment, and to stand in his place, touching the payments to the king and other matters, and afterwards the king sued the assignor for money which the assignee ought to have paid, the court decreed that the agreement should be specifically performed, and referred it to a master, and directed that, *toties quoties* any breach should happen, he should report the same especially to the court, so that the court might, if there should be occasion, direct a trial at law in a quantum *damnicatus*. The court further decreed that the assignee should clear the assignor from all these suits and incumbrances within a reasonable time. The case was compared to that of a counter bond, where, although the surety is not molested or troubled for the debt, yet, after the money becomes payable, the court will decree the principal to pay it."

To sustain this proposition, the cases of *Champion v. Brown*, 6 Johns. Ch. 405, and *Ranalaugh v. Hayes*, 1 Vern. 189, are referred to. The case of *Champion v. Brown*, decided by Chancellor Kent, is a very elaborate case, and seems to me to sustain the text of Justice Story. This case, and the case of *Ranalaugh v. Hayes*, 1 Vern. 189, have been reviewed by the supreme court of Michigan in *Bank v. Hastings*, 1 Doug. 235. The learned judge in the Michigan case

explains the case of *Champion v. Brown* as merely deciding that the covenant there made the defendants stand in the place of the intestate of complainant; and that they assumed the payment to *Champion & Storrs* which the estate of the intestate stood charged with. Therefore the court claims that it is not an authority for the specific performance of a covenant merely for indemnity, but that the obligation of the covenant was directly to pay; and so with the case of *Ranelaugh v. Hayes*, 1 Vern. 189. I do not understand that Chancellor Kent decided that the covenant made the parties *Champion & Storrs* directly liable to the original party for the debt which *Paddock* had agreed to pay. It is true, the chancellor used the following language in that case:

"In the case before me, the defendants, by their covenant of indemnity, and purchase of the contract between C. & S. and P., undertook to relieve the estate of P. from the burden of that contract. This is the true intent and meaning of the agreement; and it is as just that they should be decreed to clear the representatives of P. from the charge which they assumed for them as it is that a principal debtor should exonerate his surety before he is sued, and not leave 'a cloud always hanging over him.'"

The statement of the case, we think, makes this clear. It appears that *Henry C. and Lemuel Storrs* agreed to sell and convey to *John Paddock* 952 acres of land for the sum of \$8,000, \$500 to be paid in cash, and the residue to be paid in six annual installments. *John Paddock* died, intestate, November 16, 1816; and his administrators and heirs, being unable to perform the contract, for want of personal assets, on the 1st of June, 1818, entered into an agreement with the defendants, *John Brown* and *Jacob Brown*, by which the defendants covenanted and agreed that "they would take up and cancel" the contract made between *Champion & Storrs* and *Paddock*, etc., by the 1st day of August then next, or in case *Champion*, the survivor of *Storrs*, should refuse to give up and cancel the said contract, then the defendants covenanted to indemnify and save harmless the administrators of *Paddock*, etc., from all damages, costs, charges, and expenses which they might sustain or be put to on account of the claims, covenants, and agreements in said agreement contained; etc. *Lemuel Storrs* died intestate, and, in the distribution and settlement of the estate, all his interest in the contract became vested in the plaintiff, *William L. Storrs*. Soon after the agreement between the defendants and the administrators of P., the former entered and took possession of the land, and have since continued in possession, exercising ownership, receiving rents, cutting timber, etc. But they have made no payments, nor taken up the contract between *Paddock* and *Champion & Storrs*, but the representatives of P. still remain liable to be sued upon it. The bill prayed for a discovery, and that the defendants may be decreed specifically to perform the contract between *Champion & Storrs* and *Paddock* according to the true intent of the agreement between the defendants and *Paddock*, and for their indemnity, the heirs offering to ratify and confirm the conveyance of the land to the defendants in fee, etc., and for general relief. So, the original contract had not been taken up, and the purchasers *Brown* had not become directly liable to the original vendors, and they could not have sued directly upon said obligation.

The opinions of the supreme court referred to by counsel are not, we think, in point. The case of *Wicker v. Hoppock*, 6 Wall. 94, was a suit at law, and the question was as to the measure of damages for the nonperformance of an agreement to bid in certain property which was to be sold under a decree obtained by the party who subsequently sued, the agreement being that the party there sued would bid in the property for the amount of the judgment, with interest and costs. The court below allowed the amount of the judgment, with interest and costs, as the measure of damages, and in the supreme court Justice Swayne says:

"If the contract in the case before us were one of indemnity, the argument of the counsel for the plaintiff in error would be conclusive. In that class of cases the obligee cannot recover until he has been actually damaged, and he can recover only to the extent of the injury he has sustained up to the time of the institution of the suit. But there is a well-settled distinction between an agreement to indemnify and an agreement to pay. In the latter case a recovery may be had as soon as there is a breach of the contract, and the measure of the damages is the full amount agreed to be paid."

It is evident the learned justice was considering the question only from a legal standpoint.

The case of *Mills v. Dow's Adm'r*, 133 U. S. 424, 10 Sup. Ct. 413, was a case at law, and the obligation of the covenant was not only to save harmless, but directly to pay the contracting party's obligation.

The case of *Johnson v. Risk*, 137 U. S. 308, 11 Sup. Ct. 111, is equally without application. There the question was whether or not there was a federal question, and whether the Tennessee statute of limitation applied.

The case of *Refeld v. Woodfolk*, 22 How. 318 (not cited by counsel), is in principle more applicable to the question under consideration. The facts in that case are, briefly, these: A man named Notrebe sold to Woodfolk a plantation in Arkansas. At the time of the purchase, there was an incumbrance arising out of Notrebe's subscribing 300 shares of the Real-Estate Bank of Arkansas, and mortgaging the land for \$30,000. Notrebe and wife obligated themselves to Woodfolk that, upon the payment of the purchase money, they would convey to him by good and sufficient deed, with general warranty of title duly executed according to law. Woodfolk, the purchaser, paid all of the purchase money. Notrebe died, and, in winding up the Real-Estate Bank of Arkansas, there was a danger of a heavy liability upon the original mortgage to the bank. Woodfolk filed his bill for indemnity against the mortgage, and the court below gave him a decree requiring that the heirs of Notrebe "remove the incumbrance whenever it can be done, and then to convey the land by a deed with warranty, and with the relinquishment of dower by the widow, and meanwhile that they should deposit with the clerk of the court bonds of the state of Arkansas, for the amount of Notrebe's note and the interest (\$61,500) to be held and appropriated under the order of the court as an indemnity, or that the executors might, in part, or for the whole, convey to the clerk unincumbered real estate of the same value, for the same object, and under the same conditions." The

supreme court reversed the case, holding that as the transaction between the parties was bona fide, and the purchaser knew of the existing incumbrance, he must rely upon the covenants of his deed, and could not get the indemnity in advance; but I do not understand this case deciding that a court of equity had not jurisdiction to grant indemnity, but merely that the facts in that case did not authorize the relief granted, and that, by the terms of the contract between the parties, the purchaser was to rely upon the general warranties of his deed.

The recent English case of *Wolmershausen v. Gullick* [1893] 2 Ch. 514, is one in which the court, in a very elaborate opinion, sustained the jurisdiction to give indemnity to a surety against a co-surety. In that case the court (Justice Wright) reviewed the English authorities, and held that a court of equity would grant relief for indemnity to a surety although he had not paid. The case is a very elaborate one, and all of the English authorities seem to be reviewed.

It is conceded by counsel for the demurrant that there are cases where sureties have been protected by a court of equity against liability before payment; but it is insisted that it is only in cases where the defendant is liable directly on the debt, or where by the agreement he has agreed to pay as well as indemnify. The case of *Wolmershausen v. Gullick* was one of surety, in which the indemnity was granted without payment, but no such distinction was taken by the court; and the jurisdiction was put entirely upon equitable grounds, and not because of the liability of the surety on the original contract. In some of such cases the original creditor was not before the court at all; and in none where the relief was granted was it because of any right of the original creditor, or because of a contract by the defendant with a creditor. If relief is given to a surety, it is given upon the equitable principle of equality. If given to party holding a contract of indemnity, and not directly liable to the original creditor, the relief is given upon the contract of indemnity, and the equity arising therefrom. Thus, in *Stirling v. Forrester*, 3 Bligh, 575, in the house of lords, Lord Redesdale, said: "The principle established in the case of *Dering v. Lord Winchelsea*, 1 Cox, Ch. 318, is universal, that the right and duty of contribution is founded upon doctrines of equity. It does not depend upon the contract." And in the case of *Lacey v. Hill*, L. R. 18 Eq. 182, Jessel, M. R., said:

"Whatever be the case at law, it is quite plain in this court that any one having a right to be indemnified has a right to have a sufficient sum set apart for that indemnity. It is not very material to consider whether he is entitled to have the sum paid to him, or whether it must be paid directly over to the creditor. If the creditor is not a party, I believe it has been decided that the party seeking indemnity is entitled to have the money paid over to him."

This, of course, would be with proper security that the money thus paid over would be properly applied.

Our attention has not been called, in the very elaborate briefs of counsel, to a case like the one at bar in which the relief now sought had been refused. It must not be overlooked that the com-

plainant in this case was a trustee for the defendant bondholders; that, by the terms of the mortgage, complainant was not bound, except upon the request of the holders of a majority of the bonds, with an indemnity by them or others against all costs or expenses, to foreclose the mortgage; that the action of the complainant was entirely in the interest and for the benefit of the bondholders in thus instituting the suit and foreclosing the mortgage; that there was neither a direct nor an implied obligation upon the part of the trustee that it should advance the expenses of the litigation, and look alone to the mortgaged property, but, on the contrary, if there had been no provision for indemnifying the trustee for the expenses of the litigation, and the foreclosure had been at the request of the cestuis que trustent under the mortgage, there would be an implied obligation to repay to the trustee, if the mortgaged property was insufficient, the expenses of the litigation. Here, if this procedure be considered as one for a specific performance, the language of the contract justifies the payment by defendants of the liability which has accrued in the mortgage foreclosure, since the obligation is not only to indemnify, but "to hold harmless the trustee from any loss or damage on account of costs, counsel fees, or other expenses in such litigation." It cannot be said that these bondholders are holding the complainant harmless from any loss on account of counsel fees or other expenses of the litigation, if the complainant is required, as indicated by the argument for the demurrant, to pay counsel fees, and then litigate with the signing bondholders the reasonableness of the compensation thus paid.

We have concluded, therefore, under the circumstances, that a court of equity has jurisdiction to grant the relief prayed. It is not intended to indicate an opinion as to whether or not the allowance made in the foreclosure suit is binding upon the defendants, or whether or not the scope of the order making such allowance is to bind the complainant. We are considering the demurrer as it must be upon the facts as stated in the bill. It follows from this view that the demurrer must be overruled, and it is so ordered

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PINE MOUNTAIN IRON & COAL CO. et al. v. BAILEY et al.

(Circuit Court, D. Minnesota. March 12, 1898.)

**AGENT OF SELLER AND BUYER — AGENT'S KNOWLEDGE — EFFECT ON BUYER'S TITLE.**

An agent and director of a trust company sold a mortgage belonging to the company to one for whom he sometimes acted as agent in similar transactions, and who was depending on his judgment as to the safety of the investment. *Held*, that the agent's knowledge of defects in the title should not be imputed to the purchaser.

Richards, Boskin & Ronald and Keith, Evans, Thompson & Fairchild, for complainants.

Wilson & Van Derlip, for defendants.

LOCHREN, District Judge (orally). The evidence shows that the plaintiffs, corporations of the state of Kentucky, on August 10,

1892, at Louisville, Ky., entered into a written contract with John D. Blake, of Minneapolis, Minn., by the terms of which he was acquiring property rights, and on his part contracted to convey to plaintiffs, or one of them, real estate situate in Minnesota, and preferably in Minneapolis, to the amount in value of \$100,000, the values to be affixed by appraisers, and that of this land there should be no part on which there should be mortgages for more than half the value, and the mortgages on the whole should not aggregate more than \$20,000 on the \$100,000 worth of property. The appraisal was had, and on the 25th of October following he presented deeds to these companies, containing descriptions of the land which he offered them, and I suppose, also, of the incumbrances upon the lands, for among the descriptions was a statement of this mortgage of \$17,200 to the Metropolitan Trust Company of Minneapolis, dated August 29, 1892. Objection was made to this mortgage, and a supplementary agreement was entered into between the parties at the time, upon which it was agreed that the reception of the deed should not prevent plaintiffs from objecting to the validity of this mortgage. I really do not understand how plaintiffs would be in a situation at that time to object to that mortgage if it had been delivered at the time it was dated, even although it was subsequent to their agreement in relation to these lands, because no particular land had been designated as the land to be conveyed. Blake was to select and have appraised and offer to plaintiffs lands to the amount of certain values in Minnesota, but there was nothing to prevent him from selling any of the lands that he owned in the meantime. If the mortgages should exist upon the lands offered above the amount that was stipulated, that would give the companies a right, of course, to refuse to accept such lands; but I do not see how it would invalidate any conveyances that Blake would make in the meantime, whether mortgages or not. But he certainly would not have a right to put on mortgages after the deeds were made and accepted; and it appears that these deeds of Blake were given to these companies, or one of them, on the 25th of October, and this mortgage was not in fact delivered to the Metropolitan Trust Company until the 27th of October, some two days later, and was put on record that day. If the deed to the Pine Mountain Iron & Coal Company had been recorded promptly, it would probably have come in ahead of the mortgage, but that course was not taken. On the contrary, the notice,—Exhibit L, or Exhibit I,—

Mr. Keith: The deed was recorded the next day after that notice. It was recorded on the 28th.

The Court: This notice it is not needful to dwell upon. It is somewhat vague. It does not state in any way the rights of the Pine Mountain Iron & Coal Company to this land, or any reason why they have a right to object to the giving of any incumbrances upon it by Mr. Blake. But the testimony goes further than that. These contracts, or some of them, were sent to Mr. Moore, reaching him the following day, and he had another interview with the Metropolitan Trust Company upon that day, in which he claims to have notified them more particularly in relation to the

rights of the Pine Mountain Iron & Coal Company in respect to these lands. It seems to be admitted that at this time no consideration for that mortgage was paid by the trust company to Blake, and, of course, if there was sufficient notice, it would be in season if given before the consideration was paid upon the mortgage. The testimony shows that Blake did not receive the consideration for this mortgage until the 10th of January, 1893, and that shortly prior to that time Mr. Woodman, who was trust agent and director of the trust company, conferred with Charles M. Bailey by letter, making an offer on behalf of the trust company to sell this mortgage to him. The testimony shows that for some years previously Mr. Bailey had been making loans in the state of Minnesota, and purchasing mortgages and securities of that kind, and that Mr. Woodman had, to a certain extent at least, acted as his agent in many of these transactions; that he had other agents, at St. Paul, who were interested in the like business. It appears that the relations between himself and Mr. Woodman were confidential; that Bailey entrusted a great deal to Mr. Woodman's probity and judgment in relation to questions of value and of the titles of the property upon which he made loans; and I am inclined to think, under the law in respect to principal and agent, that, with reference to any transaction of that kind in which Mr. Woodman had no personal interest, the knowledge which Mr. Woodman would acquire in a transaction, or knowledge of facts which he had previously acquired, and which were present in his mind at the time of the transaction, it would be his duty to apprise Mr. Bailey of, and the law would conclusively presume that he did so apprise him, and such knowledge would be imputed to Mr. Bailey. The exception is in cases where the agent is himself interested in the transaction, and holds a position which is in that respect antagonistic to the interest of the principal. In cases of that kind the law does not impute that knowledge.

Now, it seems that in this case, as I said before, Mr. Woodman was the trust agent and director of the trust company. He had a direct interest in its affairs, and a duty to perform, as trust agent and director, in the management of its affairs, and, so far as he participated in the disposing of its assets, his duty was to get as much for them as possible. It appears that to get money for that company this mortgage was formally assigned to him, and that he got money from the Flour City Bank upon his own note to the amount secured by this mortgage, and gave the bank this mortgage as collateral to his own note, and that this was the situation when the sale was finally made to Charles M. Bailey of the mortgage. Woodman wrote to Bailey, as he had been accustomed to do with reference to other matters, describing the mortgage, stating its amount, and giving his estimate of the security, and also of the financial responsibility of the maker of the note and mortgage, and advising Mr. Bailey to buy it as a safe and good investment; and upon these representations Mr. Bailey finally did purchase the mortgage upon terms that were agreed upon between himself and Mr. Woodman,—not entirely upon the terms that Mr. Woodman

first offered, because he asked better terms; that is, he asked that he should have the January interest, although the transaction was not completed until the 27th of January. This Mr. Woodman did not agree to, but offered, doubtless with the assent of the trust company, to divide the commission which the trust company had received from Blake, and which altogether amounted to about \$122, with Mr. Bailey in case he purchased; and this was accepted.

It appears from the testimony, and it seems to be conceded, that Mr. Bailey in this transaction was personally innocent of any knowledge as to any defects in the title to this mortgage; that he bought it in entire good faith, and paid the full consideration for it. If his title is to be assailed, it must be entirely upon this imputed knowledge of Mr. Woodman as agent, and the question is whether Mr. Woodman was in such a position that his knowledge of the matter, which was complete, can be imputed to Charles M. Bailey.

As I said, he was trust agent and director of the trust company. At the time when these negotiations took place it appears that he had been requested by another officer of the company, Mr. Cooke, to dispose of this very mortgage. It had, therefore, been placed in his hands to dispose of as the agent of the trust company. He had assumed the sale of that mortgage, acting as the agent of the company. It hardly seems correct to hold, under those circumstances, that he must also be treated as the agent of the buyer.

It seems, further, that he was connected with it in the way I have suggested, by having had it assigned to him, so that the nominal title to the mortgage and note was in him at that time; although I am inclined to think, from all the circumstances of the case, that this was a sort of shifty proceeding upon the part of the trust company to get the money in hand at the time, and prior to making an absolute sale of the mortgage to some other person, and probably with some understanding that he was not to be considered as the absolute holder, and the trust company as having nothing further to do with it. But it enabled the trust company to get the money, for it appears that Woodman turned the money over to the trust company when he got it from the bank. The title, therefore, of this property that he was selling to Bailey, was nominally in himself, although it was really the title of the trust company.

Under his authority to sell it, he did more than to bring the parties together to allow them to trade with each other. He negotiated the terms of the sale himself, and himself agreed to give up half of the commission, though with the assent of the trust company. I am inclined to think his connection with the trust company and with the mortgage was such that he would be necessarily interested in protecting the trust company, and in representing the mortgage which it had for sale to be valuable, and to conceal whatever would make it unsalable; and that, under the circumstances, there is no inference that he would disclose a defect to a purchaser to whom he was anxious to sell, especially in the case of a defect which he himself did not really deem a substantial de-

fect, so that he would consider himself as acting dishonestly in failing to disclose it, but still a defect which he would naturally regard as likely to deter as cautious a man as Bailey from buying the mortgage if it had been disclosed.

I think, on the whole case, that the defendant is entitled to a decree dismissing the bill, with costs.

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GREEFF et al. v. MILLER. FLEITMAN et al. v. SAME. SCHWIETER-  
ING et al. v. SAME. DIECKERHOOF et al. v. SAME.

(Circuit Court, S. D. New York. May 2, 1898.)

Nos. 3,500, 3,573, 3,503, 3,666.

**1. ATTORNEYS—COMPENSATION—AMOUNT—EXPERT TESTIMONY.**

Where it is the custom for attorneys to take cases on a contingent basis, paying expenses themselves, and to add a percentage to their normal charges to cover the consequent risk of loss, the court, in determining the amount which it will allow as attorney's fees in a particular case, should consider expert testimony in the light of the fact that no such risk exists under the circumstances.

**2. SAME—TEST CASES—APPORTIONMENT.**

Where there are a number of cases, all presenting practically the same questions of law and fact, and certain ones are selected for trial as test cases, the amount allowed by the court to attorneys, for disbursements and professional services in the preparation and trial of such test cases, should be charged pro rata against the whole number of cases, since all are benefited equally by such services.

These causes were heard on exceptions to the referee's report as to the amount due the attorneys and counsel on the basis of a quantum meruit for professional services rendered.

Benjamin Barker, Jr., for the motion.  
Wm. B. Coughtry, opposed.

LACOMBE, Circuit Judge. The successive attorneys and counsel having asked for no distribution, as between themselves, of the amount proper to be paid upon order of substitution, the question presented for consideration is much simplified. It will be disposed of as if there had been but a single attorney and a single counsel engaged for the plaintiffs during the progress of the litigation.

The referee finds that a payment of \$50 in each case would be full compensation to the attorneys for the professional services rendered in each of these cases. In this opinion I entirely concur. There is, it is true, a disbursement of \$63 paid for chemical analysis which might properly be included among the attorneys' charges; but, inasmuch as the expense therefor was undoubtedly incurred in preparing one of the typical cases for trial, this item may be considered with the allowance for services of counsel to be hereafter discussed.

The referee confined himself not only to services rendered in these cases, but to services rendered as attorney only. For that reason his report does not go far enough. It is unnecessary, however, to

send the case back to him, since this court is fully advised as to all the facts.

It appears that there was a group of some 40 or 50 cases (including the 4 above entitled), all involving the same questions of law and practically the same questions of fact. They were all in charge of the same attorney and counsel. From time to time a case supposed to be typical, and to present in a favorable light the propositions which plaintiffs sought to maintain, was selected for trial. This was undoubtedly the proper way in which to deal with a volume of litigation such as is presented by this group of cases. Success or failure in the test cases, of course, affected the cases not tried, and to that extent the professional work resulting in such success or failure may be considered as proportionately rendered in each case of the group. Two cases, which seem to have involved but few entries, were successively tried at circuit, the plaintiff defeated in both, and appeal never prosecuted. A third suit, known as the "Butterfield Case," was tried at circuit. Plaintiff prevailed, appeal was taken to the supreme court of the United States, and judgment affirmed. By this affirmation several of the questions arising in the case were finally disposed of favorably to the plaintiff, and by the result of such decision the plaintiffs in each of the four above-entitled actions have directly benefited. A fourth case was tried before me in October, 1888, involving some 15 or 16 entries, a verdict being rendered for the defendant. A writ of error was sued out to review this decision, but subsequently abandoned. Some effort has subsequently been made to get another test case ready for trial, but none has been tried. The question now presented is, what were the services which resulted as above indicated worth?

I am familiar with the questions raised in the case tried before me. It did not take a long time, and while the facts were fresh in my mind I certified a charge in favor of the United States attorney for his services for the government on the trial of the case of \$250. In the absence of any specific proof of some extraordinary expenditure to obtain evidence, I should consider \$500 a fair allowance for the services of counsel upon the trial, and for the services of attorney and counsel in preparing the case for trial. The allowance of \$250 for preparation for trial seems large, but it appears that part of the testimony was taken by deposition, which is always expensive. The same amount may fairly be allowed for the trial of the Butterfield Case, and for the two small actions first tried \$350 each should be sufficient. This would aggregate \$1,700. For all services in prosecuting writs of error and arguing the case in the supreme court of the United States \$1,500 would seem to be a fair remuneration. This brings the aggregate up to \$3,200. For all other services of counsel, including the preparation of additional cases for trial, \$1,000 would seem to be a liberal award. This makes the aggregate \$4,200, and when it is considered that this sum is separate from and additional to the allowance for attorneys' services of the kind passed upon by the referee, and by him found to be worth \$50 per suit, it is thought that the conclusion

reached by this court is not so far away from the estimates testified to by the expert witnesses as might at first be supposed. Moreover, it must be borne in mind that all of these witnesses testify from the point of view of the practitioner in customs cases, who almost invariably finds it necessary to add a percentage to his normal charge in order to cover contingencies, since most of that business is placed in the hands of attorneys with the understanding that they are to receive nothing, and themselves bear the current expenses, unless they succeed eventually in recovering from the government. This estimate of \$4,200, however, is made with no such contingency in view, since whatever proportion of it may be properly chargeable to the plaintiffs in these suits is going to be paid by them, and thus no contingency of loss exists.

This \$4,200, having been paid for services by which all interested benefited equally, should be distributed proportionately against the several cases. Thus, if the amount sued for in one of the cases entitled above be \$6,000, and the total amount sued for in all of the cases of the group amounted to \$120,000, one-twentieth of the \$4,200 should be charged against this suit.

It appears, however, that there was a recovery in the Butterfield Case which was affirmed by the supreme court, and it must be assumed that the amount of such judgment was paid by the government. Under the original agreement with the several plaintiffs, 50 per cent. of this must have been received and retained by the attorney. That sum should therefore be deducted from the \$4,200, and the balance only distributed as a charge proportionately against the different actions. Inasmuch as all the figures required to reach the result are matters of record, it would seem as if a conclusion might be reached without any further reference to the master.

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UNITED STATES v. SEUFERT BROS. CO.

(Circuit Court, D. Oregon. April 29, 1898.)

Nos. 2,308 and 2,318.

**1. CONDEMNATION PROCEEDINGS—INSTRUCTIONS—DAMAGES.**

In a proceeding by the government to condemn lands for a boat railway along the Dalles of the Columbia river, defendant requested an instruction that when the government takes land it takes the fee simple, and the premises would never revert to defendant even if the work should be abandoned. *Held*, that this instruction was irrelevant, (1) because the character of the use did not admit of an inference that it might be abandoned, and the jury must be presumed to base its award on the demands of the complaint, which were for the fee; and (2) because, even on the theory of a possible abandonment, the fact that the fee would remain in the United States would not damage the defendant, since the land itself was of merely nominal value, and the damages sought were for interference with fishing rights.

**2. SAME—PROVINCE OF JURY—ESTIMATES OF WITNESSES.**

Where the estimates of witnesses as to the value of property taken differ very widely, and the jury themselves view the premises, it is proper to refuse an instruction that they cannot disregard the testimony of the witnesses, and base their verdict on mere conjectures of their own, unsupported by the evidence, as such instructions are liable to mislead the jury into supposing that they must not rely on their own opinions.

8. SAME—CONDITIONS OF CONDEMNATION—INSTRUCTIONS.

It is not proper to submit to the jury instructions to determine whether the government can comply with a condition on which its proposed condemnation of land is sought, and authorize them to award damages in advance as for a failure.

4. SAME—EXTENT OF RECOVERY.

The owner of land sought to be condemned cannot recover for the value of the land belonging to a railroad company's right of way across a portion of it.

5. SAME—INADEQUATE DAMAGES—PASSION AND PREJUDICE OF JURY.

Of seven witnesses no two agreed as to the amount of damages to the land affected, their estimates ranging from \$5,000 to \$175,000. The jury viewed the premises under an order of the court, and awarded \$9,000. *Held*, that the damages were sufficient, and the jury was not influenced by passion or prejudice.

John H. Hall, U. S. Atty., and Julius C. Moreland, for the United States.

A. S. Bennett and Lionel R. Webster, for defendant.

**BELLINGER**, District Judge. This is a motion by the defendants for a new trial in a proceeding to condemn a right of way for a boat railway between Celilo and Dalles City on the Columbia river. The jury assessed defendants' damages at \$9,000. The motion is based upon alleged errors of the court in failing to give instructions, requested by defendants, as follows:

"(10) Where the government of the United States takes the land, as in this case, it takes the fee simple or entire and perpetual title of the land; and the premises would never revert to the defendant, even if the work should be abandoned."

"(12) In relation to the building and improvements of a permanent and fixed character situated upon premises sought to be taken, I charge you that they are a part of the land, and go with the land, and the defendant is entitled to have the full value of the same included in your assessment of damages."

"(29) In arriving at your verdict, it is your duty to be governed by all evidence in the case, and this applies to the question of the amount of damages. You would not have a right to disregard the sworn testimony of the witnesses as to the amount of damages, and base your verdict upon some mere conjecture of your own, unsupported by the evidence."

"(2a) If any of the crossings of the defendants which the defendants now have across land occupied by the proposed right of way are of such a character that it will be impossible or impracticable to replace them with a crossing equally good, then you should allow the defendant for the loss or impairment of such crossing, notwithstanding the reservation in the pleadings in that regard."

"(32a) Whether the O. R. & N. Co. owns the right of way over part of the ground sought to be appropriated or not can make no difference, as you must allow the defendants in this case full value for the whole strip taken, whether it belongs to the defendants or to the O. R. & N. Co.; and then, if the O. R. & N. Co. has any interest, that will be a matter for settlement between it and this defendant. You cannot reduce the damages of this defendant any whatever upon the ground that part of the land may or does belong to said company, or that said company has a right of way across it."

And it is assigned as a further ground of the motion "that the jury was influenced by prejudice, and that the damages assessed are insufficient."

Instruction numbered 10 is irrelevant, for these reasons: (1) The case does not admit of an inference that the use for which condemnation is sought might be abandoned. It must be pre-

sumed that the jury's award was based upon the demands of the complaint, which are for the fee; and, moreover, the character of the use shows that it is to be perpetual. (2) Upon the theory of a possible abandonment of the use by the United States, the fact that the fee to land condemned would continue in the latter would in no way prejudice the defendants, since the damages claimed by them are based wholly upon the interference to the fishing industry occasioned by the use to be made of the condemned property by the United States, the land as such having only a nominal value.

The substance of the above instruction numbered 12 was given to the jury. The court instructed the jury that they should consider the present value of defendants' premises as a whole, including the uses to which they are or may be applied, including fishing rights and privileges, and the permanent improvements as they now are, and then consider what such value will be when the boat railway is completed and in operation.

The instruction requested, and not given, that it is the duty of the jury to be governed by the evidence in the case, is a matter of such universal knowledge that the jury are presumed to know it. The further statement in the instruction requested was calculated to lead the jury to conclude that they were obliged, in the assessment of damages, to be governed by the opinions of witnesses as to the damages, and were thereby precluded from forming opinions of their own from the facts before them. To illustrate: Witnesses gave opinions as to the value of the property condemned as a railroad right of way, placing such value as high as \$100,000. The jury were not bound, in estimating defendants' damages, to include the amount at which these witnesses placed the value of the land for railroad purposes. These estimates were mere opinions, based upon facts to which the witnesses testified, and from which the jury might form opinions of their own. And so of the other elements of damages, such as the damages resulting from the inconvenience occasioned the defendants in handling fish by the proposed improvement. The jurors were not required to adopt any estimate of witnesses as to these matters, but were at liberty, upon a consideration of the facts before them, to make their own estimates. The instruction requested in effect directed the jury to find in accordance with this opinion evidence; at least it was liable to be so understood; and from the tenor of the instruction and the contention made before the jury in the argument this was the purpose of the instruction. The court was asked to instruct the jury that they had no right to disregard the sworn testimony of the witnesses as to the amount of damages, and base their verdict upon mere conjecture of their own, unsupported by the evidence. The understanding and purpose of this instruction was to require the jury to base their findings upon the statement of witnesses as to the amount of damages, and to advise them that they must not form opinions of their own unless supported by such opinion evidence. The character of this testimony as mere opinion, and its value as affording a proper basis for determining the compensation to which defendants were entitled, is shown by the wide

divergence of this testimony. Of the seven witnesses who gave their opinions on this subject, no two were agreed. The first witness was of the opinion that the entire property was worth \$150,000, and that the damages caused by the proposed taking were one-half this sum,—\$75,000. The second witness was of the opinion that the damages should be placed at \$100,000. The opinion of the third witness was that the entire property was worth \$200,000, and that the damages were one-third of this sum,—\$66,666. The fourth witness was of the opinion that the rights condemned were worth, for railroad purposes alone, from \$25,000 to \$50,000; that, aside from this, the value of the property affected was \$200,000, and the damages, not including value of the land taken for railroad right of way uses, were from 10 to 25 per cent. of this value; making the total damages, according to the opinion of this witness, from \$45,000 to \$100,000. The fifth witness,—Seufert,—the principal owner, testified, in effect, that the land taken was worth, in his opinion, from \$60,000 to \$75,000 for a railroad right of way alone, and that the damages accruing to him otherwise would reach \$100,000; making a total of from \$160,000 to \$175,000. One of the two witnesses testifying for the United States estimated the damages at from \$12,000 to \$15,000, and the other testified that, if there was no inconvenience caused by the work of construction, defendants' damages would be from \$5,000 to \$10,000, but that with such inconvenience it would reach from \$10,000 to \$15,000. These widely varying conjectures of the different witnesses and of the same witnesses cannot afford a basis for estimating the compensation to be paid defendants. The jurors were quite as competent to form opinions as the witnesses in the case. Furthermore, the statute provides that the jury "are not bound to find in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number, or against a presumption or other evidence satisfying their minds." Comp. Laws, § 845. And so the jury, upon the facts before them, might properly disregard not only the conclusions of witnesses, but their testimony as to facts, if not satisfied of their correctness, and from other evidence before them form their own conclusions. There was a view by the jury of the premises in question, under an order of court, made in pursuance of a statute of the state. In this class of cases the view of the jury is evidence to be taken into consideration with the other evidence in the case. "The result of a jury's personal view of the land is evidence proper to be acted upon by them; and if they believe, from the whole evidence, that they have from such view arrived at a more accurate judgment as to the value of the premises sought to be taken, and of the damages, than that shown by the evidence in open court, they may, upon the evidence, rightfully fix the value of the land taken and the damages at the amount so approved by their judgment formed from the personal examination, even though it differs from the amount testified to and the weight of testimony given by witnesses in open court." *Kiernan v. Railway Co.*, 123 Ill. 188, 14 N. E. 18; *Railroad Co. v. Sawyer*, 71 Ill. 361. And where there is a wide conflict

of testimony they will be justified in acting on their own judgment entirely. *Railroad Co. v. Reed*, 35 Cal. 621; *In re Antoinette Street*, 8 Phila. 461; 7 Enc. Pl. & Prac. 583, note.

Instruction numbered 2a, requested by the defendants, proposed to leave it to the jury whether the United States could comply with the condition upon which its proposed condemnation was sought, and, in effect, authorized them to award damages in advance as for a failure in that respect. The rights which the government secures by this proceeding are subject to the limitations and conditions contained in its complaint. If any of these conditions are impossible of performance, it must be assumed that the United States will not insist upon the right of way without further compensation. The good faith of the government must be presumed. Its obligations admit of no higher or other security. And, besides this, the practicability of what is proposed is shown by the testimony of the only witnesses whose experience and engineering knowledge qualify them to testify in the premises. There is nothing legitimately tending to contradict the testimony which shows that it is practicable to replace existing crossings with others "equally good." The jury were specially instructed to consider any inconvenience to result from the operation of the proposed crossings and from the increased length of tramway, made necessary by the proposed boat railway; and the general instruction, already referred to, which required the jury to consider the difference between the present value of defendants' property, rights, privileges, and improvements, including all their present and prospective uses, and their value as affected by the proposed improvement, includes every element of damage, whether it arises out of possible inconveniences from differences in the character of the crossings from those now in use or otherwise.

The instruction requested by defendants numbered 32a was properly refused. The railroad right of way of the Oregon Railway & Navigation Company is not subject to the condemnation attempted in this action, and there can be no recovery of compensation or damages on account thereof. The so-called possession of defendants is, therefore, not material, although, notwithstanding the admission of the pleadings, the facts shown by the evidence are that the railway company is in possession of its right of way and is operating its road thereon, and the alleged possession of defendants consists in their occupancy of a part of the land within the right of way by sufferance of the company. But, aside from these matters, the admitted fact being that the land sought to be condemned for a boat railway has no value, any recovery, if allowed, of its "full value," could only be for a nominal or trifling amount, of which the law will not take notice. The defendants claim nothing for any of their land to be condemned, except as the proposed use will affect their adjacent fishery. The compensation and damages claimed by defendants as to all the land taken are based wholly upon the injury that the proposed use will cause to their adjacent fishery, and upon the value of the land condemned as a railroad right of way. The instructions given were broad enough to warrant compensation for all injuries to defendants' fishing rights and interests by the proposed

boat railway, without reference to the fact that it might occupy some portions of the railroad right of way, and it does not admit of argument that defendants cannot recover for the value as a right of way of land belonging to the railroad company, and in its actual use for that purpose.

The last ground of this motion is that the jury was influenced by passion and prejudice, and that the damages are insufficient. I am of opinion that the verdict is sufficient to fully compensate defendants for the land taken and for all the injuries consequent upon the construction and operation of the proposed improvement. The damages claimed are speculative. The wide conflict in the testimony of defendants' witnesses shows upon what an unsubstantial and conjectural basis they rest. These estimates range from \$45,000 to \$175,000. The testimony of one witness fixed such damages at anywhere from \$45,000 to \$100,000, while the testimony of witnesses for the United States placed such damages as low as \$5,000, not including possible inconveniences to defendants from the proposed improvement, leaving the matter of such inconvenience a matter of doubt. I am of the opinion, from all the testimony in the case, that the proposed improvement will not interfere with or injure the fishing interests and business of defendants, and that the damages awarded more than compensate for the increased expense and inconvenience likely to result from the operation of tramways and new roadways in connection with the conduct of defendants' business, and from injuries to improvements, and that there is no prospective use for additional rights of way at this point; and the claim for compensation on that account is without foundation. In reaching these conclusions I do not take into account the fact that defendants, in May, 1895, offered this right of way to the United States for \$5,000, and offered to remove such of their buildings as might be required at their own expense. This offer was accompanied by the statement that defendants did not consider such sum "any compensation for the damages" that the proposed road would cause them, and that the offer was only "to get the matter settled." Making due allowance for defendants' wish to get the matter settled, it is unreasonable to suppose that they believed their damages were \$150,000, or were greatly above the sum they were willing to take. Nor have I taken into account the fact that last year, and after defendants' answer claiming damages in the sum of \$150,000 was filed, all of defendants' real property and improvements were assessed at \$14,578, and their fish wheels were assessed at the further sum of \$8,000, and that the real estate was, in the opinion of the assessor, assessed at three-fourths of its actual value. While this assessment appears to have been made by the assessor, and was upon the basis of values adopted for other similar property, yet the figures of the assessment were examined by Mr. Seufert, president of the defendant company, and he must, therefore, assume responsibility for them as a just estimate of value. One of two conclusions from this assessment, bearing upon the credit to be given to the testimony of defendants' witnesses, seems unavoidable,—either that there is a lax state of public morals in the community where real property and im-

provements, worth, according to the testimony of the owners and of all the witnesses, in the vicinity of from \$150,000 to \$300,000, is taxed at \$22,000, or that the testimony of these witnesses as to value is unreliable and worthless; nor does it mend matters to say that all other property in the vicinity of the same character is assessed at the same rate. The motion for a new trial is overruled.

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PENDERY et al. v. CARLETON.

SAYER et al. v. SAME.

(Circuit Court of Appeals, Eighth Circuit. May 2, 1898.)

Nos. 982 and 983.

1. APPEAL—AMENDMENT OF PLEADINGS—OBJECTION NOT RAISED BELOW.

Defendants, who have answered an amended bill, and given evidence and submitted the cause thereunder, without objection, cannot, on appeal, raise the point that it states a different cause of action from the original bill.

2. CHANCERY PRACTICE—AMENDED BILL—NEW CAUSE OF ACTION.

Amendments to a bill, consisting merely of the omission of all allegations against one defendant, and changes in the prayer for specific relief made necessary by such omission, do not make the bill state a new and independent cause of action.

3. SAME—LACHES.

Where a bill of complaint, filed in due season, was, upon hearing, dismissed as to one defendant, and leave granted to amend as to the others, and an amended bill, subsequently filed, contained practically the same allegations as to such other defendants, the defense of laches cannot prevail, even if an original bill filed at the time of the amended bill would have been open to that objection; it not appearing that the complainant was solely responsible for the slow progress of the proceedings under the original bill.

4. CORPORATION—EQUITABLE TITLE TO STOCK—ACCOUNTING.

A mining company contracted with complainant for the purchase of his interest in certain mining property, in consideration of a certain proportion of its capital stock, which stock, however, was never issued to him. Later, the board of directors, in good faith, ordered a sale of all the company's stock to pay expenses of development, and purchased it themselves, but without taking undue advantage of any other interested parties. Finally, the property, proving of little or no value for mining purposes, was sold,—the sale being an advantageous one,—and the proceeds divided among themselves by the directors, who believed themselves to be the only shareholders. On suit against the directors for an accounting, *held*, that complainant was the equitable owner of the agreed amount of stock, and was entitled to such proportion of the net proceeds of the sale as his stock bore to the total capital of the company, and no more, with interest from the date of filing the amended bill asking such accounting.

5. SAME—SALE OF PROPERTY.

Where all the property of a corporation is sold, and a regular conveyance thereof executed, the fact that the purchaser, as a precautionary measure, requires an assignment to him of all the stock of the corporation, does not make the transaction a mere sale of the stock, rather than of the property; and the proceeds belong to the corporation, and not to the individuals transferring the stock.

Appeal from the Circuit Court of the United States for the District of Colorado.

On July 19, 1883, John K. Carleton, the appellee, exhibited his bill of complaint against John L. Pendery, Luther M. Goddard, Charles I. Thomson, and

Daniel Sayer, the appellants, and against James Armstrong, George W. Melville, L. R. Tucker, William S. Ward, and the Portland Mining Company, in the circuit court of the United States for the district of Colorado. The case stated by the bill was as follows: Prior to the 3d day of January, 1881, the complainant was the owner of an undivided  $11/32$  of a mining claim known as the "Portland Lode," situated in the county of Lake, state of Colorado. George S. Coryell and Edmund H. Watson each owned an undivided  $1/4$  interest in said claim, James E. Fuller  $4/32$  thereof, and the defendant John L. Pendery an undivided  $1/32$ . In the month of January, 1881, John L. Pendery, Luther M. Goddard, George W. Melville, Charles I. Thomson, and Daniel Sayer formed a corporation known as the Portland Mining Company, under the laws of the state of Colorado, for the purpose of acquiring title to the aforesaid mining claim; the capital stock of said corporation being \$1,000,000, divided into 10,000 shares, of the par value of \$100 each. The parties last above named, to wit, Pendery, Goddard, Melville, Thomson and Sayer, together with James Armstrong and L. R. Tucker, became the board of directors of said corporation for the first year. At a meeting held by said board on March 29, 1881, Pendery was elected president, Goddard, vice president, Armstrong, secretary, and Thomson, treasurer, of said company. At said meeting a resolution was passed by the board to the effect that the owners of the Portland lode, should receive  $5/6$  of  $1/2$  of the capital stock of said company, as a consideration for the conveyance of their respective interests in said property to the corporation, each owner to receive such a share of the stock as would be in proportion to his interest in said Portland lode,—and that  $5/6$  of the remaining  $1/2$  of the capital stock be reserved as a fund for the purpose of working and developing the property. On May 6, 1881, Carleton, the complainant below, who was the owner of an undivided  $11/32$  of the mining claim aforesaid, was induced to convey his interest in the property to the mining company aforesaid, which had just been formed, by its promise and agreement that it would issue and deliver to him  $11/32$  of  $5/6$  of  $1/2$  of its capital stock, to wit, 1,430 shares, of the par value of \$100 each. When such conveyance was made, the complainant was at Portland, Me., and the deed conveying his interest was there executed, and transmitted to the Portland Mining Company at its office in Leadville, Colo. On receipt of the conveyance by the mining company, it was duly recorded. The mining company failed to deliver to the complainant any of its stock pursuant to the aforesaid agreement. On May 12, 1882, the mining company conveyed the property in question to the defendant William S. Ward. The bill charged that no consideration was paid by William S. Ward to the Portland Mining Company for the conveyance last aforesaid, and that said conveyance was made in pursuance of a conspiracy between Pendery, Goddard, Thomson, Armstrong, Sayer, Tucker, Melville, and Ward to deprive the complainant, Carleton, of his interest in the Portland lode, and of his share of the capital stock of said mining company. It also averred that, when Ward acquired title to the aforesaid property, he was well aware that the complainant had been the owner of an undivided  $11/32$  of the property before its conveyance to the mining company, and was well aware of the agreement by virtue of which the complainant had been induced to convey his interest to said mining company, and that the consideration promised him for so doing, to wit,  $11/32$  of  $5/6$  of  $1/2$  of the capital stock of the company, had not been paid or delivered. In view of the premises the bill prayed that the aforesaid conveyance from the Portland Mining Company to said Ward might be set aside, and the title to the lode restored to the Portland Mining Company; that the defendants Pendery, Goddard, Thomson, Armstrong, Sayer, Tucker, Melville, and Ward, as directors of said mining company, might be required to issue and deliver to the complainant such portion of the capital stock of said company as he was entitled to under the aforesaid agreement; and that, if such relief was not deemed adequate, the Portland Mining Company might be required to convey to the complainant his interest in said lode, so as to vest him with the title to  $11/32$  thereof, as fully and completely as if no conveyance had theretofore been made by him to said mining company.

Answers were filed to the aforesaid bill, testimony was taken, and at a hearing had on June 21, 1890, it was adjudged by the circuit court that the bill of complaint be dismissed as against the defendant William S. Ward, but that the complainant below have leave to amend his bill as against the other defendants at any time within 30 days thereafter, and that the defendants other than said William S. Ward be required to answer the averments of such amended

bill within 30 days after the service of a copy thereof. Pursuant to such order, an amended bill was filed on July 19, 1890. The amended bill differed from the original bill in the following respects; that is to say: It charged that the Portland lode had been sold by the mining company to the defendant William S. Ward about May 13, 1882, for the sum of \$30,000. It omitted the allegations made in the original bill which tended to show that Ward had acted fraudulently, and conceded, in effect, that said Ward was a purchaser of the property for value, and in good faith. It charged that the other defendants, to wit, Pendery, Goddard, Thomson, Armstrong, Sayer, Tucker, and Melville, had managed to dispose of the greater portion of the capital stock of the Portland Mining Company, and had wrongfully appropriated to their own use the moneys which were received from the sale thereof, and that by their mismanagement of the corporate affairs they had utterly destroyed the value of the mining company's stock. It also charged that the defendants last aforesaid had failed to account to the complainant for his share of the capital stock of the Portland Mining Company, and had not paid to him his portion of the same which was received from the sale of the property to the defendant Ward, and that they had appropriated to their own use moneys to which the complainant was entitled by reason of the agreement of the mining company to issue to him  $11\frac{1}{32}$  of  $\frac{5}{8}$  of  $\frac{1}{2}$  of its capital stock. The prayer of the amended bill was, in substance, as follows: That the defendants be required to show what sum they had received for and on behalf of the Portland Mining Company, from all sources; in what manner they had expended the same; and that after such accounting they be adjudged and required to pay to the complainant his proportion of the moneys to which he was entitled as the owner of an interest in said property, and as the equitable owner of the capital stock of the company, to the extent heretofore stated; and that the complainant have such other and further relief as to equity and good conscience might seem proper.

The defendants Charles I. Thomson and Daniel Sayer, who are appellants here, joined in an answer to the amended bill of complaint, which answer, after admitting the organization of the Portland Mining Company, and several other allegations contained in the amended bill, stated, in substance, the following facts: That said defendants were partners engaged in the practice of law under the firm name of Thomson & Sayer, and prior to January, 1881, had rendered certain legal services for and on behalf of the original owners of the Portland lode, on account of which services they had become entitled to an undivided  $\frac{1}{6}$  interest in said lode; that upon the organization of the Portland Mining Company their right to the aforesaid interest in the lode was duly recognized by the mining company, whose directors passed a resolution (being a part of the same resolution which is referred to in the bill of complaint) by which it was provided that  $\frac{1}{6}$  of  $\frac{1}{2}$  of the company's stock should be issued to the defendants, and also  $\frac{1}{6}$  of the treasury stock which might remain unsold after the development of the mine; that it was also understood and agreed by the directors of the mining company that each person who was an owner of an interest in the mine at the time it was conveyed to the mining company should have the right to purchase an amount of the treasury stock which was reserved for development purposes, proportionate to his interest; that the defendants subsequently purchased the  $\frac{1}{4}$  interest of George E. Coryell in said lode, which is referred to in the bill of complaint, and that by virtue of such purchase they succeeded to all of his rights in and to the stock of the mining company. Defendants further averred that the resolution passed by the directors of the mining company, which is referred to by the complainant in the bill of complaint, and on which he mainly founds his right to relief, was superseded on the very day it was passed by another resolution of the board of directors of the mining company, which provided, in substance, that none of the stock of the mining company should be issued until warranted by the development of the lode, and until its product was sufficient to pay working expenses; that 5,000 shares of its stock should be set aside for development purposes, and offered at the minimum price of 50 cents per share to the persons interested in the company, in proportion to their respective interests; that, if such persons failed to purchase such stock, the same should be thereupon offered to outside parties at the same price; that, if the amount of stock reserved for development purposes should prove insufficient for that purpose, then other portions of the stock should be set aside and sold in the same manner; and that the residue of the stock after the development of

the property should be divided among the persons interested in the mining company in proportion to their respective interests. The defendants also averred that in point of fact no stock was ever issued to them as provided in either of the aforesaid resolutions; that no stock was issued under either of said resolutions to any persons interested in the mining company; that the stock of the company was in fact sold from time to time, to realize money for development purposes, at prices which were fixed by the directors; that every share of stock which the said defendants ever received was bought and paid for by them in money, at prices fixed by the directors; and that the entire amount of stock so purchased and received by them did not exceed, in the aggregate, 2,300 shares, and was less than the amount which they were entitled to receive and purchase under and by virtue of the plan of distribution proposed by the aforesaid resolutions. \*Said defendants also alleged that, at the time the Portland Mining Company was organized, it was the understanding among all the incorporators that the defendant John L. Pendery had a contract with the complainant, John K. Carleton, under and by virtue of which he was entitled to represent said Carleton both in the organization of said Portland Mining Company, and in the management of its business after it was organized; that said defendants had no information until the commencement of this suit that said Carleton asserted any claim to, or had any interest in, the stock of the mining company; and that the defendants were entirely ignorant of any arrangement or agreement between said Carleton and the mining company, under and by virtue of which he had conveyed his interest in the Portland lode to the mining company, in consideration for its undertaking to issue to him the  $\frac{11}{32}$  of  $\frac{5}{8}$  of  $\frac{1}{2}$  of its capital stock. With reference to the stock which said defendants had acquired from the Portland Mining Company, they alleged, in substance, that they had sold said stock to the defendant William S. Ward for the price of \$2.70 per share. They admitted, however, that, when such sale of their stock was made to said Ward, they understood that said Ward desired the mining company to execute a deed for the Portland lode, and that, with such knowledge, they, together with the other directors of the company, had assented to the execution of such deed.

The defendants John L. Pendery and L. M. Goddard, who are appellants here, also filed a joint answer to the amended bill of complaint. Their answer differed from that of their co-defendants Thomson and Sayer chiefly in the following respects: Pendery and Goddard admitted that at the first meeting of the Portland Mining Company held on March 29, 1881, a resolution was passed by the directors of the company to the effect that the then owners of the Portland lode should receive  $\frac{5}{8}$  of  $\frac{1}{2}$  of the capital stock of said company as a consideration for the conveyance of the property to the company,—each owner to receive such a share of said stock as would be in proportion to his interest in the Portland lode,—and that  $\frac{5}{8}$  of the remaining half of the capital stock should be reserved to realize a fund for the development of the property. They averred, however, that such resolution never became operative, but was superseded by a resolution passed on the same day, the terms of which are set forth, in substance, in the joint answer of their co-defendants Thomson and Sayer, heretofore quoted. They denied that the Portland Mining Company obtained a deed from the complainant for his interest in the Portland lode in consideration of its promise to issue to him  $\frac{11}{32}$  of  $\frac{5}{8}$  of its capital stock, or any other portion thereof whatsoever. They averred that the only correspondence had between the mining company and the complainant relative to the acquisition of his interest in the Portland lode was conducted on behalf of said company by its secretary, James Armstrong, and that said Armstrong had no authority whatever from the company or its directors to obtain a deed from the complainant for his interest in the Portland lode in consideration for the issuance to him of any part of the company's capital stock, and that, if said deed had been obtained in pursuance of any such agreement or promise made by said Armstrong, his action in that behalf was without the knowledge or consent of the board of directors of the mining company. They averred that, in selling and disposing of the stock of the mining company after its organization, the board of directors of the company had acted altogether under the provisions of the second resolution above stated; that they had sold stock from time to time, in pursuance of that resolution, to pay the indebtedness of the company, and to obtain money wherewith to develop the property; that the said defendants Pendery and Goddard, and their co-defendants Thomson and Sayer, had purchased all of the stock of the company that was ever issued

and sold under the aforesaid resolution, and that they had been compelled to purchase the stock from time to time because all other persons interested in the mine had refused to purchase it, in order to obtain money wherewith to discharge the indebtedness of the company that had been incurred for development purposes. They further averred that all the stock of the mining company which they had thus acquired they had subsequently sold to William S. Ward, at the rate of \$2.70 per share, and that all the money which they had at any time realized from sales of stock had been applied by them, in good faith, in developing the mining property, and in paying the indebtedness of the company, and for no other purpose whatsoever.

The Portland Mining Company filed a separate answer to the amended bill, but it is unnecessary to state the contents thereof, since the mining company has not perfected an appeal.

Prior to the filing of the aforesaid answers, the defendants Pendery, Goddard, Thomson, and Sayer joined in a general demurrer to the amended bill, which was overruled. Replications to the aforesaid answers to the amended bill having been filed, and additional testimony having been taken, both by the complainant and the defendants, the cause was submitted to the circuit court on February 8, 1897, for final decision upon the amended bill, the answers thereto, and the proof taken in support thereof. On March 1, 1897, the trial court rendered a decree against the defendants for the sum of \$8,593.31. A joint appeal from that decree was taken by the defendants Pendery, Goddard, and Thomson. The defendant Sayer was allowed a separate appeal, but both appeals are before us on the same record.

H. Riddell and J. C. Starkweather, for appellants Pendery, Goddard, and Thomson.

Thomas Mitchell (on behalf of Victor A. Elliott), for appellant Sayer.

Hugh Butler, for appellee.

Before SANBORN and THAYER, Circuit Judges, and PHILIPS, District Judge.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is urged in the first place, as a sufficient ground for the reversal of the decree of the circuit court, that the amended bill of complaint on which the case was tried differs so essentially from the original bill that it cannot be regarded as an amendment thereof, and ought to have been rejected by the trial court. We would doubtless be justified in overruling this contention for the sole reason that it was not urged in the trial court in any appropriate form, or in any form whatever, so far as we can discover. When, upon the first hearing of the case, the original bill was dismissed as to the then defendant William S. Ward, and the complainant by the same order was granted leave to amend his complaint as to the other defendants, no objection was made or exception taken to such action. Furthermore, when the amended bill was filed no exceptions thereto were taken, or motion made to strike it from the files, on the ground that the facts averred were essentially different from those alleged in the original bill, and that the amended complaint amounted to an abandonment of the original cause of action. It is true that four of the defendants joined in a demurrer to the second pleading on the general ground that the complainant was not entitled to the relief prayed for therein, but in due season they filed answers to the amended bill which were sub-

stantially the same as the answers which they had previously interposed to the original bill. Afterwards they took considerable testimony in support of the allegations of their respective answers, and eventually submitted the case for such final decree as the court might deem proper to enter, without a suggestion, so far as the record discloses, that an error to their prejudice had been committed in allowing the amended complaint to be filed. The defendants below were apparently willing to meet the charges contained in the amended bill, without reference to the manner in which they had been made. Under these circumstances, we are of opinion that they have waived whatever right they may at any time have had to object to the amended bill on the ground that it stated a cause of action different from the one alleged in the original complaint. We are not willing, however, to concede that the objection which is urged to the amended bill, based on the ground above stated, was ever tenable. The material facts entitling the complainant to relief as against the defendants other than William S. Ward are stated alike, and with the same degree of fullness, both in the original and in the amended bill. The facts so alleged in both bills are, in substance, that the mining company had received a conveyance of the complainant's interest in the lode on the strength of its promise to issue to him  $11/32$  of  $5/8$  of  $1/2$  of its capital stock, that the promise had not been fulfilled, and that the defendants, acting as directors of the company, and with full knowledge of complainant's rights, had caused the mining lode in question to be conveyed to the defendant Ward, with a view of depriving the complainant of his interest therein, and had thereby rendered the stock to which he was entitled, and which he ought to have received, valueless. On the first hearing under the original bill, the testimony showed to the satisfaction of the trial court that Ward was an innocent purchaser of the lode, for value; and by reason of that fact the trial court ruled that the specific relief prayed for in the original bill, namely, the cancellation of the deed to Ward, could not be granted. The complainant was accordingly required, as a condition precedent to obtaining any relief, to amend his complaint, to the end that such relief might be granted against the other defendants as the facts warranted. It may be admitted that the prayers for relief in the original and amended bills are essentially different, but we do not perceive any substantial change in the state of facts alleged in the respective bills, upon which the complainant predicated his right to relief as against the present appellants. It is not improbable, we think, that, under the prayer for general relief which was contained in the first complaint, the same decree could have been rendered by the trial court which was eventually rendered under the amended bill. We need not stop, however, on the present occasion, to consider this suggestion. It is apparent that the trial court deemed it necessary that the original bill should be amended, at least by changing the prayer for relief; and, whether that view was right or wrong, it is now unnecessary to determine. The original bill was amended to accord with the views of the lower court. The amendment consisted

in changing the prayer for specific relief which was contained in the original bill, and in omitting those allegations which tended to show that the defendant Ward was not an innocent purchaser, for value, of the Portland lode. Such changes, in our judgment, do not sustain the contention that the original cause of action, as against the appellants, was thereby abandoned, and that the amended bill stated a new and independent cause of action. We think that the second pleading may properly be regarded as possessing all the characteristics of an amended bill, and that, if any error was committed in requiring the complainant to change the form and structure of his original bill, the error so committed was prejudicial to the complainant, rather than to the defendants.

The views last expressed will serve to dispose of another proposition, which was argued at some length in behalf of the appellants, namely, that the complainant's right to relief is barred both by limitation and laches. This latter contention is founded altogether upon the theory that the amended bill stated a case other and different from the one which was stated in the original complaint, and that the amended pleading must for that reason be treated as an original bill filed on July 19, 1890. If this theory were tenable, it might well be that laches or limitation would be a good defense; but as we feel constrained to hold that both the original and amended bills allege substantially the same facts, and count upon the same transaction, there is no basis for the claim that the complainant has lost his rights by a failure to assert them at an earlier day. The original bill was filed in due season, to wit, on July 19, 1883; and as it stated the same cause of action, in substance, on which a recovery was eventually allowed, lapse of time cannot be successfully interposed as a defense. The litigation, since it was instituted, has progressed slowly, but we perceive no reason for holding that the complainant is solely accountable for the delay.

When the answers to the complaint were filed, it seems to have been the intention of a part of the defendants to contend that the Portland Mining Company never promised to issue  $11/32$  of  $5/6$  of  $1/2$  of its capital stock to the complainant in exchange for a conveyance of his interest in the Portland lode, and to further insist that the representations to that effect which were made by James Armstrong, the secretary of the company, in his correspondence with the complainant, were made without lawful authority, and that they were not binding upon the company. It is conceded in the briefs, however, that this position is untenable, and that the company, by accepting a conveyance from the complainant of his interest in the lode, and by retaining it, thereby became bound by the representations of Armstrong, its secretary, on the faith of which the conveyance was executed. In view of this admission, the only further questions of law or fact arising upon the record which require notice are: First, whether the damages which were awarded by the trial court are excessive; and, second, whether the defendant Sayer is jointly liable with the other defendants for such damages.

The testimony shows, without any substantial contradiction, that, when the complainant conveyed his interest in the Portland lode to the mining company, he was well aware that the company had reserved and intended to devote one-half of its capital stock, or such part thereof as might be found necessary, to realize funds for development purposes. That fact was stated, in effect, in the letter of Armstrong, the secretary of the company, on the faith of which the complainant claims to have executed a conveyance of his interest in the lode. The testimony further tends to show that all the stock of the company which was at any time issued or sold was so disposed of either to obtain funds to develop the mine, or to pay debts which had been contracted by the company for that purpose. No stock seems to have been sold or distributed for other purposes. In view of these facts, we can perceive no reasons which will entitle the plaintiff to complain of the sale of at least one-half of the capital stock of the company. It was sold, as he was informed it would be; and the proceeds thereof were applied, as he understood they would be applied, to the development of the property, and he must be held to have assented both to the sale of at least one-half of the capital stock, and to the use which was made of the proceeds. Moreover, we do not understand that the complainant at the present time either denies the right of the directors of the mining company to sell the lode to William S. Ward, or that he questions the propriety of their action in that behalf; provided the property was at the time unproductive, and the company was without means to further develop it or make it productive. That such conditions did exist at the time of the sale is a fact concerning which we can entertain no doubt, on the testimony contained in the record. The proof shows to our entire satisfaction that, after considerable development work had been done on the lode in controversy, it proved to be of little or no value as a mineral-bearing lode, that all persons who were in any wise interested in the property were benefited by the sale thereof to the defendant Ward, and that the directors acted wisely in negotiating the sale. It is to be observed, further, that by his amended bill the complainant prays that the defendants be required to show what sums of money they have received from all sources for and in behalf of the mining company, how they have disposed of the same, and that after such accounting the defendants be required to pay to the complainant that proportion of whatever balance is found to be in their hands, to which he is entitled as the equitable owner of  $\frac{11}{32}$  of  $\frac{5}{8}$  of  $\frac{1}{2}$ , or in other words, 1,430 shares of the capital stock. We are compelled to regard this prayer for relief as an election on the part of the complainant to accept in lieu of other damages such a part of the corporate assets as the ownership of 1,430 shares of the capital stock would entitle him to, after the corporate debts are paid. The prayer is, in substance, that the defendants, as directors, may be charged with all moneys received for and in behalf of the corporation, including moneys received from the sale of stock; that they be credited with all outlays for development work, or other legitimate corporate expenses;

and that the residue in their hands be divided among the stockholders, treating the complainant as a shareholder, to the extent of 1,430 shares. We think that the complainant is justly entitled to the special relief so prayed for in his amended bill; and in view of the fact that the defendants were probably ignorant of the complainant's right to 1,430 shares of the capital stock until after the sale of the mine, and the division of the proceeds among themselves, we are furthermore of opinion that he is not entitled to other or greater relief at this time.

The testimony contained in the record does not disclose that the mining company owed any debts at the time of the sale and conveyance of all of its property to the defendant Ward for the sum of \$30,000, other than a commission of \$3,000 for negotiating the sale. This latter sum was deducted from the purchase price of the mine at the time of the sale, leaving a net balance of \$27,000. The money necessary for development work and other necessary corporate expenses had been obtained by sales of stock from time to time, substantially in accordance with a resolution of the directors that was passed on March 29, 1881, under and by virtue of which the directors profess to have acted in selling stock for development purposes. The evidence does not show that the four defendants who are now appellants, to wit, Pendery, Goddard, Thomson, and Sayer, ever bought and paid for an amount of stock to supply money for development purposes in excess of 5,300 shares. If other stock was issued to them, it must have represented their original interest in the lode. Some stock (but precisely how much is not shown) was issued to persons other than the four directors last named, which stock was accepted, as it seems, in payment for labor, materials, and supplies that had been furnished to the company; and, in view of that fact, it is fair to infer that a large part, and probably all, of the capital stock of the company had been sold when the company conveyed its property to Ward, and ceased to be a going concern. The four directors above named, who were in office when the sale took place, admit that they divided among themselves the entire net proceeds of the sale, amounting to \$27,000, and that they did so upon the theory that they either owned, controlled, or represented the entire capital stock of the corporation, and were entitled to appropriate to their own use whatever remained of the corporate assets. They do not profess to have paid any debts of the company out of the proceeds of the sale, because all corporate debts had at that time been paid, or otherwise liquidated. It appears, therefore, that the corporation has ceased to do business; that it has disposed of all its property, and become practically dissolved; and that four of the directors who were in office when it ceased to do business have divided among themselves a sum of money belonging to the corporation which was adequate to return to each shareholder \$2.70 upon each share of stock by him held, if we assume that the entire stock had been issued when the dissolution took place. In view of these facts, we can entertain no doubt that the complainant is entitled to a portion of the fund which the directors divided among themselves on the assump-

tion that they were the only shareholders; and, as he was the equitable owner of 1,430 shares of the capital stock of the mining company, we think that he should be allowed \$2.70 for each of the shares of stock by him held, or, in the aggregate, \$3,861. Interest on this sum should also be allowed, at the rate of 6 per cent. per annum, from and after July 19, 1890, when the amended bill of complaint was filed. We think that no interest should be allowed prior to that date, because the defendants appear to have acted in ignorance of the complainant's right to the 1,430 shares of stock in question when they sold the mine and divided the proceeds; also, because the complainant expressed no willingness to accept his pro rata share of the sum realized from the sale of the mine prior to filing his amended bill, but before that time demanded other and different relief, accompanied with charges of fraud and conspiracy which have not been sustained. For these reasons, we consider it inequitable to allow interest prior to the date last above mentioned.

Respecting the claim of the appellant Daniel Sayer that he is exempt from liability because he simply sold his stock to Ward, and was not otherwise concerned in the action taken by the other defendants to transfer the property to Ward, we deem it sufficient to say that an examination of the testimony has led us to conclude that Ward bought the Portland lode, and paid \$30,000, rather than the stock of the Portland Mining Company. As a precautionary measure, he doubtless made it a condition of the purchase that the several stockholders should assign their stock in the company, either to him, or to such persons as he might designate, to give him complete control of the corporation; but the fact that he required a conveyance of the property from the mining company, and that his proposition to the mining company was to buy the lode, has served to convince us that he bought the mine, and not the stock, and that the true nature of the transaction was well understood by all the defendants, including Sayer, when it took place. Such being the case, it must be held that the several sums of money received by the several defendants, including Sayer, were the money of the corporation, and not their individual property, which they were bound to account for to the corporation, and see that it was properly distributed among the shareholders to whom it belonged. Inasmuch as the defendants appear to have acted in concert, and to have agreed with one another that a certain sum might be paid to each, to be by him retained, and not accounted for to the company, they all participated in a wrongful disposition of the funds of the company, and are jointly accountable for the money which they collectively received.

It results from these views that the decree of the circuit court—the same being for an excessive amount—must be reversed. The case is accordingly remanded to that court, with directions to vacate its former decree, and in lieu thereof to enter a decree against the defendants, and in favor of the complainant, for the sum of \$3,861, with interest to be computed thereon at the rate of 6 per cent. per annum from July 19, 1890, until the decree shall be fully

satisfied, together with all costs accrued or to accrue in the circuit court. The costs incurred in this court will be divided between the parties in the following proportions: Those incurred by the separate appeal of the defendant Daniel Sayer will be taxed against him. The balance of the costs will be taxed against the appellee.

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HUBBARD et al. v. MANHATTAN TRUST CO.

(Circuit Court of Appeals, Second Circuit. April 7, 1898.)

No. 73.

**1. EQUITY PLEADING—PARTIES.**

The joinder of a party who has no interest in the suit may be taken advantage of by general demurrer for want of equity; but the defect is curable by amendment.

**2. SAME—PLEDGE.**

The pledgee of a chose in action, having an equitable interest therein, is a proper party plaintiff in a bill in equity with reference to such chose in action.

**3. SAME.**

Where an assignment of a chose in action is not absolute, or its extent or validity are in dispute, or remaining rights or liabilities of the assignor may be affected by the decree in a bill in equity with reference to such chose in action, the assignor is a necessary party to such suit. His non-joinder, however, may be cured by amendment.

**4. SAME—CASE FOR RELIEF—DEMURRER.**

Where a subscription certificate for railway bonds on its face entitles the subscriber merely to bonds of some one of several railways, whenever such bonds may be issued, but the subscriber's bill of complaint alleges that a supplementary agreement was made by which he was to receive bonds of one specified company, and that all the bonds of that company have been otherwise disposed of, the bill states a case for relief, and is good on demurrer.

**5. SAME—RECENTLY DISCOVERED FRAUD—NECESSARY AVERMENTS.**

In a bill for relief from an alleged, but concealed and recently discovered, fraud, there must be distinct averments as to the time of discovery of the fraud, how the knowledge was obtained, why it was not obtained earlier, and as to diligence previously used in investigating the transaction. A mere allegation of concealment and ignorance is not sufficient.

**6. SAME—STALENESS OF CLAIM—DEFENSE HOW RAISED.**

A defense grounded upon the staleness of the claim asserted may be made by demurrer.

**7. SAME—DEMURRER—AMENDMENT TO BILL.**

Where a bill has been dismissed on demurrer for laches, because no sufficient explanation of the delay is pleaded, the appellate court may, in the absence of positive inequity, reverse the decree and direct the allowance of an amendment to the bill.

**8. STOCK CERTIFICATE—ASSIGNMENT.**

Although stock certificates provide that they shall not be negotiable without the consent of the company and transfer on its books, a complete equitable title passes by absolute and unconditional assignment.

**9. LACHES—WHAT CONSTITUTES.**

The defense of laches is not a mere matter of time, like limitation, but is a question of the inequity of enforcing the claim; and hence the statute of limitations does not necessarily bind the court in all cases. Each case depends upon its own circumstances, and no invariable rule as to time and vigilance can be laid down.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Chas. H. Hanson, for appellants.

John L. Cadwalader, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The complainants are Elbert H. Hubbard, as assignee of the Union Loan & Trust Company, an Iowa corporation, John Peirce, and R. J. Chase, each of said persons and their assignors being citizens of Iowa and residents of Sioux City, who are suing in their own behalf and in behalf of all others similarly situated with them who shall come into the suit. The only defendant served with process is the Manhattan Trust Company, a corporation of New York City. The circuit court for the Southern district of New York sustained the defendant's demurrer, with leave to the complainants to file an amended bill of complaint within 30 days from the date of entry of the order. No amended bill having been filed, and 30 days having elapsed, the bill was dismissed, with costs. It does not appear from the record in what respect the circuit court required amendments to be made. The grounds of demurrer were: First, for want of equity; second, that the causes of action are stale, and that so much time has elapsed that a court of equity ought not to take cognizance thereof or to give relief; third, that no case for relief is made by the bill.

The bill makes the following material averments:

Sundry persons, among whom were Francis O. French, the president of the defendant, and Amos T. French, his son, who was its treasurer, caused the Wyoming Pacific Improvement Company to be incorporated in March, 1888, with a nominal capital of \$1,500,000, which company was to be the means for the construction of a continuous railway of about 960 miles in length from Covington, Neb., opposite Sioux City, to Salt Lake City or Ogden, and called the "Pacific Short Line." It was to be built in three sections, by three railway companies, called the "Nebraska & Western Railway," the "Wyoming & Eastern Railway," and the "Salt Lake Valley & Eastern Railway," and the stock of these companies was to be issued to the improvement company. The only portion of this through line which was actually constructed was a part of the Nebraska road, from Covington to O'Neill, of about 129 miles, which was completed in 1890. In the latter part of 1888, the improvement company issued a circular for subscriptions in the following form:

"Pacific Short Line.

"The Salt Lake Valley & Eastern, the Wyoming & Eastern, and the Nebraska & Western Railway Companies, respectively, have contracted with the Wyoming Pacific Improvement Company for the construction of their several lines extending from Covington, Nebraska (opposite Sioux City, Iowa), to Salt Lake City, Utah, a distance of about 960 miles. It is proposed to consolidate these companies in one corporation, to be styled the 'Pacific Short Line.' The Wyoming Pacific Improvement Company will receive for the road, as constructed, stock and bonds as follows: \$20,000 of forty years' five per cent. bonds, and \$19,500 of stock for each mile of completed road. The companies above named will issue for each mile of road: \$25,000 of forty years' five per cent. bonds,

and \$20,000 of stock. The stocks and bonds issued to and received by the Wyoming Pacific Improvement Company will be exchanged at par for stock and bonds of the Pacific Short-Line Company, when same are issued.

"The Wyoming Pacific Improvement Company invites subscriptions on the following terms: Each subscriber of \$10,000 or any multiple thereof, and on payment of the amount to the Manhattan Trust Company, becomes entitled to receive:

\$5,000 bonds, at 90.....	\$ 4,500
Trust receipts for fifty-five shares Wyoming Pacific Improvement Company, at par.....	5,500
	<hr/>
	\$10,000

"In accordance with terms of certificate, copy of which follows:

"No. ———. Certificate of Subscription. \$——.

"Pacific Short Line.

"This is to certify that ———, having subscribed ——— dollars, will be entitled, on payment thereof to the Manhattan Trust Company, to receive trust certificate for Wyoming Pacific Improvement Company stock for ——— shares (being 55 per cent. of said subscription), and also railway bonds for \$—— (being 50 per cent. of said subscription), which shall be delivered within two years from date, or as soon thereafter as the same are issued; subject to option to purchase said bonds at 95 and accrued interest within two years. This certificate is negotiable only by transfer on the books of the company, and with the assent of this company first obtained thereto.

"Wyoming Pacific Improvement Company,

"By ———, Secretary.

"New York, ———, 18—.

"Countersigned and registered by

Manhattan Trust Company,

"By ———, President."

The installments were to be paid to the defendant. Annexed to each certificate were blank receipts, to be filled out upon the payment of installments. The residents of Sioux City signed subscriptions of this form to the amount of about \$337,500, of which amount A. S. Garretson and John Peirce each subscribed \$50,000, John Hornick and James E. Booge each subscribed \$25,000, Chase & Taylor subscribed \$10,000, and Kearney & Howard subscribed \$500. On April 18, 1889, before installments were paid on these subscriptions, the terms were modified so that the money from Sioux City should be deposited in a Sioux City bank, and one-half of the expenditures on the Nebraska road should be paid from that money, and one-half should be paid from the funds in the Manhattan Trust Company from Eastern subscriptions. Thereafter the subscribers hereinbefore mentioned paid their subscriptions in full, except Chase & Taylor, who settled with the improvement company by paying a part of their amount. After these payments, Garretson, Hornick, Booge, and Peirce had in their possession their subscription certificates, all dated April 27, 1889, and installment receipts in full, with the dates of payment of each installment, in the following form, mutatis mutandis:

"This is to certify that A. S. Garretson, of Sioux City, Iowa, having subscribed fifty thousand dollars, will be entitled, on payment thereof to the First National Bank of Sioux City, Iowa, to receive trust certificates for Wyoming Pacific Improvement Company stock for two hundred and seventy-five shares (being 55 per cent. of said subscription), and also railway bonds for \$25,000 (being 50 per cent. of such subscription), to be delivered within two years from date, or as soon thereafter as the same are issued. Subject to option to purchase said bonds

at 95 and accrued interest within two years. This certificate is negotiable only by transfer on the books of the company, and with the assent of this company first obtained thereto.

Wyoming Pacific Improvement Company,  
"By E. E. Gedney, Pt.

"New York, April 27, 1889.

"Countersigned and registered by

"First National Bank of Sioux City, Iowa,  
"By Thos. J. Stone, President."

"The installments on account of the subscription represented by this certificate have been paid as follows:

Per Cent.	Date.	Amount Paid.	
25	May 7, 1889	\$12,500	First National Bank of Sioux City, by E. H. Stone, Cash.
15	June 24, 1889	7,500	First National Bank of Sioux City, by E. H. Stone, Cash.
10	Aug. 10, 1889	5,000	First National Bank of Sioux City, by E. H. Stone, Cash.
10	Oct. 23, 1889	5,000	First National Bank of Sioux City, by E. H. Stone, Cash.
10	Oct. 23, 1889	5,000	First National Bank of Sioux City, by E. H. Stone, Cash.
10	Dec. 13, 1889	5,000	First National Bank of Sioux City, by E. H. Stone, Cash.
10	Dec. 13, 1889	5,000	First National Bank of Sioux City, by E. H. Stone, Cash.
10	Dec. 13, 1889	5,000	First National Bank of Sioux City, by E. H. Stone, Cash.

"At the option of the subscriber, payment may be made in full. In case of default, at option of the Wyoming Pacific Improvement Company, all further rights of the subscriber shall cease to the extent of such default; and, for all cash actually paid, there shall be required to the subscriber, in lieu of any other interest, the amount paid in bonds at par. Interest adjusted at 6 per cent. from 1st October, 1888."

Hornick's last installment was paid in February, 1890; Booge's last installment was paid in January, 1890; and Peirce's last installment was paid in November, 1890. It will be observed that the certificates which have been thus described, and which were given, entitle the owners to receive "railway bonds," without specifying the class of bonds, and are in accordance with the original circular.

The bill averred that:

"When your orators or their assignors contributed to the construction fund as aforesaid, it was understood and agreed by and between them and the improvement company and the Manhattan Trust Company, to the knowledge of Francis O. French and Amos T. French, that the bonds of the Nebraska and Western Railway Company, when issued, on account of said section of railway from Covington to O'Neill, and the stock of the improvement company, when issued, should, to the amounts specified in the subscription receipts and trust certificates, hereinbefore mentioned, be set apart and reserved in trust for delivery to your orators or their assignors at the times specified in said receipts and certificates respectively; and said Manhattan Trust Company received and held all the stock of the said improvement company and all the bonds of the Nebraska Railway Company with full knowledge of the trust, interest, and first and prior lien thereon in favor of the holders of said certificates for said stock and bonds, including complainants; and with the understanding and agreement on the part of said Manhattan Trust Company, improvement company, Nebraska

Railway Company, and contributors to said construction fund, that said Manhattan Trust Company would receive and hold said bonds and stock in trust to be by it finally delivered to the holders of said certificates or receipts, including those now held by these complainants, under and in discharge and satisfaction of said receipts and certificates and the requirements thereof, and the oral and written agreements relative thereto herein alleged."

To John Peirce was issued, by the improvement company, a certificate that he was entitled to receive on May 1, 1891, or as soon thereafter as the same may be issued, \$18,500 first mortgage 5 per cent. gold bonds, of \$1,000 each, of the Nebraska & Western Railway Company, due 1929, according to the terms of subscription to said improvement company, with provisions similar to those in the Garretson certificate in regard to purchase and negotiability. He received a similar certificate for \$3,000 first mortgage bonds of the Nebraska & Western Railway. These two certificates were countersigned and registered by the defendant on June 28, 1890. Chase & Taylor received from the improvement company a similar certificate for \$2,500, of the same bonds, countersigned and registered on September 26, 1890. Peirce also received from the defendant its certificate, registered with the improvement company, June 9, 1890, that he is entitled to receive on October 1, 1893, 203½ shares of the improvement company stock, which are deposited with and stand in the name of the defendant trustee under an agreement of October 12, 1888. He received from the defendant its similar certificate that he was entitled to receive 33 shares of the improvement company stock. Kearney & Howard received a similar certificate registered with the improvement company that they were entitled to 2¾ shares of its stock, which certificate was assigned to Peirce, October 9, 1890, and assented to by the improvement company. Peirce also received from the improvement company a certificate that he was entitled to \$40,000 in a total proportion of \$675,000, or in that proportion of any less amount earned by the syndicate of the full-paid stock of said company, to be deposited with the defendant, and deliverable after October 1, 1893. The subscriptions under which these Peirce certificates for stock only of the improvement company were issued are not set forth in the bill; but it is alleged that there was an agreement of October 12, 1888, by which all the stock of the company was, when issued, delivered to the defendant in trust for the subscribers, with a voting power upon said stock, until October 1, 1893, reserved to certain of the promoters.

The bill alleges that on August 19, 1896, Chase & Taylor assigned to R. S. Chase all their rights and interests in said certificates; and that on February 15, 1890, "said Garretson, Hornick, and Booge assigned their said certificates to a partnership composed of A. S. Garretson, James E. Booge, John Hornick, D. T. Hedges, and Ed. Haakinson, who in turn at once pledged the same with the Union Loan & Trust Company, assignor of said E. H. Hubbard, as collateral security for an indebtedness greatly in excess of their actual or face value, which indebtedness is due and unpaid, and, as assignee for the benefit of creditors of said Union Loan & Trust Company, said Hubbard has become invested with all the rights of the said trust company in the premises." The bill alleges that in

the year 1890 an agreement was effected between the improvement company and the trust company, through the procurement or aid of F. O. French and Amos T. French, by which certain of the bonds, viz. \$2,100,010, issued or agreed to be issued to the improvement company by the Nebraska & Western Railway Company, were hypothecated with the Manhattan Trust Company, to secure loans to the improvement company to the amount of \$1,050,000; that subsequently, in the same year, all the stock of the said railway company, and all the bonds issued by said company, to wit, \$2,583,000, were, by procurement or with the connivance and aid of the Messrs. French, hypothecated with the trust company to secure a further loan to the improvement company of \$600,000; and that, pursuant to the terms of the said agreement, a commission of 5 per cent. was paid to underwriters thereof, who had agreed, if it were necessary, to purchase said bonds at least at 50 cents on the dollar, and a further commission of  $2\frac{1}{2}$  per cent. to F. O. French and others for securing the underwriting of the said loan. The bill then alleges that, when said hypothecations were made, F. O. and A. T. French and the Manhattan Trust Company knew that complainants had subscribed to said construction fund, and that subscriptions had been made thereto in Sioux City to the amount of \$337,500; and that subscription agreements in the form and in the manner hereinbefore set forth had been made with the orators and their assignors, who had paid the greater part of their said subscriptions, and that, upon payment in full, such subscribers were entitled to receive trust certificates for stock and subscription receipts for bonds, entitling them to stock of the improvement company, and to said first mortgage bonds of the Nebraska & Western Railway Company, in proportion to the amounts of their subscriptions, as specified in their subscription agreements respectively; that the said bonds so hypothecated embraced the entire issue of Nebraska & Western bonds, and all of the bonds which, by the terms of the said mortgage, the said railroad company was authorized to issue; that the said Manhattan Trust Company, with full knowledge of such alleged facts, and that said hypothecations rendered impossible the delivery of said bonds and stock in compliance with said certificates, nevertheless accepted and effectuated said hypothecations; that all said bonds and stock so hypothecated were, during the year 1890, sold pursuant to the terms of said hypothecations, and passed into the possession and ownership of many persons unknown to the complainants; that the facts of such hypothecations were never disclosed to the complainants, but were fraudulently concealed from them by the trust company and F. O. and A. T. French, and were not learned by them until long after they had been hypothecated and sold, as aforesaid; that the bonds and stock comprised all the valuable assets, and that the improvement company became, in the latter part of 1890, hopelessly insolvent, and passed into the hands of receivers, and that neither the stocks nor bonds mentioned or designated in the trust certificates and subscription receipts had been delivered to the complainants or either of them; and the orators or their assignors did not know

nor learn of the frauds and wrongs hereinbefore alleged until after the sale of the stock and bonds so hypothecated as aforesaid.

The complainants thereupon pray that it be decreed (1) that the first mortgage bonds of the Nebraska & Western Railway Company issued on account of the construction of the section of railway from Covington to O'Neill were subject to a lien in behalf of the complainants and the other subscribers to the said construction fund who were contributors thereto, and that such contributors became owners as equitable assignees of said bonds and stock, as the same were issued, to the extent and in the proportion specified in their subscription receipts respectively; (2) that the said agreements be rescinded and canceled, and the defendant account to the complainants for the moneys paid in by them on account of their subscriptions; or if it shall appear that a rescission and cancellation of said agreements cannot be had, or ought not to be decreed, then that the defendant account to the complainants and other contributors for and concerning said bonds and stock so hypothecated and sold as aforesaid, to which the complainants and such other contributors are entitled.

The defendant's first point is that no cause of action is shown in favor of the complainant Hubbard, and that the bill is therefore demurrable generally. It is true that the addition of a party who has no interest in the suit, and who is not a necessary or proper party on the record, can be taken advantage of by a general demurrer, for want of equity. *Hodge v. Railroad*, 1 Dill. 104, Fed. Cas. No. 6,561. Such an addition of parties is, however, curable by amendment. *House v. Mullen*, 22 Wall. 42; *Heath v. Railway Co.*, 8 Blatchf. 347, Fed. Cas. No. 6,306. Hubbard was a proper party plaintiff, inasmuch as he had become the pledgee of the certificates, and had an equitable interest in them. He did not have the absolute title to these choses in action, and had only a special property in them, for the title of the pledgors had apparently not been divested, and there is no averment of their insolvency or inability to pay the debt for which the certificates were a security. They were therefore also proper and necessary parties to the bill; for where the assignment of a chose in action "is not absolute and unconditional, or the extent or validity of the assignment is disputed or denied, or there are remaining rights or liabilities of the assignor which may be affected by the decree, he is not only a proper, but a necessary, party." Story, Eq. Pl. § 153; *Montague v. Lobdell*, 11 Cush. 111. This demurrable defect for want of parties was not apparently cared for by the pleader; for, if it had been, he would have demurred specially, and would have pointed out the proper parties, for the purposes of an amendment. 1 Daniell, Ch. Pl. & Prac. 287. The bill is, however, apparently defective in this regard, upon its face; and the defect ought to be cured by an amendment, which can be directed at the instance of the court, even on appeal. *Lewis v. Darling*, 16 How. 1.

The title of Hubbard is said to be incurably defective, because the consent of the improvement company was not obtained to the assignment to the Garretson partnership. The certificates declared that

they were negotiable only by transfer upon the books of the company, and with the assent of the company first obtained thereto. It has been held that when the rules of a corporation provided that a transfer of the shares of its stock should not be valid in law or in equity unless approved by the company, such a provision was a condition precedent to a valid title (*Walburn v. Ingilby*, 1 Mylne & K. 61); but the provision in the certificate did not prevent the vesting of a complete equitable title in the assignee by an absolute and unconditional assignment, and such a title is sufficient for the requirements of the courts of equity in this country (*Story, Eq. Pl., supra*; *Trecothick v. Austin*, 4 Mason, 16, Fed. Cas. No. 14,164).

The question whether the bill makes out a case for relief is one of importance. The circular and the certificates which were to be given to Garretson and others stated that the subscribers were to receive railway bonds, but did not say of which road, whether of one of the three sections, or of the consolidated "Pacific Short Line." The complainants would have apparently had no adequate cause of complaint, unless they could show that some new or modified agreement existed which entitled them to the bonds as they were actually issued upon a completed piece of road; and which made the defendant, as a party to the new agreement, a bailee of these bonds for their benefit. The allegations of the bill, in regard to this new agreement, are vague as to the time when it was made; silent as to a new consideration, and were evidently intended to state an agreement in very general terms; but they aver that there was an understanding and agreement by the defendant that the bonds of the Nebraska Railway, when issued, on account of the Covington-O'Neill section, should be set apart and reserved for delivery to the certificate holders at the time specified in the certificates, and that the defendant received and held all the bonds with knowledge that they were the bonds thus set apart, and with the agreement that it would receive and would hold them in trust for the certificate holders. It thus appears that, whereas the original agreement simply provided for the delivery of bonds within two years from its date, meanwhile, the improvement company having the right to use them as it pleased, the new agreement provided that the Nebraska bonds were, as soon as issued, to be set apart for the certificate holders, and that, when they were received by the defendant, they were received with the knowledge and upon the agreement that they were to be held upon this trust. Whether the bonds were hypothecated simultaneously with their delivery to the defendant, or after they had been received upon this agreement, does not appear; but it does appear that, whenever received, such reception was with full knowledge of the obligation to hold them for the certificate holders. The effect of this modification apparently was that, when the certificates of Garretson and his associates said that they were entitled to "Railway bonds," the modification said that the bonds were to be those of the Nebraska Railway. Moreover, it appears that Peirce and Chase actually received from the improvement company certificates for Nebraska Railway bonds, which were countersigned and registered by the defendant in June and September, 1890, so that the modified

agreement did not apparently rest in an unexecuted promise. These averments say, not however, with a commendable definiteness, that the defendant had, at the time when the bonds upon the completed section of the Nebraska road were hypothecated, agreed to hold them as a custodian for the certificate holders, and that it received the bonds with full knowledge of its own relation to them, but that it disregarded its duties as a trustee. It cannot be said upon demurrer that the averments of the bill do not state a cause of action which entitled the complainants to relief.

The next cause of demurrer is that the causes of action are stale, and that so long a time elapsed before the happening of the matters alleged that it would be contrary to equity to take cognizance thereof. It is averred that the improvement company became in the latter part of 1890 hopelessly insolvent, and went into the hands of receivers, and the defendant sold all the hypothecated bonds and stock during the year 1890. The complainants were entitled to receive the bonds in May, 1891. The bill was verified August 24, 1896. It is averred in the most general terms that the hypothecation was fraudulently concealed from the complainants, and that they did not learn of the wrongs alleged until after the sale, and in another part of the bill, until long after the sale of the bonds and stock. The bill does not seek to set aside the foreclosure, but to have the defendant account for their proportion of the avails of the bonds and stock. The defense of staleness is not the defense that a lapse of time has taken place since the cause of action accrued, which has created a bar analogous or akin to the bar created by the statute of limitations. "Laches is not, like limitation, a mere matter of time, but principally a question of the inequity of permitting a claim to be enforced" (*Galliher v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. 873); and, when this inequity exists, a court of equity will refuse relief, although the time which has elapsed since the alleged injury is less than that which is made a bar by the statute of limitations (*Alsop v. Riker*, 155 U. S. 448, 15 Sup. Ct. 162). This inequity often arises from the changed value of the property during the time which has elapsed since the date of the transactions which are the subject of the suit, or from the changed relation of the parties to the property, as when a sale has taken place, and new rights have arisen. This class of cases frequently appears in the later volumes of reports of the supreme court, some of which are cited in *Galliher v. Cadwell*, *supra*. This case is not one of the class where the value of the property has risen greatly while the complainant slumbered, or where new rights have arisen. Examples of the latter state of facts are found in *Harwood v. Railroad Co.*, 17 Wall. 78, which was brought to upset a decree of foreclosure of a railroad, five years after it was entered, "under which new rights and interests must necessarily have arisen"; and in *Foster v. Railroad Co.*, 146 U. S. 88, 13 Sup. Ct. 28, which was also to set aside a foreclosure of a railroad under a mortgage, 10 years after the date of the decree. In a bill to obtain relief from an alleged, but concealed and recently discovered, fraud, it was always held that there must be distinct averments as to the time of

the discovery of the fraud, how the knowledge was obtained, why it was not obtained earlier, and as to the diligence previously used in the investigation of the fraudulent transaction, so that a court could discover from the bill itself whether the complainant had not lost his rights by his negligence. *Stearns v. Page*, 7 How. 819. It therefore naturally resulted that "a defense grounded upon the staleness of the claim asserted may be made by demurrer." *Lansdale v. Smith*, 106 U. S. 391, 1 Sup. Ct. 350.

The defendant, in discussing the recognized extent of the power of a court of equity to dismiss a bill for insufficiently excused laches, cites particularly *Hardt v. Heidweyer*, 152 U. S. 547, 14 Sup. Ct. 671, where, upon a demurrer to a bill in equity, brought for the purpose of compelling fraudulently preferred creditors of a partnership to account to the general creditors for all the property which came into their hands by virtue of the alleged inequitable transactions with the partnership, the bill, which was brought five years after the transfers were made, was dismissed absolutely, upon the ground that it "must be held deficient in not showing how knowledge of the wrongs complained of was obtained by the plaintiffs," and why they did not previously ascertain the same facts. The case was that of an inactive creditor, who sought to make a preferred creditor account for the property which he received, and to account for it at its true market value, and not at the amount which was realized from it; and the excuse for inaction was simply a reliance upon the representations of the preferred creditor that the transactions were not fraudulent. If this was the only excuse that the complainants had, the court deemed it unnecessary to spend more time in the litigation.

It has frequently been pointed out that each case of laches depends upon its own circumstances, and that no inflexible rule can be established in regard to the length of time which shall be held to constitute undue delay, or in regard to the vigilance which shall be required. In the case at bar the defendant is alleged to have entered into the relation of a trustee for the complainants, and to have disposed of the property for its own benefit. The bill showed an unseemly delay, and a sufficient excuse for the complainants' inaction was necessary. The pleader recognized this necessity, but averred in the most general terms that they were ignorant, and that the defendant concealed the hypothecation,—general averments, which have always been held to be insufficient. *Stearns v. Page*, 1 Story, 204, Fed. Cas. No. 13,339; *Wood v. Carpenter*, 101 U. S. 135; *Felin v. Patrick*, 145 U. S. 317, 12 Sup. Ct. 862; *Hardt v. Heidweyer*, *supra*. The bill is plainly demurrable, but the question is, shall it be dismissed, or shall the complainants be permitted to attempt to remedy it? If the bill was of the inequitable class already mentioned, as, for example, if it was an attempt to upset established titles to property, it should be dismissed; but, as the bill presents itself upon its face, we prefer to follow the example of Judge Story, in *Stearns v. Page*, *supra*, who held that the court "had a right to require, before the bill is entertained, that a clear case should be made out, upon the very face of the bill, calling for its interposition, and showing

that the parties in interest have been guilty of no negligence or undue delay in not applying for relief at an earlier period," but granted leave for an amendment.

We have said nothing in regard to the stock of Peirce, which was not to be delivered until 1893, because the bonds were in 1890 the only thing of value which is the subject of the suit. Where a circuit court dismissed a bill generally upon demurrer, and the supreme court, upon appeal, was of opinion that the bill was demurrable, but amendable, it reversed the decree, and remanded the case, with directions to allow the complainants to amend their bill. *House v. Mullen*, 22 Wall. 42. Let the decree be reversed, without costs of this court, and the case be remanded to the circuit court, with directions to allow the complainants to amend their bill in conformity with this opinion, or, if they fail to do this in a reasonable time, to dismiss it, with costs.

SANDERS v. PECK et al.

(Circuit Court of Appeals, Seventh Circuit, May 2, 1898.)

No. 394.

**1. PRINCIPAL AND AGENT—UNAUTHORIZED SALE BY AGENT—RATIFICATION.**

Where the owner of property which has been sold without authority by one assuming to act as his agent enters into negotiations with such assumed agent, without reservation, for a settlement, on the basis that the latter is accountable for the price received for such property, he thereby ratifies the sale, and cannot afterwards withdraw such ratification, and claim the property from the purchasers.

**2. JUDGMENT—CONCLUSIVENESS—PERSONS BOUND.**

One for whose benefit certain petitioners in a suit in equity prosecuted their claims, being represented therein by his authorized attorney, is bound by the decree therein, unless set aside by direct proceedings therefor.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

W. A. Foster, for appellant.

James L. High, Henry W. Booth, and D. T. Corbin, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. The bill in this case was brought by Joshua C. Sanders, the appellant, against Ferdinand W. Peck, William R. Page, Harvey W. Booth, and David T. Corbin, to set aside a sale of 22 bonds, of \$1,000 each, executed by the Riverside Improvement Company. The sale was made on September 10, 1890, by Corbin, as agent of the owners, to Peck, who was represented in the transaction by Page and Booth, and the bill charges a conspiracy of the defendants to cheat and defraud Sanders out of his interest in the bonds, and in certain decrees in which the bonds, excepting two, had been merged. The appellees answered, denying all fraud, averring a purchase in good faith through Corbin, who, as agent and attorney of the owners of the bonds, it is alleged, had full authority to make the sale, and setting up certain

orders and decrees of the circuit court of Cook county, Ill., in the case of Peck against Chicago & Great Western Railroad Land Company and others, as an adjudication of Peck's title as against the title asserted by Sanders.

It is not found necessary to rehearse the numerous facts incident to this litigation. A few propositions are controlling. That Corbin had no authority to sell the two bonds which had belonged to Hendrickson is clear, and the preponderance of the evidence seems to us to be that the sale made of the other bonds was unauthorized, and that, having been notified of the appellant's ownership and of his denial of Corbin's authority before the purchase money was paid, Peck and his agents proceeded at their peril in an effort to consummate the sale by paying the price to Corbin and by taking assignments of the decrees, which, though obtained in the names of Ver Nooy and Temple, belonged to the appellant. But, though unauthorized, we are of opinion that Sanders ratified the sale by his subsequent conduct, when, with full knowledge of the circumstances, he entered into negotiations with Corbin for a settlement of the account between them on the basis that the sale was valid, and that Corbin was accountable to him for the price received for the bonds or decrees. In that negotiation, which was entered upon without any reservation of a right to repudiate the sale if a settlement should not be effected, a sum was agreed upon as proper compensation to Corbin for making the sale, and the difference between them which prevented an adjustment was in respect to a matter in no way connected with the sale of the bonds. This unreserved assertion of ownership of the proceeds amounted to recognition of the validity of the sale. A ratification once fairly made, it was not revocable. If it be said that this ratification did not extend to the Hendrickson bonds, of which Sanders was not then the owner, he is nevertheless in no better position, in respect of those bonds, because of his failure for more than a year after acquiring Hendrickson's title to question the sale.

In respect to the Ver Nooy and Temple bonds, we are of opinion that the decrees and orders of court in the Peck foreclosure suit constitute an estoppel against Sanders to deny Peck's title. The petitions brought in that case in the names of Ver Nooy and Temple, respectively, were brought at the instance of Sanders, and were prosecuted by his attorney, Corbin, for his benefit. Decrees were rendered whereby, through the petitioners, his right to share in the proceeds of the sale was established. After the rendition of the decrees there was a reference to a master, who, acting within the scope of his authority, reported that the decrees in favor of Ver Nooy and Temple had been assigned to Peck, and in pursuance of that report a final decree was entered giving to Peck what otherwise would have been awarded to Ver Nooy and Temple for the appellant. In contemplation of law, the appellant was a party to the proceedings and decree, represented by his attorney, Corbin, of whose unrevoked authority in the premises there is and can be no question, and, if the decree so rendered is not to be regarded as having been consented to by the appellant, it is at

least binding upon him until set aside, as of course it might be on proof of fraud. See *Freem. Judgm.* §§ 174, 175; *Cheney v. Patton*, 134 Ill. 422, 25 N. E. 792; *Id.*, 144 Ill. 373, 34 N. E. 416; *Prentiss v. Holbrook*, 2 Mich. 372; *Louis v. Brown Tp.*, 109 U. S. 162, 3 Sup. Ct. 92.

If anything is due the appellant from Corbin, it should be recovered in an action or suit against him alone, not upon this bill for conspiracy against the appellees jointly. The decree below is affirmed.

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NEW YORK LIFE INS. CO. v. McMASTER.

(Circuit Court of Appeals, Eighth Circuit. March 21, 1898.)

No. 976.

1. SPECIFIC PERFORMANCE—FRAUD—MISTAKE.

A contract may be reformed in equity where a parol agreement was made which failed of embodiment in the subsequent written contract through the fraud of one, or the mistake of both, of the parties to it; but such agreement, and the fraud or the mistake, must be clearly proven before any such relief can be granted.

2. INSURANCE—PRELIMINARY NEGOTIATIONS—CONSIDERATION.

Where an insurance company, in preliminary negotiations, agreed with an applicant, when he signed the application, to insure him for a longer time than was subsequently fixed by the policy, the oral agreement is not binding, since nothing was paid in consideration thereof, and the applicant was at liberty to reject the policy before payment of the premium. Customary negotiations for insurance do not constitute a contract, where there is no intention to contract otherwise than by policies made and delivered upon payment of the premiums.

3. SAME—REFORMATION OF CONTRACT—ESTOPPEL.

Where it is sought, on the plea of fraud, to reform a policy so as to give it the legal effect claimed under an oral agreement made in preliminary negotiations, the insurance company is not estopped from denying that the actual contract was the oral agreement, unless there was on its part a willful intent to deceive, or such gross negligence as is tantamount thereto, involving some moral turpitude or breach of duty.

4. SAME—ACCEPTANCE OF POLICIES—KNOWLEDGE OF CONTENTS.

An applicant for insurance, who accepts policies, the provisions of which are plain, clear, and free from all ambiguity, is chargeable with knowledge of the terms and legal effect of these contracts. It is his duty to read and know the contents of the policies before accepting them, and, where he fails to do so, he is estopped from denying knowledge thereof, unless he proves that he was dissuaded from reading the policies by some trick or fraud of the other party.

5. REFORMATION OF CONTRACTS—MISTAKE.

The mistake which will warrant the reformation of a contract must be made in common by the parties to it. A court of equity may not reform a written agreement, on the ground of mistake, so as to impose on one of the parties obligations which he did not intend to assume.

6. WRITTEN CONTRACTS—PAROL NEGOTIATIONS.

No representation, promise, or agreement made, or opinion expressed, in the previous parol negotiations, as to the terms or legal effect of the resulting written agreement, can be permitted to prevail, either at law or in equity, over the plain provisions and just interpretation of the contract, in the absence of some artifice which concealed its terms, and prevented the complainant from reading it.

## 7. LIFE INSURANCE—REFORMATION OF POLICY.

An application for life insurance was signed December 12, 1893, when the agent told the applicant that one premium would carry his policy 13 months. The agent wrote on the application, "Please date policy same as application." The policy was dated December 18th, and required payment of premiums December 12th, annually, with a provision for 1 month of grace. The first premium was paid and policy delivered December 26th. December 12, 1894, a collector called for the second premium, and was told that insured did not intend to keep up the insurance, but that, if he decided to do so, he would pay the premium within the month of grace. He did not pay, and never objected to, or complained of, the policy or its terms. He died January 18, 1895; and a bill was filed to so reform the policy as to advance the term of insurance 6 days, making it run 13 months from December 18, 1893, and so cover the death on January 18, 1895. *Held*, that the relief must be denied, in the absence of proof that through the fraud of one, or the mistake of both, of the parties, the policy failed to embody the preliminary parol agreement, or that the agreement was on a valuable consideration.

### Appeal from the Circuit Court of the United States for the Northern District of Iowa.

This is an appeal from a decree which so reformed five policies of life insurance as to advance the term of insurance described in them six days, and which in this way made them cover a death which occurred on the sixth day after the policies had expired by their terms. Each of the policies was dated on December 18, 1893. By each, the New York Life Insurance Company, the appellant, insured the life of Frank E. McMaster in the sum of \$1,000, for the benefit of his executors, administrators, and assigns, in consideration of his written application, "and in further consideration of the sum of twenty-one dollars and — cents, to be paid in advance, and of the payment of a like sum on the twelfth day of December in every year thereafter during the continuance of this policy." Each policy contained these stipulations: "If any premium is not thus paid on or before the day when due, then (except as herein otherwise provided) this policy shall become void, and all payments previously made shall remain the property of the company. After this policy shall have been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of five per cent. per annum for the number of days during which the premium remains due and unpaid. During the said month of grace the unpaid premium, with the interest as above, remains an indebtedness due the company; and, in the event of death during said month, this indebtedness will be deducted from the amount of insurance." Each policy was issued upon a written application, which was dated on December 12, 1893. The policies were delivered to McMaster, and the first premiums were paid, on December 26, 1893. He never paid the premiums due on December 12, 1894, and he died on January 18, 1895, on the sixth day after the policies had expired. Fred A. McMaster, the administrator of the estate of the deceased, and the appellee in this case, exhibited his bill in the court below to so reform these policies that their terms of insurance should commence on December 18, 1893, and should expire at midnight on January 18, 1895, after the death of the insured. In his bill he set forth two grounds for the relief which he sought: (1) That, after the insured had signed his applications for these policies, the agent of the insurance company wrote into them, without his knowledge, the words, "Please date policy same as application," and the company made the annual premiums due on December 12th in each year, when they would have been due on December 18th if those words had not been inserted in the applications; and (2) that the contract for the insurance was that the insured should have policies of the kind which he received, which should remain in force 13 months from the time when the first annual premiums were paid, without further payments, and that the policies actually delivered remained in force only 12 months and 17 days after their delivery. The answer denied the averments of the bill, and these facts were established by the evidence: In order to induce the insured to make his applications for the policies, the solic-

for of the company told him that its policies gave him 13 months of insurance for the first annual premium, and in answer to this direct question, "Did you, or did you not, agree for the company that they would furnish him a policy that would be good for thirteen months, and that, in order to secure the thirteen months of insurance, all that he had to do was to pay one premium?" he answered, "Yes, sir; I stated to Mr. McMaster that the one premium he paid carried his policy for full thirteen months." McMaster signed the applications for the policies at the time of this conversation, on December 12, 1893, but he did not pay any premiums until December 26, 1893; and there is no evidence that, at any time before the policies were delivered, on December 26, 1893, he ever agreed to take the insurance, or to pay any of the premiums. After the applications were signed, the agent who procured them wrote into them the words, "Please date policy same as application," for the purpose of securing a bonus or extra commission which the company allowed its agents on December business. In November, 1894, written notices were sent to the insured by the company that his second premium on each policy would be due on December 12, 1894. On December 11 or 12, 1894, a collector called on him for his second annual premiums, and asked him to pay them. He replied that he did not intend to keep the insurance in force, and did not care to pay the premiums. The collector told him that he had 30 days of grace in which to make the payments, and told him when the days of grace would expire. He answered that, if he decided to keep any of the insurance, he would come to the office and pay the premiums before that date. He did not come, and he never objected to, or complained of, the policies or their terms. Upon this record the decree which is challenged by this appeal was rendered.

W. E. Odell, for appellant.

F. E. Gill, for appellee.

Before SANBORN and THAYER, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

In form, this is a suit in equity to reform written contracts. In fact, it is a bald attempt to supersede written agreements with the parol negotiations which preceded and induced them. It is contended that the insurance company agreed in the preliminary negotiations that it would issue policies which would insure the life of the deceased for 13 months, in consideration of the payment of the first annual premiums, and that, either by mutual mistake or by the fraud of the company, policies were issued which insured his life for only 12 months and 17 days, in consideration of those premiums. A contract may be reformed in equity where a preliminary parol agreement is made, which fails of embodiment in the subsequent written contract through the fraud of one, or the mistake of both, of the parties to it. But the oral agreement and the fraud or the mutual mistake must be clearly proved before any such relief can be granted. The chief difficulty with this case is that neither the oral agreement nor the fraud nor the mutual mistake are established by the evidence. It is an indispensable requisite of a binding agreement that it should have a good or a valuable consideration. If the insurance company agreed with the deceased when he signed his applications that it would issue policies which would insure his life for 13 months, in consideration of the payment of the first annual premiums, there was no consideration for that agreement, because McMaster neither paid nor agreed to pay anything for this

preliminary promise. He merely signed applications for policies, and, until he received them and paid his premiums upon them, he was at perfect liberty to reject the insurance and to refuse the policies. Before these policies were delivered, on December 26, 1893, no suit could have been maintained against him for the premiums, or for a specific performance of any agreement to take any insurance or to accept any policies, because he had never made any such agreement, and had never promised to pay any premiums. Nor could he have maintained an action against the insurance company upon its agreement to issue policies that should give him insurance for 13 months, because that agreement was without consideration and void. There were, as is customary in life insurance cases, negotiations, but no contract, and no intention to contract, otherwise than by policies made and delivered upon the simultaneous payment of the premiums; and the agreement upon which the appellee counts was nothing more than a representation or promise, without consideration, as to what would happen in the future. *Society v. McElroy*, 49 U. S. App. 548, 28 C. C. A. 365, and 83 Fed. 631, 638; *Kendall's Adm'r v. Insurance Co.*, 10 U. S. App. 256, 263, 2 C. C. A. 459, 461, and 51 Fed. 689, 691; *Heiman v. Insurance Co.*, 17 Minn. 153, 157 (Gil. 127); *Markey v. Insurance Co.*, 103 Mass. 78; *Hoyt v. Insurance Co.*, 98 Mass. 539, 543; *Markey v. Insurance Co.*, 118 Mass. 178, 194; 1 May, Ins. (3d Ed.) § 56.

Nor is there any proof of fraud in this record. The fraud upon which reliance is placed here is pleaded as the basis of an estoppel. The claim is that the insurance company is estopped from denying that the actual contracts were the oral agreement for insurance for 13 months from December 26, 1893, and that the written contracts should be so reformed as to have this legal effect, because the solicitor promised that such would be the agreements. But a willful intent to deceive, or such gross negligence as is tantamount thereto, is an essential element of such an estoppel. There must be either some moral turpitude or some breach of duty. *Bank v. Farwell*, 19 U. S. App. 256, 262, 265, 7 C. C. A. 391, 394, 396, and 58 Fed. 633, 636, 639; *Henshaw v. Bissell*, 18 Wall. 255, 271. The deceit of its victim, and consequent damage, are essential elements of actionable fraud. If the acts of this insurance company did not deceive the insured, or if he was not induced thereby to change his position to his damage, no fraud which will warrant relief was perpetrated upon him. Before any cause of action for a reformation or avoidance of these policies can be maintained on the ground of fraud, convincing proof must be furnished that by some trick, artifice, or deceit of the company, the insured was induced to accept his policies, and to pay his first premiums, in the belief that they insured his life for 13 months from December 26, 1893. But he received the policies on that day, and he retained them in his possession until he died, on January 18, 1895. Their provisions are plain, clear, and free from all ambiguity and doubt. They stipulate that the company insures his life for 12 months and 17 days from December 26, 1893, only, and that at the end of that time they shall become void unless the second annual premiums are paid. He could not have

been deceived as to the terms or legal effect of these contracts, if he read them. It was his duty to read and know the contents of the policies when he accepted them. It is true that the evidence is that he did not read them, but the legal effect of his acceptance is the same as if he had read them. He had the opportunity to read and to learn their contents, and, if he did not, it was his own gross negligence, and no act of the insurance company or its agent that concealed them and misled him as to their effect. The statement of the agent 14 days before the deceased received the policies that they would insure him for 13 months from the payment of the first premiums was not a statement of an existing fact. It was not calculated to impose upon him, or to prevent him from reading his policies, and learning for himself whether this promise had been kept or broken. It was not a fraudulent representation, because fraud can never be predicated of a promise or a prophecy. *Railway Co. v. Barnes*, 27 U. S. App. 421, 12 C. C. A. 48, and 64 Fed. 80; *Sawyer v. Prickett*, 19 Wall. 146, 163; *Kerr, Fraud & M. (Bump's American Notes)* 85, note 3. Neither the company nor its agent, therefore, made any representation or promise, or used any artifice or deceit, to prevent the insured from learning the terms of his policies. Their contents were not concealed. They were not misrepresented. The deceased must accordingly be conclusively presumed to have known their terms when he accepted them. If one can read his contract, his failure to do so is such gross negligence that it conclusively estops him from denying knowledge of its contents, unless he was dissuaded from reading it by some trick, artifice, or fraud of the other party to the agreement. *Railway Co. v. Belliwith*, 55 U. S. App. 113, 28 C. C. A. 358, and 83 Fed. 437, 440. Contracts for insurance are no exceptions to this rule. *Morrison v. Insurance Co.*, 69 Tex. 353, 359, 6 S. W. 605; *Quinlan v. Insurance Co.*, 133 N. Y. 356, 365, 31 N. E. 31; *Wilcox v. Insurance Co.*, 85 Wis. 193, 55 N. W. 188; *Fuller v. Insurance Co.*, 36 Wis. 599, 604; *Herbst v. Lowe*, 65 Wis. 316, 26 N. W. 751; *Hankins v. Insurance Co.*, 70 Wis. 1, 2, 35 N. W. 34; *Herndon v. Triple Alliance*, 45 Mo. App. 426, 432; *Palmer v. Insurance Co.*, 31 Mo. App. 467, 472; *Insurance Co. v. Yates*, 28 Grat. 585, 593; *Ryan v. Insurance Co.*, 41 Conn. 168, 172; *Barrett v. Insurance Co.*, 7 Cush. 175, 181; *Holmes v. Insurance Co.*, 10 Metc. (Mass.) 211, 216; *Insurance Co. v. Swank*, 12 Ins. Law. J. 625, 627; *Insurance Co. v. Hodgkins*, 56 Me. 109, 112; *Insurance Co. v. Neiberger*, 74 Mo. 167, 173; *Beach, Ins.* (1895) § 414, and cases cited. The legal conclusion that the insured knew the terms of his policies, because he had an opportunity to know them, and it was his duty to do so, is in accordance with the actual fact. The proof is clear and indisputable that before December 13, 1894, he was notified that his second annual premiums fell due on December 12, 1894, and that his policies would expire on January 12, 1895, unless he paid them, and that he replied that he did not intend to keep the insurance in force, and did not care to pay them. This record therefore presents no evidence that the insurance company or its agent made any representation of which fraud can be predicated, and it presents no evidence that the

insured was deceived into taking his policies by any misrepresentation of the company or its agent.

The case is equally barren of evidence of a mistake in drafting the policies. The mistake which will warrant the reformation of a contract must be a mutual mistake. A court of equity may not reform a written agreement, on the ground of mistake, so as to impose on one of its parties obligations which he did not intend to assume when he made it. *Insurance Co. v. Henderson*, 32 U. S. App. 536, 546, 16 C. C. A. 390, 394, and 69 Fed. 762, 767. It is conceded by counsel for appellee that the act of the solicitor of the insurance company in directing the policies to be dated on the same day as the applications was the act of the company. The agent of the company, and the company itself, therefore, intended to make the term of insurance in these policies exactly what it was made by their terms, and there was no mistake on their part in drafting and delivering the contracts. The result of a careful examination of the record is that there was no binding, legal agreement before the policies were delivered, no fraud which induced the insured to accept them, and no mutual mistake in drafting or delivering them; and the policies cannot be reformed on any of these grounds.

It is strenuously insisted, however, that the statement of the solicitor of the company that its policies would give insurance for 13 months, in consideration of the payment of the first annual premiums, was a construction of the terms of the policies which the company is estopped from denying, in the absence of fraud and mistake, and that the appellee is entitled to recover the indemnity promised, on this ground, whether he is entitled to a reformation of the policies or not. The case of *Insurance Co. v. Chamberlain*, 132 U. S. 304, 10 Sup. Ct. 87, is cited and relied upon in support of this proposition. In that case the agent of the insurance company wrote the answers of the applicant to the questions propounded in his application. One of those questions was, "Has the said party [the applicant] any other insurance on his life?" When the agent asked this question, the applicant told him that he had certain certificates of membership in certain co-operative societies, which he named, and that he did not know whether they would be considered insurance or not. The agent told him emphatically that he did not consider that insurance, and that the proper answer to the question was "No;" and he thereupon wrote the answer, "No other," into the application, and the applicant signed it. The company undertook to defend an action on the policy on the ground that this answer was false, because the applicant had insurance in the co-operative societies; and the supreme court held that inasmuch as the agent of the company, after hearing all the facts, dictated and wrote the answer, the company was estopped from claiming that it was false. Indeed, it is well settled that an insurance company is estopped from defending against a loss on the ground that the policy is avoided by a false answer in the application, where the insured told the agent the truth, and the latter wrote the falsehood into the application himself. The false statement then becomes the statement of the company, and not of the insured, and it may not plead its own wrong, to forfeit its policy. *Laclede Mfg. Co. v. Hart-*

ford Ins. Co., 19 U. S. App. 510, 521, 9 C. C. A. 1, and 60 Fed. 351; Insurance Co. v. Robison, 19 U. S. App. 266, 7 C. C. A. 444, and 58 Fed. 723; Insurance Co. v. Russell, 40 U. S. App. 530, 553, 23 C. C. A. 43, 54, and 77 Fed. 94, 106; Insurance Co. v. Wilkinson, 13 Wall. 222, 225; Insurance Co. v. Mahone, 21 Wall. 152; Insurance Co. v. Snowden, 12 U. S. App. 704, 7 C. C. A. 264, and 58 Fed. 342; Kausal v. Association, 31 Minn. 17, 21, 16 N. W. 430; Dietz v. Insurance Co., 31 W. Va. 851, 8 S. E. 616. This rule, however, is very far from the proposition that an opinion expressed, or a promise or agreement made, in the previous parol negotiations, to the effect that the subsequent written contract which results from them will have a certain legal effect, must prevail over the plain terms and right construction of the actual, written agreement, which is subsequently made and accepted. The former statement is based on existing facts, completely disclosed, while the latter is a mere opinion or promise as to what the future will bring forth. The former is the statement of the effect of known and existing conditions, which, if false and injurious, is fraudulent, while the latter is a mere promise or prophecy, which cannot be fraudulent, even if it is a mistake. The latter proposition is the converse of the established rule that written contracts shall prevail over the previous oral negotiations from which they result. Nevertheless, it has a familiar sound. It has been repeatedly presented to, and has repeatedly received the condemnation of, this and other courts. In *Laclede Mfg. Co. v. Hartford Ins. Co.*, 19 U. S. App. 510, 513, 520, 9 C. C. A. 1, 3, 8, and 60 Fed. 351, 353, 358, the agent of the insurance company told the insured, in the previous preliminary negotiations, that the policy upon seven boilers, which he was soliciting him to take, would certainly cover any additional boilers which the insured might subsequently acquire, provided only seven were in operation at a time. The insured took the policy in reliance upon this representation. After he had obtained it, he acquired additional boilers, one of which exploded while only seven were in operation. He brought an action upon the policy for the explosion, but it failed. This court declared:

"That the opinion that Elckhoff [the agent] expressed, or, if it could be so called, the promise that he made, before the policy was issued, that it would cover all after-acquired boilers, when but seven were in use, was merged in the written contract evidenced by the policy, and was not available to the plaintiff in this action, either as a representation, an agreement, or an estoppel."

In *Insurance Co. v. Henderson*, 32 U. S. App. 536, 540, 543, 547, 16 C. C. A. 390, 391, 393, 395, and 69 Fed. 762, 764, 766, 768, the agent of the insurance company informed the insured, in the previous parol negotiations which led to the contract, that the policy he would receive would cover his death by assassination. The policy subsequently delivered excepted from the risks against which it insured "intentional injuries inflicted by the insured or any other person." The insured was shot from ambush. A suit was brought to reform the policy so as to cover the risk which the solicitor had assured the deceased would be covered by the policy. But this court directed the dismissal of the bill, and held that:

"When the risks intended to be insured against are clearly described in the policy, and the insured has a full and fair opportunity to read the instrument, the company will not be bound by representations made by its agent, in good faith, that the policy covers risks that are not in fact within its provisions."

In *Thompson v. Insurance Co.*, 104 U. S. 252, 259, the policy provided that it should be void on the nonpayment of the note taken for the premium; and the supreme court held that a plea that a parol agreement was made, at the time of the giving and accepting of the note and policy, that the policy should not become void for the nonpayment of the note, but should only be voidable at the election of the company, was bad. Mr. Justice Bradley, in delivering the opinion of the court, said:

"An insurance company may waive a forfeiture, or may agree not to enforce a forfeiture; but a parol agreement, made at the time of issuing a policy, contradicting the terms of the policy itself, like any other parol agreement inconsistent with a written instrument made contemporaneous therewith, is void, and cannot be set up to contradict the writing."

In *Insurance Co. v. Mowry*, 96 U. S. 544, 547, the policy provided that it should be void and wholly forfeited if the premiums were not punctually paid. The agent who procured the policy agreed with the insured that the company should give notice when the premiums fell due, but this agreement was not contained in the policy. The company failed to give the notice, and the insured failed to pay the premium. The agreement of the agent before the policy issued was claimed to be an estoppel of the company against insisting upon the forfeiture of the policy. Mr. Justice Field, in delivering the opinion of the court, said:

"All previous verbal arrangements were merged in the written agreement. The understanding of the parties as to the amount of the insurance, the conditions upon which it should be payable, and the premium to be paid, was there expressed, for the very purpose of avoiding any controversy or question respecting them. \* \* \* An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made. \* \* \* The doctrine has no place for application when the statement relates to rights depending upon contracts yet to be made, to which the person complaining is to be a party. He has it in his power, in such cases, to guard in advance against any consequences of a subsequent change of intention and conduct by the person with whom he is dealing. For compliance with arrangements respecting future transactions, parties must provide by stipulations in their agreements when reduced to writing. The doctrine, carried to the extent for which the assured contends in this case, would subvert the salutary rule that the written contract must prevail over previous verbal arrangements, and open the door to all the evils which that rule was intended to prevent. *White v. Ashton*, 51 N. Y. 230; *Bigelow, Estop.* 437, 441; *White v. Walker*, 31 Ill. 422; *Faxton v. Faxon*, 28 Mich. 159."

In *Assurance Co. v. Norwood*, 57 Kan. 610, 611, 613, 615, 617, 618, 47 Pac. 529, 532, the agent of the insurance company agreed with the insured, in the preliminary negotiations, that they should be permitted to carry \$37,500 additional insurance, and promised to make out the policies to that effect. In reliance upon this agreement and promise, the insured neglected to read the policies when they were delivered. They were for \$2,500 each, permitted only \$32,500 concurrent insurance, and provided that they should be void if the in-

sured procured more without the consent of the company. The insured obtained \$37,500 concurrent insurance, and the company defended an action on one of the policies on the ground that it was avoided by this overinsurance. The insured pleaded the previous oral agreement and promise, and alleged that the company was thereby estopped from making this defense. The supreme court of Kansas held that the plea could not be sustained, and that there could be no recovery upon the policy. In *Union Nat. Bank v. German Ins. Co.*, 18 C. C. A. 203, 71 Fed. 473, the circuit court of appeals for the Seventh circuit came to a like conclusion. In *Association v. Kryder*, 5 Ind. App. 430, 435, 31 N. E. 851, the solicitor of the company promised the insured in the prior parol negotiations, that the policy of insurance on his barn and its contents would insure his horses, whether they were in or out of the barn. The horses were killed by lightning in the field near the barn; and, to the plea that the association was bound by the construction which the agent gave to the policy, the court answered:

"The policy was read by the appellee, and the representation was not of any material fact, but of a question of law, relative to the construction of the contract. The appellee had no right to rely upon such representation, and fraud cannot be predicated upon it." *Burt v. Bowles*, 69 Ind. 1; *Clodfelter v. Hulett*, 72 Ind. 137.

In *Casualty Co. v. Teter*, 136 Ind. 672, 673, 676, 679, 36 N. E. 283, the agent represented to the insured that a policy of insurance against accidents of travel as a passenger on a public conveyance, which he was soliciting him to take, would cover accidental injuries which he might receive while he was caring for and selling a load of horses which he was about to transport to market by rail. He fell from a hayloft in a livery barn while caring for his horses in a market town to which they had been transported, but the supreme court of Indiana held that he could not recover.

It is useless to review other decisions. This proposition is founded in reason, and sustained by the authorities, and it should be deemed to be the settled law of the land: No representation, promise, or agreement made, or opinion expressed, in the previous parol negotiations as to the terms or legal effect of the resulting written agreement, can be permitted to prevail, either at law or in equity, over the plain provisions and just interpretation of the contract, in the absence of some artifice or fraud which concealed its terms, and prevented the complainant from reading it. *Laclede Mfg. Co. v. Hartford Ins. Co.*, 19 U. S. App. 510, 513, 520, 9 C. C. A. 1, 3, 8, and 60 Fed. 351, 353, 358; *Insurance Co. v. Henderson*, 32 U. S. App. 536, 540, 543, 547, 16 C. C. A. 390, 391, 393, 395, and 69 Fed. 762, 764, 766; *Thompson v. Insurance Co.*, 104 U. S. 252, 259; *Insurance Co. v. Mowry*, 96 U. S. 544, 547; *Assurance Co. v. Norwood*, 57 Kan. 610, 611, 613, 47 Pac. 529, 530, 531, 532; *Association v. Kryder*, 5 Ind. App. 430, 435, 31 N. E. 851; *Union Nat. Bank v. German Ins. Co.*, 18 C. C. A. 203, 71 Fed. 473; *Casualty Co. v. Teter*, 136 Ind. 672, 673, 676, 679, 36 N. E. 283; *Burt v. Bowles*, 69 Ind. 1; *Clodfelter v. Hulett*, 72 Ind. 137; *Hudson Canal Co. v. Pennsylvania Coal Co.*, 8 Wall. 276, 290; *Insurance Co. v. Lyman*, 15 Wall. 664; *Pearson v. Carson*, 69 Mo.

550; Insurance Co. v. Neiberger, 74 Mo. 167; Lewis v. Insurance Co., 39 Conn. 100.

Under the evidence presented in this record, the appellee cannot recover upon these policies, either at law or in equity; and the decree below must be reversed, and the case must be remanded to the court below, with directions to dismiss the bill. It is so ordered.

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BOSWORTH et al. v. CHICAGO, M. & ST. P. RY. CO. et al.<sup>1</sup>

(Circuit Court of Appeals, Seventh Circuit. February 25, 1898.)

Nos. 442, 452, 453, and 454.

**1. CARRIERS OF GOODS—DESTRUCTION BY FIRE—DELIVERY.**

A railroad operated by defendant as receiver, being without yard facilities or switching engines at its terminus, in East St. Louis, entered into a contract with a terminal company having yards and tracks and connecting with St. Louis, by which such company, for a stipulated charge, agreed to furnish to the railroad the necessary yard room and track facilities, and the necessary switch engines and yard men for making up and breaking up its freight trains. It was the custom, in operating under this contract, for the terminal company to take cars of freight arriving, and place them on its tracks, where they remained until a new waybill was furnished to it by the defendant, and were then transferred according to its directions. In case of freight consigned to St. Louis, it was the custom of defendant to notify the consignee on its arrival, and, on receipt of directions from such consignee, to issue the waybill to the terminal company, designating the point of delivery. It appeared that the terminal company, to increase its transfer business across the river, had offered to dealers in barley in St. Louis to hold upon its tracks free of charge cars received by it, until the barley should be sold, but it did not appear that defendant knew of such arrangement. Certain cars loaded with barley, the shipments being induced by this arrangement, and also a car, No. 1,004, consigned to a point in Alabama, came over defendant's road, and were taken by the terminal company, and placed on its tracks, where it usually placed defendant's cars. While standing upon such tracks, where some of them had remained for several days, the cars were destroyed by fire through the negligence of the terminal company. No waybills for any of such cars had been issued by defendant. *Held*, that as to the cars loaded with barley and their contents defendant was not liable. Woods, J., holding that, under the arrangement between the consignees and the terminal company, which, in the absence of their dissent, was binding on the shippers, there was a delivery by defendant when the cars came into the actual possession of the company. Showalter, J., concurring on the ground that the taking possession of the cars by the terminal company with knowledge that the shipment over defendant's line had been completed, and that they were to be moved over its tracks to some point of delivery or connection, constituted a delivery to it as connecting carrier. Jenkins, J., dissenting on the ground that there was no delivery by defendant, which relieved him of liability as a carrier, until shipping directions had been given to the terminal company, that company having no authority to move or deliver the freight until the receipt of such directions, and only in accordance therewith. As to car 1,004, *held*, that there was no delivery, and defendant was liable for its loss. Showalter, J., dissenting.

**2. SAME—CONTINUOUS CARRIAGE.**

When a car load of goods is shipped for continuous carriage over connecting lines, the initial carrier is not relieved of responsibility by merely delivering possession of the car to the connecting carrier, but his liability for a loss continues until he has also delivered shipping directions to the latter. Showalter, J., dissenting.

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<sup>1</sup> Rehearing denied April 1, 1898.

## Appeals from the Circuit Court of the United States for the Southern District of Illinois.

These appeals are from decrees against the appellant, C. H. Bosworth, as receiver of the Chicago, Peoria & St. Louis Railway Company, in favor of interveners in the case of the Mercantile Trust Company against the Chicago, Peoria & St. Louis Railway Company, wherein the receiver was appointed, for damages caused by the burning of freight cars and their contents, of which the appellant is alleged to have had possession as a common carrier, on the evening of October 28, 1894, at East St. Louis. By an amendment the petitions were made to charge that, while the cars were still in the possession of the receiver at East St. Louis, he negligently caused and permitted them to be placed in proximity to a wooden warehouse filled with baled and loose hay, which was exposed to fire from passing locomotives, and in some manner caught fire, which, communicating to the cars, caused the damage complained of. The amounts decreed to be paid to the interveners, respectively, were: To the Chicago, Milwaukee & St. Paul Railway Company, \$9,033.73; to Jacob Rau, \$1,144.07; to the Hunting Elevator Company, \$2,600.95; to the Carr, Ryder & Engler Company, \$777.26; and to others, not parties here, whose decrees it has been agreed shall abide the result of these appeals, various sums, aggregating nearly \$10,000. The facts, in the main, were agreed upon; and the controlling question is whether the cars and goods at the time of destruction were in the possession of the receiver, or had passed into the possession of the Terminal Railroad Association of St. Louis, which owned the tracks upon which the cars were standing when they were consumed. It appears that, not having adequate yard facilities of its own at East St. Louis, the Chicago, Peoria & St. Louis Railway Company on August 1, 1892, entered into an agreement with the terminal railroad association for the use of its tracks, and, either by acquiescence or by formal stipulation, that agreement remained in force between the terminal association and the receiver. Only the first, fourth, and fifth clauses need be quoted:

"It is agreed that the party of the first part [the terminal railroad association] shall furnish the necessary yard room and track facilities in their yards in East St. Louis, Illinois, as now located, and the necessary switch engines and yard men to do the switching of the party of the second part in the making up and breaking up of all freight trains that depart from and arrive at East St. Louis, and to furnish storage room for a reasonable number of cars necessary to properly take care of and handle the business of the party of the second part, not exceeding one hundred and fifty (150) cars at any one time; and the charge for the facilities and the work above named shall be at the rate of fifty (50) cents per loaded car in and out, except cars on which the party of the first part receives a bridge toll, which will be handled free; empty cars in and out free." "Fourth. All cars consigned to and from the East St. Louis freight house of the party of the second part to be switched to and from the Wiggins Transfer tracks without extra charge. Regular switching charges and rules to apply on all other cars to and from connections; the party of the first part to be governed in making its collections by instructions shown on billing to it as to who should pay. In the absence of any instructions the switching charges will follow the car. Fifth. The party of the first part to furnish track room upon which the engines of the party of the second part can be switched and cared for and turned as may be required; the care of such engines to be under the supervision of the party of the first part; the price for the service rendered to be agreed upon by the master mechanic of the party of the first part and the superintendent of motive power and machinery of the party of the second part."

"These tracks of deposit," says the master's report, "were not exclusively used by the C. P. & St. L., but the cars seem to have been always placed upon them." It is apparent from the evidence, however, that the receiver had no voice in determining where a car should be placed, or with what care it should be guarded.

For the purpose of saving the labor and expense of making proof, the parties stipulated that the property described in the several petitions was destroyed as stated; that the Carr, Ryder & Engler Company, a corporation, on October 20, 1894, delivered the property described in its petition to the Chicago, Milwaukee

& St. Paul Railway Company at Dubuque, Iowa, loaded in car No. 1,004 of the Rock Island & Peoria Railway Company, and consigned for transportation as per bill of lading to the May & Thomas Hardware Company, Birmingham, Ala., by way of East St. Louis, Ill.; that the Chicago, Milwaukee & St. Paul Railway Company was the owner of the 38 cars described in its petition; that during the evening of October 28, 1894, those cars, while on the tracks of the Terminal Railroad Association of St. Louis, commonly used by the receiver under the agreement between that association and the Chicago, Peoria & St. Louis Railway Company, dated August 1, 1892, were damaged by fire to the total amount of \$9,033.73; that the cars were consigned as per bills of lading and waybills introduced in evidence; that Jacob Rau, of Wykoff, Minn., at the times and places alleged in his petition delivered to the Chicago, Milwaukee & St. Paul Railway Company two car loads of barley, consigned to the Orthwein Grain Company, St. Louis, Mo., by way of East St. Louis, Ill.; that receipts, in the form of exhibits attached to the stipulation, were given by the railway company at the time the barley was received for transportation; and that when destroyed the barley belonged to the petitioner, and was of the value of \$1,144.07. The stipulation in respect to the shipment of the Hunting Elevator Company is in the same words, except that the consignee named is the Telchman Commission Company, and the value of the goods destroyed is stated to have been \$2,650.95. Like stipulations were made concerning the cases of other interveners, from whose decrees there has been no formal appeal. The agreement was afterwards amended by striking out the clause in respect to the ownership of the barley shipped by the several petitioners, except Rau and one other, whose consignments were for sale on commission.

It is contended by the appellant that the destination of the cars consumed, except five, as shown by the waybills and receipts or copies thereof introduced in evidence by the interveners, was East St. Louis, although in the column under the head of "Marks and Consignees" the name of the consignee, and the words "St. Louis, Missouri," appear. The shipments of barley, except those for sale on commission, were made in pursuance of telegraphic correspondence showing offers of net prices by the brokers or commission men at St. Louis, accepted by the shippers; and it is contended by the appellant that on delivery of the grain to the carrier the title passed to the consignees, and that the interveners have no right of action. On the other hand, proof was offered to show that delivery at St. Louis was intended by the parties, and that on that understanding other shipments were made after the fire in lieu of those destroyed. At the time of the fire, the cars destroyed, together with others which were injured and afterwards repaired, had been on the tracks of the terminal association for various periods of time,—one since the 28th day of September preceding,—and of those received in October there arrived on the 10th, 1; on the 16th, 1; on the 24th, 4; on the 25th, 18; on the 26th, 12; on the 27th, at 7:55 a. m., 9; at 6:44 p. m., 2; and on the 28th, at 6:55 a. m., 4; at 1:45 p. m., 1; and at 2:57 p. m., car 1,004. Of the aggregate number (54), all but 8 were cars of the Chicago, Milwaukee & St. Paul Railway Company.

In respect to the manner in which the cars brought in over the receiver's road were handled and disposed of by the employes of the receiver and of the terminal association under their agreement, it appears that after an incoming train had been broken up, and the cars placed on the tracks of the terminal company, they remained there, in the physical control of that company, until the consignee, to whom the receiver was accustomed to send prompt notice of the arrival of a car consigned to him, should indicate the particular destination, which might be on the east or west side of the river, or a point on the line of another railroad, whereupon the receiver would make out and deliver to the terminal company a new waybill, on which that company would transfer the car as directed. It appears further that on the delivery of such a new waybill, and not sooner, it was the custom of the receiver, if the car belonged to another company, to send notice to that company that the car had been delivered to the terminal association; it being the custom of railroad companies in that way to keep each other advised of the disposition and whereabouts of their respective cars. It satisfactorily appears further that it was the custom of brokers and buyers at St. Louis to leave in the cars, until sold, certain classes of goods, and particularly consignments of barley received upon the tracks of the terminal railroad

association, whether billed to St. Louis or East St. Louis; the mode of selling goods so held being by samples taken on the arrival of cars by agents of the consignees employed to visit daily the yards for that purpose. It further appears that the receiver at the hearing before the master made a statement of facts which he proposed to prove by some of the consignees of the barley in question, and asked time to produce the witnesses, and that in order to avoid delay it was agreed by the interveners that, if produced, the witnesses would testify, as stated by counsel for the receiver, to the effect following: "That the terminal railroad association personally solicited this particular barley business, originating on the Chicago, Milwaukee & St. Paul Railroad, upon which this controversy is pending; that these solicitations by the terminal railroad association were made to all barley dealers in St. Louis to whom the particular consignments of barley were made which are now in litigation; that the terminal railroad association, as an inducement to barley dealers and shippers, agreed to hold the cars on their tracks at East St. Louis, and offered other facilities in and about their yards at East St. Louis, by which the St. Louis Terminal Railroad Association succeeded in securing the business of all the shippers (by that term I mean the consignees and shippers), except the business of the John Wall Commission Company, whose business was being handled by the Wiggins Ferry Company, a competing line with the St. Louis Terminal Railroad Association, and that at a later day they also secured the business of this last-named firm; and that this solicitation was made in the interest of the terminal railroad association, for the express purpose of having the business sent down the east side of the Mississippi river, so as to give them the benefit of the transportation across the river at East St. Louis to St. Louis, in competition with lines west of the Mississippi river."

In a general report of the master touching all the cases, it is said "that no notice was sent to the owner, shipper, or consignor of the arrival of said cars at St. Louis, or of the delivery of them to the terminal railroad"; and, in the special report upon the case of Jacob Rau, it is said, concerning his cars, that "no notice of their arrival was given to owner." It is not reported that the consignee of any car was not notified by the receiver, and did not otherwise have knowledge, before the fire, that the car had arrived, and was upon the terminal tracks, subject to his order. On the contrary, the proof is that the consignees received from the shippers immediate notice by mail of each consignment, and in addition received a sample of the grain, which, according to the report, the shippers were accustomed to send by express. Informed in this way of the number and contents of a car in transit, the agent of the consignee in regular and daily attendance in the yards for that purpose was able to take, and, there being no evidence to the contrary, presumably did take, the required sample from each car promptly upon arrival. This conclusion is fortified by a letter of the Orthwein Grape Company to one of the interveners, in which it is said, "Two of your cars [giving the numbers] arrived this afternoon," and by the testimony of Rau to the effect that his consignee had possession of samples of his grain taken from the cars on the day of their arrival at East St. Louis. The proof, in addition to the facts stated, being that notice of the arrival of cars was regularly and promptly sent to the consignees by the employes of the receiver, the fair inference, in the absence of contrary evidence, is that notices of the arrival of the cars in question were sent, and were duly received by the consignees.

Bluford Wilson, for appellants.

Burton Hanson, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge (after making the foregoing statement). If the facts were simply that under the agreement of 1892, and in accordance with the custom which had grown up, cars from the receiver's road were taken by the terminal association and placed upon its tracks, and permitted to remain there until the receiver, at the request of the consignee, should make out and deliver to the terminal association

new waybills showing a particular destination, it would perhaps be true, as contended in behalf of the interveners, that the responsibility of the receiver for the cars, with their contents, which were destroyed, had not ceased, because the waybills under which they could have been transferred had not been made out. But, besides the fact of the custom, the undisputed evidence is that shipments of barley originating on the Chicago, Milwaukee & St. Paul Railroad, including the consignments in dispute, were made to or by way of East St. Louis in order that the cars should come into the possession of that association for transfer in pursuance of an understanding amounting to an agreement between the association and the consignees that the association should hold the cars on its tracks, and afford other facilities about its yards at East St. Louis, until the consignee of a car should determine and give notice to what point the transfer should be made. That agreement was equivalent to a specific direction by the consignee upon the receipt of each car by the terminal association that the car should be held for further orders; and in that situation, whatever otherwise might have been his duty, the receiver was under no obligation to notify the consignee of the arrival of a car, and it is not material whether such notice was given or not. The delivery to the terminal association was complete, and no delay in making out new waybills, or in sending junction notices to the owners of the cars, if owned by other companies, could be of force to show a continued legal or constructive possession by the receiver. The consignees, whether buyers of the grain or agents of the shippers, it is well settled, had authority, in the absence of notice to the contrary, to direct what disposition should be made of the cars on their arrival at East St. Louis, and the legal result is the same as if the terminal company's possession and detention of the cars had been with the consent or by direction of the interveners themselves. In view of the custom which prevailed, and of the agreement between the terminal association and the consignees of barley at St. Louis, the liability of the receiver as carrier ceased once the cars had been placed upon the terminal tracks. From that time the question was not whether the placing of the cars upon its tracks by the terminal association operated to transfer the liability of a carrier from the receiver to the terminal association, but was whether the liability of a bailee for hire, or as warehouseman, was on the receiver, or on the terminal association. It is doubtless true, in a general sense, that the shipper of goods, or the owner of goods shipped, is entitled to the common-law liability of the carrier until the goods shall have reached their destination; but that right, it must be clear, does not exist when the course of transportation is not to be continuous, as when, to the knowledge and with the consent of the shipper, there must be on the way a place and period of storage; and, when the right exists, it is one which the shipper or his agent, the consignee, may waive, and in this case it was waived by the consignees when they agreed and directed that the cars and contents should be held on the terminal tracks to await their specific orders for transfer. If the original destination was St. Louis, and was so intended by the shippers, no notice of any restriction upon the authority of the consignees

to change the destination was given; and when by their direction the course of transit was broken or suspended the liability of the carrier ceased, and under the facts, as they appear, the liability of bailee commenced, on the part either of the receiver or of the terminal association, and the question is, on which? It does not solve this question to say that the action of the terminal association, under its contract with the receiver to break up trains and to remove the cars to certain tracks, did not constitute a delivery. Under that contract, and under the custom which had prevailed, if the proof went no further, it is conceded that the terminal association would have been under obligation to obey the orders of the receiver with respect to the cars; but when, in addition to that contract and the custom, it is shown that the terminal association was under a separate agreement with the consignees (to which the receiver was not a party, and of which it does not appear that he had knowledge) to hold on its tracks all cars consigned to them, until they should give notice of the desired transfer, a radically different case is shown. Under that agreement it was not material, nor was it contemplated, that the terminal association should know of the final destination of any car, or of its contents, until the time for transfer should come. The purpose of the agreement was to leave the destination undetermined until the last. No liability as common carrier could attach to the terminal association until a forward movement or transfer of the car should be ordered; and there being, as already explained, no question of liability as a carrier, the question of formal delivery, as affecting the existence of such liability, or its transfer from one company to the other, was in no sense involved. Whether the receiver, either in ignorance of the agreement of the association with the consignees, or for other reason growing out of the custom of business between the two companies, supposed himself to be in some sense responsible for the consignments in question, is not material. Neither is it important, if true, that the terminal association undertook to furnish terminal or yard facilities which it was the duty of the receiver's company to provide. If otherwise there would have been such a duty on the receiver, he was relieved of the duty in respect to these cars by force of the agreement between the consignees and the terminal association. To a consignee who has provided a place for the receipt and storage of his goods a carrier is certainly under no obligation to afford like facilities; and if, by reason of an independent contract, the carrier has a right to make delivery or to store goods in the same place provided by the consignee, the carrier does not on that account remain responsible to that consignee for the safety of his goods after depositing them in that place. These consignees having bargained with the terminal association to hold their cars upon its tracks, the tracks became theirs for that purpose, just as much as otherwise they would have been the tracks of the receiver under his agreement with the terminal association; and, the cars having been placed upon those tracks, the receiver's possession and responsibility ceased, as they would have ceased if the cars had been placed on private tracks of the consignees; and whether waybills had been handed over, or re-

mained in the possession of the receiver, could be of no possible significance.

The principles of law underlying these propositions, if they are not to be regarded as elementary, are well established and familiar, and are quite in harmony with the opinion in *Mt. Vernon Co. v. Alabama G. S. R. Co.*, 92 Ala. 296, 8 South. 687, and other cases to which reference has been made. See, also, *Pratt v. Railway Co.*, 95 U. S. 43. While it is conceded that ordinarily there must be a continuous liability as common carrier upon somebody until the goods have arrived at their destination, manifestly the rule does not apply when, as here, the shipper, through his agent, the consignee, has consented to an interruption of the course of transit, and to the holding of the goods meanwhile by a bailee of his own selection. The supposed difficulty with the proposition that the terminal association was still in possession, because it did not know that these cars were for St. Louis, nor to whom they were consigned, nor whether they might not be intended for the Wiggins Ferry Company, and in the usual course of business could not know until waybills had been delivered to it, is not substantial. There is no evidence that the association did not in fact know that the cars were for consignees in St. Louis for whom it had agreed to hold cars. The evidence shows that sometimes the agents of the association at the instance of consignees called for cars for which no waybills had been requested of the receiver by the consignees. If the information had been deemed important, it was easy to obtain it from the consignees and their agents, and doubtless from the agents of the receiver, without waiting for the time of transfer, when, customarily, waybills were called for and delivered. The information, however, was not in fact important, because until the particular destination of a car had been determined by the consignee the responsibility of the association as bailee was only for ordinary care, and could not be greater or less whether the name of the consignee or the destination of the car were known or unknown. Indeed, the association, under its contract with the receiver, was under the same liability to the receiver, if the receiver remained liable to the owner; and on no possible supposition or theory is it perceived that its liability could be affected by its knowing or not knowing whether particular cars came within the scope of its agreement with the consignees at St. Louis. Besides, it was not a part of the agreement that the terminal association would hold for the consignees cars received upon its tracks, which it knew to be, or when it knew them to be, so consigned. Such a limitation upon the scope of the agreement is not even suggested by the evidence, would be in itself unreasonable, and presumably was not in the mind of either party. Even under the agreement with the receiver, the actual possession and physical control of the cars passed immediately upon arrival to the terminal association; and, if consigned to parties for whom the association had agreed to hold them, there is no reason suggested for continued liability of the receiver, in any character, except the lack of the mere formality of making out and delivering to the terminal association a waybill, which, in the course of business, could not be

made out until the consignee, in his own pleasure, should give the necessary direction; and, if that had been done, the terminal association would have become liable, as a carrier, to make an immediate transfer to the place, or in the direction, of ultimate destination. In other words, on the theory that the terminal association's liability to the consignees or shippers could arise only upon receipt, in the usual course, of waybills from the receiver, it could never have become liable as bailee under its agreement with the consignees to hold the cars for them, and could have incurred liability only as a carrier to make transfers as ordered. It is evident, moreover, that the receiver was not bound to make out new waybills, and might have avoided this formal objection to his discharge from liability, if he had known of the agreement of the terminal association with the consignees, by delivering or tendering the original waybills on the arrival of the cars, or at a later time to the terminal association; but that, again, would have been only a formality, without substantial effect upon the relations or rights of the parties, and therefore was not necessary. It is perhaps true that, if the responsibility of the receiver had not ceased, the owners, whether consignees or shippers, would have had their election to sue the receiver for a breach of contract as bailee, or the terminal association for negligently causing the injury; but, having themselves entered into an understanding with the terminal association whereby it was to hold the goods for them, they necessarily waived any right to look further to the responsibility of the receiver; and, upon the destruction of their property through the fault of the terminal association in exposing it to what the master has characterized as a veritable fire trap, they had, upon the facts disclosed, and presumably have yet, a clear right of action against that association upon its contract with them; and in such an action, if brought, the association could hardly be heard to say that no liability had arisen under that contract because it had not received waybills, or did not know to whom the cars had been consigned.

If it appeared that the receiver had knowledge of the agreement between the terminal association and the consignees, the plain, if not necessary, inference, would be that it was merely for the convenience of the parties that the receiver did not give the original waybills, or copies, to the terminal association upon the arrival of cars, but waited until the consignees had determined the final destination, and then made out new waybills; and, if it be assumed that the receiver was ignorant of that agreement, it is no less clear that the terminal association and the consignees, solely for their own convenience, continued, according to the custom, not to call upon the receiver for waybills until by the determination of the consignees the cars were to be forwarded; and the legal consequence should be and is the same as if the receiver had possessed full knowledge of the situation, or, if there be a difference, it is in the receiver's favor. The principle involved is well illustrated, upon a converse state of facts, in the case of *St. Louis, L. M. & S. Ry. Co. v. Commercial Ins. Co.*, 139 U. S. 223, 11 Sup. Ct. 554. There the owners of cotton destroyed by fire, and the railroad company which was sued, were, as here, in separate contract relations with the Union Compress Company, which, like the terminal association

here, held the goods as bailee either for the owner or for the railroad company. Pursuant to a custom which had grown up for the convenience of all parties, the railway company had been in the habit of giving to the owners of cotton, in exchange for the receipts of the compress company, through bills of lading, before the cotton had been loaded upon the cars, and had been accustomed to give the compress company notice of the fact of loading, with direction in each instance to ship the cotton on the railroad by a route and to an address named; but in this case no bill of lading had been given, and, before loading, the cotton was burned. The railroad company was charged with a negligent failure, though often requested by the compress company, to furnish transportation according to its contract with that company; and one of the questions in the case was how far the railway company's liability in the action was affected by the fact that it had issued bills of lading for other cotton, which formed a part of the accumulated mass which was burned in the street,—no waybill having been given for the 340 bales for the destruction of which the suit was brought. "This cotton, certainly," says the opinion, "was in the exclusive possession and control of the compress company. The railway company had not assumed the liability of a common carrier, or even of a warehouseman, with regard to it; had given no bills of lading for it; had no custody or control of it, and no possession of it, actual or constructive; and had no hand in placing or keeping it where it was." And, speaking directly in respect to the effect of the issuing of bills of lading upon the company's liability for cotton covered thereby, the court said:

"There is nothing else in the case which has any tendency to show that the railway company had or exercised any control or custody of the cotton, or of the place where it was kept by the compress company, before it was put upon the cars by that company. \* \* \* The evidence warranted, if it did not require, the inference that the bills of lading were issued merely for the convenience of all parties, and with no intention of making any change in the actual or legal custody of the cotton until it was so loaded. *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387-415, 10 Sup. Ct. 365. Upon the facts of this case, it may well be doubted whether the liability of the railway company as a common carrier began before the cotton had been received upon its cars, and had thereby come into its actual and exclusive possession and control."

In *California Ins. Co. v. Union Compress Co.*, referred to above, in respect to a similar issue of bills of lading it is said:

"At most, the railroad companies, by acquiring the receipts of the plaintiff and issuing bills of lading for the cotton, took only constructive possession of it; and the plaintiff, retaining actual and physical possession of it, did not lose any element of possession necessary to give it the right to effect insurance for its own benefit."

So, here, upon the facts stated, the nondelivery of waybills by the receiver to the terminal association, in any view, can constitute evidence only of constructive possession, and, since in that respect a waybill is less significant than a bill of lading, should not, in view of the agreement between the consignees and the terminal association, be deemed to be controlling, or even persuasive, evidence of continued possession, even constructive, on the part of the receiver, and of consequent responsibility for the safe-keeping of the cars. Two things are necessary to the beginning of liability as a carrier, namely, delivery

(that is to say, a transfer of the physical possession of the goods) and shipping directions, while to the initiation of liability merely as a bailee for hire notice of ulterior destination is unimportant, and only possession of the goods is essential. And it is on this distinction that upon a delivery thereof into the possession of the terminal association the liability of the receiver ceased, and that association, if any one, became responsible for such cars and contents as were covered by its agreement with the consignees, whether it had or had not received notice of the ultimate destination of particular cars.

It is conceded that a railroad company is responsible for the cars of another company in use upon its road, under the same rule of liability as for the goods carried therein; and it follows that, not being responsible in these cases for the contents of the cars of the Chicago, Milwaukee & St. Paul Railway Company, the receiver is not responsible for the loss of the cars themselves.

The agreements and the custom under which cars were transferred at East St. Louis, of course, had no application to the case of the Carr, Ryder & Engler Company, and the decree in favor of that company was right. No cessation in the course of carriage was contemplated, and, by the rule that the liability of one carrier in a continuous transit does not cease until the liability of the connecting carrier begins, the receiver must be held responsible for the loss of the goods of that company. Though in physical possession, under its agreement with the receiver, of the car in which the goods were being transported, the terminal association had not become responsible as a carrier therefor, because it had not been put in possession of a waybill or other form of information on which it could proceed with the carriage. In respect to that car, no interruption in the course of transit having been contemplated or authorized either by the shippers or by the consignees, it may be said that the receiver, as one of the connecting carriers, was under the double duty—it would perhaps be proper to say as agent for the shipper—to deliver possession and to communicate shipping directions to the next carrier; and that duty, in one aspect, not having been performed, his liability as carrier had not ceased.

JENKINS, Circuit Judge (concurring). I concur that the appellant should be held liable for the destruction of the property contained in car numbered 1,004, and this because he had not divested himself of his liability as insurer by delivery of the car and its contents to the next succeeding carrier. The owner or shipper of goods to be carried over connecting lines of railway is entitled to the protection afforded by the common-law liability of a carrier until the goods have arrived at their destination, and a reasonable time has elapsed after their arrival to accept delivery of them; and, with respect to connecting lines, each carrier assumes the responsibility of an insurer while the goods are in transit over its particular line, and until delivery to the next succeeding carrier. *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318; *Railroad Co. v. Jones*, 155 U. S. 333, 339, 15 Sup. Ct. 136. What shall constitute a delivery which relieves the one carrier from, and imposes upon the succeeding carrier, the burden of an insurer of the property in transit, has been the subject of some contention in the

courts. The result of the discussion has been, as I think, to establish a rule that is at all times protective to the shipper or owner, and imposes the burden of insurer upon the carrier, with whom it should properly be lodged. No better expression of the rule can be found than that declared by the supreme court of Alabama (Clopton, J., delivering the opinion) in *Mt. Vernon Co. v. Alabama G. S. R. Co.*, 92 Ala. 296, 298, 8 South. 687:

"The duties and obligations of the common carrier do not commence until there has been a complete delivery of the goods,—until they are placed in his custody, and under his exclusive control,—for immediate transportation. Though the goods may be delivered, if transportation is to await shipping orders or directions, or some act to be done by the consignor before they are forwarded, or if they cannot be at once put in transitu, because of the failure of the shipper to give shipping orders or directions, the carrier is liable only as bailee until such orders and directions are given, or until he is informed to what place the goods are to be forwarded, and to whom delivered. The strict responsibility of a common carrier arises concurrently with the duty of immediate transportation, and this duty does not arise so long as anything remains to be done by the consignor before the goods can be intelligently started on the route to their destination. *Barron v. Eldredge*, 100 Mass. 455; *O'Neill v. Railroad Co.*, 60 N. Y. 138; *Hutch. Carr.* §§ 3282–3288. The same rule is applicable in the case of connecting carriers. The responsibility peculiar to the common carrier is not devolved on the next connecting carrier until the receiving carrier has delivered the goods to the former, with directions for their shipment,—the place of destination, and to whom consigned. Until this is done the relation of common carrier is not established between the shipper and the connecting carrier."

The facts in that case are similar to those in the cases under consideration. The East Alabama Railway Company received certain cotton, and issued a bill of lading for through transportation from Gadsden, Ala., to Mt. Vernon Switch, Md., over its own and connecting roads. The receiving carrier transported the cotton from Gadsden to Attalla, at which place the lines of the two companies connected; and the car containing the cotton was placed upon a side track of defendant,—the East Alabama Railway Company having no side track at that point. No notice was given to defendant's agents at Attalla that the cotton was placed on a side track for through shipment, nor was there any name or address of the consignee, nor any waybill or shipping directions, sent with the cotton, or to the agent of defendant, until after the cotton was burned, which occurred during the night of the third day after its arrival at Attalla. It was held that there had been no delivery, and that the liability of insurer had not been assumed by the defendant company. See, also, *Reynolds v. Railroad Co.*, 121 Mass. 291; *McDonald v. Railroad Corp.*, 34 N. Y. 497; *Condon v. Railroad Co.*, 55 Mich. 218, 21 N. W. 321; *Conkey v. Railway Co.*, 31 Wis. 619. The result of this rule is that before a delivery can be deemed completed the succeeding carrier must be invested by the preceding carrier with the possession and exclusive control of the property, and that for immediate transportation. The liability of the succeeding carrier commences only when that of the preceding carrier has terminated. A delivery is not consummated by merely placing the car upon the tracks of the succeeding carrier; for such carrier is not by that act informed of the destination of the car, and cannot, therefore, give it immediate transportation. The delivery of a bill of lading or waybill without delivery of possession would confer,

at most, only a right to ultimate possession (*California Ins. Co. v. Union Compress Co.*, 133 U. S. 387-415, 10 Sup. Ct. 365), and would not impose upon the succeeding carrier the liability of an insurer until delivery of actual and exclusive possession and control. *Railway Co. v. Knight*, 122 U. S. 79, 93, 7 Sup. Ct. 1132; *St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 11 Sup. Ct. 554; *Railway Co. v. McFadden*, 154 U. S. 155, 160, 14 Sup. Ct. 990. So, also, the mere physical possession, without shipping directions, would not impose such liability, although the company might be liable for the goods as bailee, because the goods must be delivered into the carrier's exclusive possession and control, for immediate transportation, and the duty of immediate transportation could not arise until the delivery of proper shipping directions. There must concur the possession and exclusive control, and the necessary directions essential to immediate transportation, before the character of insurer can attach to the connecting carrier. Until these conditions have been performed by the delivering carrier, he is not absolved from liability as insurer. In the cases before us it appears that the appellant was without yard facilities or switching engines at the end of his line at East St. Louis. Under contract with the terminal association, the latter undertook, for a consideration stated, to furnish him with yard facilities and with switch engines to break up his incoming trains, and to place his cars upon certain designated tracks belonging to the terminal association, there to await further directions with respect to their destination. The terminal association had no means of knowing the destination of the cars until such further directions were given. This was accomplished by means of the delivery of waybills stating the name of the consignee and the place of destination. In doing this work of switching and placing the cars, the terminal association acted as the agent of and for and in behalf of the receiver. While the cars so stood upon the designated tracks they were in the possession and under the control of the receiver, and not of the terminal association. A completed delivery could only be made, according to the usual course of business between the two lines, by the delivery of a waybill indicating the destination of the goods, the amount of advance charges, the name of the consignee, and taking receipts for them. Then, and not until then, was the terminal association invested with the possession and exclusive control of these goods. Then, and not until then, was the duty of immediate transportation imposed. This was the uniform course of business between the connecting carriers, concerning which there is no disputation in the evidence, fortified by the fact that the receiver's company, accustomed to make daily reports to other companies of delivery of their cars to connecting carriers, did not report such cars as delivered until waybills had been given to the terminal association, and its receipts taken for the cars. The initial placing of the cars by the terminal association upon its tracks under its contract with the receiver's company was merely the act of an agent performing for the principal a duty devolving upon him, and which he was unable to perform except in that way. It was the act of the receiver by his agent, and was not a delivery of the car for transportation to a succeeding carrier.

As I read the case of *Pratt v. Railway Co.*, 95 U. S. 43, the facts being considered, it is in full accord with the position here assumed. Without doubt the custom of business established between two connecting carriers may largely control in the application of the rule, since such custom may determine the agreement of the carriers with respect to acts which shall constitute a delivery. In that case, as not here, the goods were placed within the exclusive control of the succeeding carrier. There the presence of the goods in the precise locality agreed upon for the deposit of goods for transportation over the lines of the succeeding carrier, with the address of the consignees upon them, sufficiently indicated that they were for transportation over its line of railway. Not so here, for the cars were placed upon tracks set apart for the accommodation of the receiver, and the terminal association was without knowledge of consignee or destination of the cars, or whether they were to be transported over its line at all. There the goods were deposited by the one party, and received by the other, for transportation. Not so here, because the car was placed by the terminal association under its contract for the accommodation of the receiver, and without further direction it was not possible for the terminal association to know whether the car was for transportation at all over its lines, or whether it should be transferred to the Wiggins Ferry Company. There, by the custom of business, it was the duty of the succeeding carrier, with respect to goods deposited in the particular place for transportation, to call upon the preceding carrier for waybills. Not so here, for the duty of delivering a waybill was cast upon the receiver. There the liability as insurer was denied because the goods had been delivered to the succeeding carrier for proper carriage.

I am of opinion that the like rule should be applied with respect to the car loads of barley consigned to parties in the city of St. Louis, unless the liability of insurer had been interrupted by some act of the consignor or consignee. It will be observed that the transit of the barley was not ended upon the arrival of the cars at the end of the receiver's line of road at East St. Louis. It was still to be transported over other and connecting lines to its destination. The barley was still in transitu. The record discloses that it was the custom of the receiver, with respect to goods consigned to the city of St. Louis, upon their arrival at East St. Louis to give immediate notice to consignees, and take their directions to what part of the city of St. Louis the goods should be forwarded, and by what line,—whether by the lines of the terminal association, or by the lines of the Wiggins Ferry Company, two rival companies, whose lines of railway connected with the road of the receiver. The master's report in the principal case states "that no notice was sent to the owner, shipper, or consignee, of the arrival of said cars at St. Louis, or of the delivery of them to the terminal railroad." The appellant has cast upon him the burden of showing that he has fulfilled his contract of carriage; that upon the arrival of goods, according to the custom of business, he had notified the consignees, and taken their directions with reference to the further carriage of the goods. It is not shown that this notice was given, and the master reports that it was not. This phase of the case, however, need not be dwelt upon; for, assuming that notice had been given,

and no instructions received within a reasonable time, the liability of the receiver as a common carrier was discharged, but liability as warehouseman was assumed. The goods were still in his custody and under his control. They had not been delivered to the terminal association for further carriage, or for any other purpose. The cars were placed upon the tracks designated as the yard tracks of the receiver, and were there for his accommodation. The terminal association had no control over them. It was not advised of the destination of those cars, or of the consignees. Until such advice, it could not rightfully take possession of them, nor rightfully transport them, nor safely deliver them. They might be for transportation over the Wiggins Ferry Company, its rival; and the terminal association was bound by its contract with the receiver to furnish switch engines for the transportation of those cars, and their delivery to the Wiggins Ferry Company, when so ordered. If, in the case supposed, the receiver held them merely as warehouseman, he is still liable, for his answer asserts that the cars were placed in close proximity to a "veritable fire trap"; so that, whether the receiver is to be regarded, with respect to his obligation, as insurer or as warehouseman of these goods and these cars, he is liable for their destruction.

It is held by the presiding judge that by reason of a certain supposed agreement between consignees in St. Louis and the terminal association, to the effect that the latter, as an inducement to barley dealers to ship over its lines, would hold cars containing shipments to such consignees on the tracks of the terminal association at East St. Louis, the receiver was absolved, and liability under such agreement imposed upon the terminal association, so soon as these cars had, under the contract with the receiver, been placed upon the tracks designated for the accommodation of the receiver's cars. I am unable to concur in this conclusion. I have sought to show that there had been no delivery of these cars to the terminal association. It had not knowledge of their destination. It had not knowledge of the consignees of them. They were subject to the direction and control of the receiver. The terminal association, under its contract with the receiver, had placed these cars upon these tracks for the receiver, and for a compensation agreed upon. It therein was the agent of the receiver. It could not know whether these cars were to be transported over its line, or the lines of the Wiggins Ferry Company. It could not know in what direction they were to be transported, or their ultimate destination. When it had placed the cars on these tracks pursuant to its contract with the receiver, it had nothing further to do with them until the receiver had dispossessed himself of possession and control, and had invested the terminal association therewith. I cannot comprehend that the general agreement between the terminal association and consignees can become operative, with respect to the contents of these cars, until delivery to the terminal association, and it had been invested with the exclusive possession and the exclusive control of them. The force of the reasoning is not perceived, whereby it is held that, because in fact these goods were ultimately to go to persons who had contracted with the terminal association,—of which contract the receiver had no knowledge,—therefore these goods were held under that con-

tract before delivery in fact to the terminal association, and before it was invested with exclusive control of them. I do not undertake to say that the terminal association may not be liable to the receiver for its negligent acts causing the fire whereby this property was destroyed. Neither the question nor the party is before us. The question here is whether the receiver is absolved from liability; whether, failing a delivery of the cars to the terminal association, failing a surrender by the receiver of control over them, with ignorance upon the part of the terminal association of their destination or their consignees, the agreement between the terminal association and the consignee had become operative with respect to these goods. I think not. If the receiver had directed that the terminal association, under its contract with him, should transfer these goods to the Wiggins Ferry Company, his order must have received recognition and have been carried out by the terminal association; and it cannot be doubted that up to the time of the fire in question the goods were so subject to the receiver's direction and control. For these reasons I think that the decrees appealed from should be affirmed.

**SHOWALTER, Circuit Judge.** The failure of appellant touching any obligation on his part to give proper shipping directions to the connecting carrier is not set up as a ground of action in any one of the petitions. The cause of action alleged in each is that he was a common carrier, and that the property therein specified, which was negligently or accidentally destroyed by fire, was at the time of such destruction still in his possession as bailee for carriage. Counsel for appellees say:

"The pleadings raise a single issue: Were the cars and their contents, at the time they were destroyed, in the possession of appellant, as receiver of the Chicago, Peoria & St. Louis Railroad Company, or had they been delivered by him to the next succeeding carrier, the Terminal Railroad Association of St. Louis? Appellees claim that the cars and their contents had not been delivered to the terminal railroad association at the time of the fire, but were in the possession of appellant, while appellant contends that he had made a delivery of them, and therefore is not responsible for the loss and damage which the fire caused. The sole question for decision, therefore, is, had there been a delivery of the cars and their contents by appellant to the terminal railroad association at the time of the fire?"

Referring to all the cars in question, other than the one mentioned next below in this opinion, they say further:

"These cars and their contents having been consigned to St. Louis, a point beyond the end of the receiver's route, the duty of the receiver was, when he received them into his possession at Peoria, to carry them safely to East St. Louis, the end of his road, and there deliver them to the terminal association, the next succeeding carrier. The obligation to safely deliver these cars and their contents to the terminal association was just as imperative as the obligation to carry them safely, and until he made such a delivery he held this property as a carrier."

On October 20, 1894, the Carr, Ryder & Engler Company, a corporation of Dubuque, Iowa, delivered to the Chicago, Milwaukee & St. Paul Railway Company a quantity of doors, sashes, and blinds, loaded in a car numbered 1,004, which belonged to the Rock Island & Peoria Railway Company. This freight was consigned, by way of

East St. Louis, to the May & Thomas Hardware Company, Birmingham, Ala. The Chicago, Milwaukee & St. Paul Railway Company hauled this car to Rock Island, Ill., and there delivered it to the Rock Island & Peoria Railway Company. This latter company hauled the car to Peoria, and there delivered it to the Peoria & Pekin Union Railway Company. By this latter company the car was taken to Pekin, Ill., and there delivered to this appellant receiver, operating the road of the Chicago, Peoria & St. Louis Railway Company, who hauled the same to a point immediately beyond the terminus of his own rails at East St. Louis, and on the rails of the Terminal Railroad Association of St. Louis; reaching that point about 3 o'clock on the afternoon of October 28, 1894. Servants of the Terminal Railroad Association of St. Louis, in the usual course of their employment by that company, then hauled the car to a certain customary halting place on the premises of their employer; using for the purpose an engine which belonged to their employer. Here they left said car stationary till the evening of that day, when it was destroyed by fire. In the usual course of business the terminal association, after obtaining from the receiver a waybill or memorandum indicating the ultimate destination of said car, would have hauled the same over its own rails in East St. Louis, or over rails subject to its control for that purpose, and delivered the same to a carrier on whose line the transit south was to continue. When the initial carrier, the Chicago, Milwaukee & St. Paul Railway Company, received this car, it gave a receipt to the shipper, containing certain terms and conditions expressly applicable to the transit over its own line. Each intermediate and connecting carrier took the car, not by virtue of any express contract with the shipper or consignee, but of its legal obligation as a carrier to accept and carry, and safely deliver at the end of its line to the next succeeding carrier. The appellant here is not liable for the loss of the car by any express contract with the shipper or consignee. From the standpoint of the shipper or consignee of car 1,004, the terminal association was a connecting carrier to haul the car from the terminus of appellant's rails to the point in or near East St. Louis whence the next succeeding carrier would take it south. Appellant was bound for the safety of the car until it went into the care of the terminal association. Appellant was also required to indicate to the terminal association the destination, and possibly the route selected south from East St. Louis. This information would be given by means of a memorandum called a "waybill." The strong contention by appellees is that, because no waybill was tendered by appellant to the terminal association before the destruction of the car, appellant must be deemed in possession at the time of the loss; in other words, that the terminal association could not be treated as in possession until it had received the waybill. The terminal association, as said, in fact took, and at the time of the loss had, the custody and care of the property. So far as appears, the haul over its tracks from the point where appellant's servants parted from the car to the point where the loss occurred, was a portion of the transit to be made, in any case, no matter what the ultimate destination of the car might be. For the purpose of moving the car thus far, the

information as to the ultimate destination which a waybill would have given was not needed. It does not appear that the lack of such information contributed in any way to the loss. It does appear that, in the peculiar carrying business conducted by the terminal association, the car in question would remain for a time stationary, and thereafter be hauled, probably with other cars grouped for the purpose, to the starting place of the carrier who was to take it south. Information as to the ultimate destination and route had not as yet been actually imparted by appellant to the terminal association. But the latter was content for the time being to treat such information then in the possession of appellant as sufficiently available to itself. The theory that appellant remained constructively bailee for carriage, it is fair to say, is urged in connection with a document showing certain contract relations between appellant and the terminal association. The first, fourth, and fifth sections of that document have been quoted in the opinion of the presiding circuit judge. The preamble is in words following:

"Whereas, the party of the first part undertakes to give the party of the second part terminal facilities at East St. Louis, Illinois, for the handling of its trains, care of its engines and cars, and the handling and care of its freight, under the following terms and conditions," etc.

The second and third sections and the last paragraph, being the remainder of the contract in question, are quoted below:

"Second. Cars made 'bad order' by and during the making up and breaking up of trains of the party of the second part to be repaired by the party of the second part, and the party of the second part shall furnish its own car inspectors. All cars made 'bad order' outside of the yards set aside for the use of the party of the second part shall be repaired by the party causing the damage. Third. For all loads to and from the National Stock Yards, the party of the second part is to pay the party of the first part one (1) dollar per car in and out, inclusive of the charge for making up and breaking up of trains, but not the trackage charge at National Stock Yards. This contract to be in force from and after the 1st day of August, 1892, and to continue for six months from that date, and to be renewed from time to time, as desired, at the expiration thereof, if satisfactory to both parties."

No yards, nor any special place or territory in any yards, were "set aside" by the terminal association "for the use of" the receiver, in the sense that he exercised any dominion over, or had any possessory right to, the same. The servants of the terminal association may have been accustomed to haul cars from the receiver's road to some special territory in the yards of the terminal association, and that territory may for the time being have been "the yards set aside for the use of" the receiver, within the sense of the second section of the contract. But said servants did not do this by any direction from the receiver; nor was any right in him to direct or control them, or to designate the place on the grounds or rails of the terminal association where any car received from his road should be at any given time, in any way recognized. This was the construction given to the contract and acted on by the parties. The document in question was not a conveyance. I do not find in it any transfer of any estate in its grounds or tracks, or any part thereof, or of any possessory interest in its engines, or control over its servants, from the

terminal association to the receiver. That the receiver had no such interest or estate is more obvious here than that in *Pratt v. Railway Co.*, cited below, the Grand Trunk Railway Company had no proprietorship of any kind over any part of the station house of the Michigan Central Railway Company. The fifth paragraph of the contract apparently licenses the receiver to enter the premises of the terminal association to look after such of his engines as may be there for the time being. But the receiver had no possessory estate of any sort in any part of the property of the terminal association.

A shipper who sends freight over a given line of road, whether operated by a single carrier, or by independent and connecting carriers, has the right to needful terminal facilities for unloading his goods. In paying the freight charge, he pays for such facilities, if in his case they are needed. But what carrier provides them is, from his standpoint, an immaterial matter. If the goods are carried to the neighborhood of the place of destination by one carrier, and the terminal facilities made use of there to haul the goods from the terminus of such carrier's rails to the place of destination, or to a new starting place for further transit, are provided by another, the freight charge to the shipper will be the same for the two as if both the road of the first carrier, and the property, rails, fixtures, and equipment of the second, belonged to a single carrier. Assuming that the rails of this receiver terminated at a point in East St. Louis, but that at this point they connected with the rails of the terminal association, and that the latter company owned or possessed terminal facilities, and a system of what may be called intramural roads, by which it hauled cars to points in St. Louis, and to the termini in and about St. Louis or East St. Louis of the roads of various other carriers leading from these cities in different directions, and that the terminal association was in the business of receiving and hauling freight over its lines to other lines, and to various points of ultimate destination in the neighborhood, then the terminal association would be a connecting carrier, and would be subject to all rules of law governing that business. The case of *Walker v. Keenan*, 34 U. S. App. 691, 19 C. C. A. 668, and 73 Fed. 755, concerned the matter of terminal facilities. Counsel for the defeated party in that case made application to the supreme court of the United States for a writ of certiorari. The sole matter of controversy was the true meaning and significance of the Covington Stock Yards Case, here called to our attention by appellees' counsel, and referred to below in this opinion. The certiorari was denied. 164 U. S. 706, 17 Sup. Ct. 1002. A contract between this appellant and the terminal association regulating the charges which the terminal association might receive for the business done by it on its own road is nothing more than a division of the freight charge between the two connecting carriers. As said above, the shipper pays no more than if the appellant had himself owned and operated the lines of the terminal association. Such a contract could not interfere with or modify the legal obligation of either carrier to a shipper whose goods are handled successively by both. Neither appellant nor the terminal association could evade or alter any legal obligation to a third party by any contract between themselves. If

the terminal association had alienated to appellant an actual ownership or possessory right over that portion of its tracks where the cars in controversy were destroyed, and such a control over its employés and engines that said employés when engaged in handling the cars in question were the servants of appellant, and the engine used by them his engine for the time being, the case would be different. On this hypothesis the tracks where the cars were destroyed would have been appellant's tracks, the employés who hauled the cars to that point his servants, the engines used by them his engines. He would have continued to be the bailee of the property, and the matter of waybills or junction reports would have signified nothing. But in my judgment, as said, the contract in question had no force as of alienation by the terminal association to appellant of any possessory right, interest, or estate in or over any property of the former company, or of any control over its servants. Neither the relation of lessor and lessee, nor that of licensor and licensee, existed between these parties, as resulting from said contract, so far as it concerned the cars and contents in question.

In the Covington Stock Yards Case, 139 U. S. 128, 11 Sup. Ct. 461, it was ruled, in effect, that a carrier bringing cattle to a consignee who had provided himself with structures connecting his yards with the railroad track, whereby cattle might be unloaded directly from the cars into his yards, could not refuse to unload the cattle of such consignee into the yards, and by means of the appliances provided by him, for the mere purpose of compelling him to pay a terminal fee at the cattle yards provided by the company, or provided by an independent corporation. This case, as I conceive, has not here the application and significance suggested by counsel for appellees. Of the cars in question, one was to go to Birmingham, Ala.; the others, loaded with barley, to different points in and about St. Louis, as directed by the consignees. Appellant did not engage to furnish unloading facilities for these cars. He was under no obligation to these appellees to provide terminal facilities for unloading. He handled the cars and freight as an entirety. So far as concerns any one of the cars here in question, when the terminal association took possession the appellant, as a carrier or bailee, no longer had any control. No one of these cars would again come into his custody, unless the owner of such car, or of the property therein contained, should see fit to reship the same back over his road. Appellant had brought the cars in controversy safely to the end of his line, and the terminal association had hauled them over its tracks to the place of loss. Appellant had ceased to be bailee of these cars, or any of them, and the terminal association had become such bailee. The terminal association had voluntarily accepted all these cars from appellant, knowing them to be at the time of such acceptance in transit. They were upon the tracks of that company, and would be moved thereafter by that company, by its servants using its engines, and over its tracks, or over tracks under its control for that purpose. It matters not that the information upon which the latter company would act in the further transit of car 1,004 was still to come from appellant, or that the information touching the different points in St. Louis where the cars

of barley were wanted by the consignees might also come through appellant. Ultimate shipping directions, as between appellant and the terminal association, were regulated by an understood course of dealing between them. Such a car, for instance, as 1,004, would in any case, and by reason of the peculiar character of the carrying business conducted by the terminal association, remain for a time stationary on its premises. It mattered not whether the ultimate shipping directions were contemporaneous with the delivery, or some hours later. Following the custom which had prevailed between the two carriers, appellant had not at the time of the loss sent the ultimate shipping directions. But for the destruction of this car, appellant would have given the shipping directions within ample time to suit the convenience of the terminal association in moving the car on to the starting place of the next succeeding carrier. Such shipping directions as appellant was able to give concerning any of these cars were at all times available to the terminal association. Concerning some of the cars consigned to parties in St. Louis, the evidence seems to show that by arrangement between the consignees and the terminal association the place on the premises of the company where the loss occurred might be, or might become, the place of final destination.

As between an intermediate and a connecting carrier, that one, I take it, which was in fact bailee of the goods when the loss occurred, is answerable to the owner. The owner is not required to work out theories of constructive possession, or of constructive nondelivery, resting on some understanding or mode of dealing between the two which he might have difficulty in finding out or proving. But the method or course of dealing whereby an intermediate carrier conveys shipping directions to a connecting carrier is a different matter. It is due to the owner that such directions be given, so that his goods may go on, and without needless delay. If this requirement be answered, I do not see how the owner is concerned with the method or custom of dealing on that matter which the two carriers find convenient. As between the owner or shipper and the initial carrier, goods are not in transit until the destination has been made known, so that the transit may commence. But, when goods are once in transit, then, barring exceptional circumstances not necessary to the discussion, they remain in transit until the final destination is reached, and some one carrier in the line of connecting carriers is always subject to the obligations of a bailee for carriage. A connecting carrier may receive and load into his own cars goods which he knows are to be carried by him, and thereafter take from the preceding carrier the shipping directions. He may even carry such goods to a specified point on his own road, to which he knows they must be carried in any event, and there receive the shipping directions. If he be content with such a course of dealing between himself and the previous carrier on the matter of shipping directions, I do not see why he did not become bailee for carriage when he received the goods, why the delivery by the preceding carrier was not then complete, or how the owner could sustain any hurt from such method of dealing between the two carriers. In *Pratt v. Railway Co.*, 95 U. S. 43, the goods had been shipped from Liverpool to St. Louis. The packages were marked,

"P. & F., St. Louis." The goods were carried by the defendant, the Grand Trunk Railway Company, from Montreal to Detroit, and there they were destroyed by fire. On a state of facts as quoted in full below, delivery to the connecting carrier, the Michigan Central Railroad Company, was predicated, and the defendant held clear of liability:

"At the time the fire occurred the defendant had no freight room or depot at Detroit, except a single apartment in the freight depot of the Michigan Central Railroad Company. Said depot was a building several hundred feet in length, and some three or four hundred feet in width, and was all under one roof. It was divided into sections or apartments, without any partition wall between them. There was a railway track in the center of the building, upon which cars were run into the building, to be loaded with freight. The only use which defendant had of said section was for the deposit of all goods and property which came over its road, or was delivered for shipment over it. This section, in common with the rest of the building, was under the control and supervision of the Michigan Central Railroad Company, as hereinafter mentioned. The defendant employed in this section two men, who checked freight which came into it. All freight which came into the section was handled, exclusively by the employés of the Michigan Central Railroad Company, for which, as well as for the use of said section, said defendant paid said company a fixed compensation per hundredweight. Goods which came into the section from defendant's road, destined over the road of the Michigan Central Railroad Company, were at the time of unloading from defendant's cars deposited by said employés of the Michigan Central Railroad Company in a certain place in said section, from which they were loaded into the cars of said latter company by said employés when they were ready to receive them, and after they were so placed the defendant's employés did not further handle said goods. Whenever the agent of the Michigan Central Railroad Company would see any goods deposited in the section of said freight building set apart for the use of the defendant, destined over the line of said Central Railroad, he would call upon the agent of the defendant in said freight building, and from a waybill exhibited to him by said agent he would take a list of said goods, and would then, also, for the first time, learn their ultimate place of destination, together with the amount of freight charges due thereon. That from the information thus obtained from said waybill in the hands of the defendant's agent a waybill would be made out by the Michigan Central Railroad Company for the transportation of said goods over its line of railway, and not before. These goods were on the 17th of October, 1865, taken from the cars and deposited in the apartment of said building used as aforesaid by the defendant, in the place assigned as aforesaid for goods so destined. At the time the goods in question were forwarded from Montreal, in accordance with the usage in such cases, a waybill was then made out in duplicate, on which was entered a list of said goods, the names of the consignees, the place to which the goods were consigned, and the amount of charges against them from Liverpool to Detroit. One of these waybills was given to the conductor who had charge of the train containing the goods, and the other was forwarded to the agent of the defendant in Detroit. On arrival of the goods at Detroit the conductor delivered his copy of said waybill to the checking clerk of defendant in said section, from which said clerk checked said goods from the cars into said section. It was the practice of the Michigan Central Railroad Company before forwarding such goods to take from said waybill in the custody of said checking clerk, in the manner aforesaid, the place of destination and a list of said goods, and the amount of accumulated charges, and to collect the same, together with its own charges, of the connecting carrier."

It will be seen from the foregoing statement that on the course of dealing between the two carriers shipping directions had not been received by the connecting carrier. The court mentions the mark on the goods, but not as a controlling factor in the decision. The Michigan Central Railroad Company did not look at the marks on the goods for the shipping directions upon which it acted. Under the

mode of dealing between the two carriers, the case was the same as though there had been no marks on the packages. The goods were on the platform of the connecting carrier at the time of the loss. The defendant did not own or have any possessory right over that portion of the connecting carrier's station house. Defendant's servants were not privileged either to unload the goods there, or to handle the goods afterwards. The servants of the connecting carrier placed all goods which were to be forwarded, as identified by defendant's checking clerk, at a particular locality on the platform in question. The defendant ceased to be, and the connecting carrier became, the bailee of the goods; and this before the shipping directions had been given by the one carrier to the other according to the understood mode of dealing between them. This was a case in which the defendant did not own or possess the unloading platform. If the defendant had owned or possessed that section of the station where the goods were unloaded, the mere placing the goods in controversy at a particular locality on the platform, from which the servants of the connecting carrier would afterwards, without special license from the defendant, take them, would not have changed the custody of such goods. The law upon this point is clear. Nor would the connecting carrier have become bailee, even if its agent had received the shipping directions before the destruction of the goods. The fact that the goods were still in the custody of the defendant would, from the standpoint of the shipper, have determined the matter. I may add that the Grand Trunk Railway Company had no terminal (that is to say, unloading) facilities at Detroit, so far as concerned the owner of the goods in question. The section of the station in which the freight of the Grand Trunk Railway Company was unloaded was owned and possessed by the connecting carrier. In the case at bar the connecting carrier not only took exclusive possession of the cars in controversy at the terminus of appellant's rails, but hauled them to a point on its own rails to which appellant had, neither in law nor by contract, even a right of access. In *Conkey v. Railway Co.*, 31 Wis. 619, the defendant carried goods marked with the name of the consignee, and with the place of destination, "Preston, Minn., via La Crosse & Lanesboro," from Milwaukee to La Crosse, and there unloaded the same into its own station or freight house. From the latter point the goods were to be taken by the connecting carrier, the Southern Minnesota Railroad Company. These goods were deposited upon a certain portion of defendant's premises, from which, according to the course of business between the two carriers, the connecting carrier would take them without further notice or request. So far as appeared, the connecting carrier, knowing that the goods so placed were for transit over its road, looked only to the marks on such goods for further shipping directions. The connecting carrier failed to remove the goods in question, and they were destroyed by fire. The court ruled that defendant was still the bailee for carriage, and so answerable to the owner for the loss. In this case there was no lack of shipping directions, and on the course of dealing between the two carriers the defendant would not again have handled the goods. But they were still *on defendant's premises*. The custody or possession in fact had not

passed to the connecting carrier. In *Mt. Vernon Co. v. Alabama G. S. R. Co.*, 92 Ala. 296, 8 South. 687, the place of junction between the connecting carriers was Attalla. The car in question was laden with cotton brought to Attalla over defendant's road, and there placed by defendant's servants on a side track belonging to the connecting carrier, whence the latter was expected to move it on towards the place of ultimate destination. No notice of this was given to the connecting carrier, and the car while so placed was destroyed by fire. Defendant undertook unsuccessfully to prove that, by a course of dealing between itself and the connecting carrier, the latter was accustomed to receive on said side track, and haul over its rails to the Chattanooga Compress, cars laden with cotton, and there await the waybill, or ultimate shipping directions. The court was evidently of opinion that, if the car in question had been so taken and hauled to the Chattanooga Compress, it would have been delivered, but suggested that such a course of dealing would have been tantamount to a shipping direction to the connecting carrier to haul the car as far, at least, as the Chattanooga Compress. So in the case at bar the terminal association knew that each of the cars in controversy was to be hauled over its own rails, in any case, as far as to the place of loss. For that much of the transit over the rails of the terminal association no special shipping directions were needed; and whether that company received, before or after the haul to the place of loss, the waybill indicating the ultimate destination of the car, was, on its peculiar method of business, and course of dealing with appellant, an immaterial matter. From the ruling of this court that appellant must be held for the loss of the car numbered 1,004, consigned to Birmingham, I dissent. I concur in the conclusion that the decree against appellant as to the barley and the destroyed cars be reversed.

It is ordered by the court that the decree in case 454 be affirmed, and that the decrees in the other cases numbered 442, 452, and 453, in favor, respectively, of the Chicago, Milwaukee & St. Paul Railway Company, Jacob Rau, and the Hunting Elevator Company, be reversed, and the causes remanded, with direction in each case to dismiss the petition.

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SMITH et al. v. TAGGART.

(Circuit Court of Appeals, Eighth Circuit. March 21, 1898.)

No. 992.

1. MUTUAL BENEFIT ASSOCIATION—INSOLVENCY—SEVERAL RECEIVERS—CONFLICT OF JURISDICTION.

A mutual benefit association, which was engaged in collecting money in small monthly installments from its members, who resided in many different states, and in investing the same for their joint benefit for future distribution, became insolvent before the period of distribution arrived; and in a proceeding to liquidate its affairs, which was commenced in New Hampshire, where the association was incorporated, a statutory assignee of its property and assets was duly appointed. In a proceeding subsequently begun in Colorado against the association, a receiver of its effects there located was appointed; and in such proceeding the New

Hampshire assignee intervened, and prayed that the Colorado assets might be transmitted to him for equal distribution among all the members of the association. *Held* that, from the nature of the association, a contract should be implied among its members, that, in the event of the insolvency of the association, all its assets, after debts due to nonmembers were paid, should be divided ratably among the members according to the several contributions to the common fund, without reference to their place of residence.

**2. SAME—DISTRIBUTION OF ASSETS.**

That the relation existing between the members of such association was different from that existing between the creditors of a decedent, and that the rule in force in some states, requiring the creditors of a decedent there residing to be paid in full out of the assets found in such states before transmitting them to the domiciliary administrator, was not applicable to the case in hand.

**3. SAME.**

That, without reference to their place of residence, all members of the association were entitled to participate ratably in the distribution of its assets according to their several contributions to the capital of the association.

**4. SAME—TRANSMISSION OF ASSETS.**

That, for the purpose of making such distribution, all the assets should be placed within the control of a single court, and that comity required such distribution to be made by the New Hampshire court, where the first proceeding to liquidate the affairs of the association was instituted.

**5. SAME.**

That a court of equity sitting in Colorado, and having charge of assets there located, could lawfully direct its receiver to transmit the same to the New Hampshire assignee.

**Appeal from the Circuit Court of the United States for the District of Colorado.**

The Granite State Provident Association (hereafter termed the "Association") is a corporation organized under the laws of New Hampshire, having its principal office at Manchester, in that state, for the purpose of doing an investment and loan business. It was quite a large concern, and, while it was doing business, it established agencies in about 20 states in the Union; among others, in the state of Colorado. The business of the Association was transacted by collecting money from its members in many small installments, for a considerable time, under a promise to return a greater amount at a time designated in the future. Its charter provided that it should carry on business "solely on the mutual plan." The manner in which its business was actually transacted was as follows: A person subscribed for stock in the Association, each share having a par value of \$200. He paid to the Association \$1 per month per share until the stock became worth par, or matured. These payments of \$1 per month per share, with the accretions thereto and profits, it was estimated, would make the shares worth \$200 at the expiration of 8 years, or 96 months. Such was the inducement held out in the prospectus of the company to induce persons to become members of the Association or shareholders. There were two classes of members in the Association: First, those who made use of their membership as a means of borrowing money; and, second, those who simply invested in the stock as a means of making a profit upon small savings. By far the greater number of the members belonged to the latter class. All dues to the Association were made payable at the home office in the city of Manchester, N. H., and it was agreed that the construction of all contracts of membership with the Association should be governed by the laws of New Hampshire. In March, 1896, the bank commissioners of New Hampshire filed a petition in the supreme court of that state, in accordance with a law of the state, alleging that they had made an examination of the affairs of the Association, and that the public safety, in their judgment, required that it should suspend business, and that its affairs should be liquidated and wound up. The supreme court of New Hampshire, on such petition, appointed David A. Taggart, the

appellee, statutory assignee of the Association; his powers and duties being such as are usually devolved upon a receiver appointed by a court to liquidate the affairs of an insolvent corporation. Subsequently, two stockholders of the Association, who resided in the state of Colorado, filed a bill in the district court of Pueblo county, Colo., praying for the appointment of a receiver in the latter state. In compliance with such application, the district court of Pueblo county appointed Albert L. Murray as receiver of the Association for the state of Colorado, and the appointee is still acting in that capacity. Subsequently, by direction of the supreme court of New Hampshire, it was ordered that Taggart, the statutory assignee, transmit and turn over to the Colorado receiver, and to the local receivers who might be appointed in other states, the choses in action in his possession that were secured by property located in the various foreign jurisdictions. This order was evidently made by the New Hampshire court as a matter of comity, and to enable the various local receivers in foreign states to more easily and speedily collect the assets of the Association there located. In October, 1896, J. W. Smith and 64 other persons, who are the appellants, filed an intervening petition in the district court of Pueblo county, alleging, in substance, that they were stockholders of the Association resident in Colorado; that they had subscribed to its stock, and paid various amounts of money thereon; and praying that Murray, the local receiver, should hold the funds realized from collections made in Colorado for distribution among the Colorado stockholders. This petition proceeded upon the theory that, as the association had ceased to do business, the various stockholders residing in the state of Colorado were entitled to judgment against the corporation for the several amounts of money which they had respectively paid on their stock. Thereafter David A. Taggart, by leave of court, filed an intervening petition in the district court in said cause, which he prayed might be taken as an answer to the intervening petition filed by the Colorado stockholders, and also as a cross petition. He prayed, in substance, in such cross petition, that the fund realized by the local receiver in winding up the affairs of the Association in the state of Colorado, be turned over to him, to the end that all of the funds of the Association, when collected, might be ratably distributed among all the members of the Association. The case was subsequently removed to the circuit court of the United States for the district of Colorado, at the instance of the foreign assignee. In the federal court the case appears to have been heard upon the two intervening petitions heretofore mentioned, and certain exhibits which were offered in support thereof. At the conclusion of such hearing, the circuit court ordered and decreed that the funds collected by Albert L. Murray, the Colorado assignee of the Association, be applied and distributed in like manner as all other funds realized in winding up the Association, and, to that end, that the Colorado receiver be directed, after paying the expenses of his trust, to pay over the funds in his hands to David A. Taggart, the statutory assignee, to be by him accounted for in the supreme court of New Hampshire, for distribution among all the stockholders of the Association ratably. The case comes to this court on an appeal from such decree, which was taken by J. W. Smith and other Colorado stockholders.

Henry B. Babb, for appellants.

Charles E. Gast, for appellee.

Before SANBORN and THAYER, Circuit Judges, and PHILIPS, District Judge.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

To obtain a reversal of the decree of the circuit court directing the transmission of the Colorado assets to the domiciliary assignee in New Hampshire, the appellants invoke the rule which is ordinarily applied where the estate of a decedent is being administered at the place of his domicile, and also in a foreign jurisdiction. They assert that a foreign administrator, unless a statute of the state

otherwise directs, is required to pay all debts proven against the estate in the foreign jurisdiction, out of the assets in his hands, before transmitting them, or any part thereof, to the domiciliary administrator, and that the same rule should be applied to the case at bar. We consider this rule inapplicable to the case in hand, because of the different relations which exist between the creditors of a deceased person and the members of an organization like the Granite State Provident Association, when it becomes insolvent. The members of the Association, under and by virtue of its charter and by-laws, were engaged in a joint or mutual enterprise. They shared alike in the profits of the Association, in proportion to the number of shares which they respectively owned, and they alike incurred the risk of loss incident to bad management or other causes. With respect to the Association, they occupied the same relation which stockholders bear to a corporation organized for business purposes. The money which they paid in under the name of "monthly dues" went to create the capital of the Association, which, by judicious management, was expected to make each share worth \$200 at the expiration of 96 months. It cannot be said, we think, that the moneys paid to the Association in the shape of monthly dues constituted a loan to the Association in the ordinary sense; but they were moneys intrusted to it as to an agent or trustee, to be by it invested and accumulated for the common benefit of all the members of the Association, and to be eventually divided between them according to their several contributions to the common fund. Such being the nature of the Association and the purpose of its organization, we can perceive no just or reasonable ground upon which it can be held that, when the Association became insolvent, the residence or citizenship of a member determined the amount that he should receive in the distribution of the corporate assets. The share that each member is entitled to in such distribution is governed and determined by the contract existing between the members, rather than by their places of residence; and the contract which must be implied from the very nature of the organization is that, if anything happened to the Association,—if the venture proved unsuccessful,—the assets of the Association, after debts due to nonmembers had been paid, should be divided among the members according to their several contributions to the common fund. When the effects of a deceased person are administered in different states, no contractual relations exist between the different creditors of the estate. Each state, therefore, is at liberty to pursue its own policy with respect to assets found within the state. A state may provide that home creditors shall be paid in full out of local assets, before any are transmitted to the foreign administrator, or it may adopt a more liberal view, and make regulations which will secure a pro rata distribution of the assets of the estate among all creditors of the same class, both foreign and domestic. We think that the rule which governs in such cases has no application to the case at bar. Inasmuch, then, as a contract must be implied from the nature of the Association requiring its funds to be distributed ratably among all the members according to

their several contributions; it is manifest that such a distribution can be more conveniently and speedily made by a single court than by numerous courts sitting in different jurisdictions; and the rule of comity which prevails among courts, in our judgment, requires that the duty of making the distribution should be devolved upon the New Hampshire court, that being the court in which a suit to liquidate the affairs of the insolvent company was first filed. Applying the rules of comity, there can be no doubt, we think, of the right and duty of a court of equity which has acquired possession of a part of the assets to direct them to be transmitted to the court of primary jurisdiction, to the end that they may be there distributed ratably among all the members of the Association, in proportion to their contributions to the capital of the corporation.

The question which is presented by this record is not new, but has been considered at length and decided by the court of last resort of several states. It was held by the supreme judicial court of Massachusetts, in an elaborate opinion, in the case of *Buswell v. Supreme Sitting*, 36 N. E. 1065, that where a mutual benefit association, with a reserve fund held by the subordinate lodges in different states, but owned and controlled by the supreme lodge, became insolvent, and a receiver was appointed with power to collect the assets wherever found, and to wind up the association, ancillary receivers of the several branches should be ordered to transmit such reserve fund to the general receiver. The same view has been taken in the states of New Jersey, Louisiana, and Michigan (*Ware v. Supreme Sitting* [N. J. Ch.] 28 Atl. 1041; *Durward v. Jewett* [La.] 15 South. 386; *Baldwin v. Hosmer* [Mich.] 59 N. W. 432); and by several other courts as well (*Failey v. Talbee*, 55 Fed. 892; *Parsons v. Insurance Co.*, 31 Fed. 305; *Fry v. Insurance Co.*, Id. 197). See, also, *Relfe v. Rundell*, 103 U. S. 222. As these authorities are also in point on all the other questions which have been raised and discussed by counsel for the appellants, we deem it unnecessary to pursue the subject at greater length. It is to be presumed, of course, that the New Hampshire court will distribute the assets of the Association in the manner hereinbefore indicated; that is to say, among all the members in proportion to their contributions to the common fund. This application was made by the foreign statutory assignee, for the reason that they ought to be so distributed, and that a distribution such as ought to be made could not be made unless the assets were concentrated in the hands of the domiciliary assignee. We think, therefore, that the circuit court very properly declined to require any pledge to be given as to the method of distribution, as a condition precedent to the transmission of the Colorado assets to the New Hampshire assignee. The decree of the circuit court is therefore affirmed.

## JACOBUS v. UNITED STATES.

(Circuit Court, S. D. New York. May 9, 1898.)

## 1. UNITED STATES MARSHAL—FEES—TRANSPORTING PRISONERS.

Under Rev. St. § 829, a United States marshal for the Southern district of New York, for transporting prisoners to prisons within the state of New York, is entitled to fees at the rate of 10 cents per mile for himself or his deputies, and for each prisoner or necessary guard. See *McMahon v. U. S.*, 17 Sup. Ct. 28, 164 U. S. 81.

## 2. SAME—DEPORTATION OF CHINESE.

For transporting to the frontier or seaboard Chinese persons unlawfully within the United States, marshals are not entitled to fees, under Rev. St. § 829, at the rate of either 10 cents or 6 cents per mile; the service is a special one, and, under the acts making appropriations for Chinese exclusion, only actual expenses are allowed.

## 3. SAME—SERVING PROCESS.

Where several distinct lots of articles, alleged to have been illegally imported, are grouped in a single libel in rem, marshals, for serving the warrant of seizure under such libel, are entitled to fees for one service only, and may not charge a separate fee for service against each separate lot. The same is true, also, in respect to the service of a monition and warrant of destruction, issued under the libel.

This was an action by John W. Jacobus against the United States, which was brought under the provisions of section 2 of the act of March 3, 1887 (24 Stat. 505), known as the "Tucker Act."

Henry L. Stimson and John C. Breckenridge, for petitioner.  
D. Frank Lloyd, Asst. U. S. Atty.

SHIPMAN, Circuit Judge. The following findings of fact have been agreed to by the respective parties, and are found to be true by the court:

(1) That the petitioner herein is now, and at all the times hereinafter mentioned was, a citizen of the United States, and a resident of the city, county, and state of New York.

(2) That from January 13, 1890, to July 25, 1894, he was the duly appointed, qualified, and acting United States marshal for the Southern district of New York, and that during said time he, as such marshal, performed services and incurred expenses in behalf of the United States, and thereby earned and became entitled to receive the fees and allowances provided by law.

(3) That during the said period above named the petitioner duly rendered his official accounts, with the vouchers and items thereof, to the district court of the United States for the said district, and duly proved to the satisfaction of the said court, in the presence of the district attorney, in the manner required by Act Feb. 22, 1875, c. 95, § 1, that the services therein charged by your petitioner had been actually and necessarily performed, and that the disbursements therein charged had been fully paid in lawful money, and the said accounts were thereupon duly approved by the said court in accordance with the provisions of the said act, and orders duly entered of record to that effect.

(4) The services described in Schedules A, B, and C of the petition were actually performed by the marshal, as therein set forth.

(5) Thereafter the accounts containing the said charges, including the fees charged in Schedules A and B of the petition, were duly presented to the department of the treasury of the United States for allowance and settlement thereof, and the fees now claimed in said Schedules A and B were each and all of them disallowed by the accounting officers of said department, on the sole ground that for said services the marshal was entitled only to be reimbursed for his actual expenses, and was not entitled to receive fees or mileage for said services. In accepting the allowance of said expenses, the petitioner expressly

notified the accounting officers in each case that he did not waive his right to the fees so charged in his account.

(6) The difference between the amount of fees charged in Schedule A (at the rate of 10 cents a mile, in going only, for each prisoner, each deputy, and each necessary guard) and the amount allowed as expenses in lieu of said fees by the accounting officers, is \$5,378.41. No part of this sum has been allowed or paid by the United States to the petitioner.

(7) The following are the services charged for in Schedule B of the petitioner: The Chinese persons therein mentioned were, on or about the dates therein set forth, brought before a commissioner of the United States circuit court, or a judge of said court, for the Southern district of New York, at the city of New York, upon complaint that they were not entitled to remain in the United States; and the said commissioner or judge, in accordance with the laws then in force, found and adjudged that the said Chinese persons were not lawfully entitled to remain in the United States. Thereupon the said commissioner or judge ordered that the said Chinese persons be removed from the United States. The dates of said judgments and orders for removal are as follows: As to two of the Chinese, June 14, 1892, and February 23, 1893; as to two others, and as to the remaining two, May 2, 1894. Thereupon, on or about the dates mentioned in said Schedule B, and in accordance with said judgments and orders, the petitioner transported the said six Chinese persons from the city of New York to the city of San Francisco, Cal., and there duly delivered them to the collector of customs at said port of San Francisco, for deportation to China. For this service petitioner now claims the sum of \$2,095.40, this amount being the difference between fees amounting to \$4,601.60, at the rate of 10 cents a mile for travel, in going only, from New York to San Francisco, for each Chinese person, each deputy, and each necessary guard, and the \$2,506.20 allowed him by the accounting officers as reimbursement of his actual expenses in performing the said services. The distance from New York to San Francisco is 3,266 miles, and the mileage charged by the marshal, as above mentioned, for each of the above Chinamen (exclusive of the mileage for deputies and guards), was \$326.60, amounting to \$1,959.60 for all six. The actual cost of the transportation and subsistence of said six Chinamen (exclusive of the transportation and subsistence of the deputies and guards) was \$689.96. The marshal also included in the amount set forth in Schedule B of the petition a charge of six cents a mile for travel, in going only, to serve a warrant of deportation for each of the above six Chinese persons, amounting in each case to \$195.96, and in all to \$1,175.76. The following is the form of the warrant thus served by the marshal upon the collector of customs of San Francisco, by delivering to him a copy thereof, together with the receipt of the said collector for the said Chinese persons attached to or indorsed upon the original warrant when returned by the marshal to the commissioner or judge who issued it:

"The President of the United States of America, to the Marshal of the United States for the Southern District of New York, and to his Deputies, or Either of Them: Whereas, complaint upon oath was duly made before me, a commissioner of the circuit court of the United States for the Southern district of New York, charging one Ung Seck, a Chinese person, or person of Chinese descent, with being then and there unlawfully within the United States, and the said Ung Seck having been arrested and brought before me by the marshal of the United States for said district upon a warrant issued by me upon the said complaint, and it appearing upon an examination before me, by the evidence presented, that said Ung Seck is a Chinese person, or a person of Chinese descent, and the said Ung Seck having failed to establish to my satisfaction his lawful right to remain in the United States; and whereas, the said Ung Seck having failed to make it appear to me that he is a subject or citizen of some other country: Now, therefore, you and each of you are hereby commanded, in the name of the president of the United States, to remove the said Ung Seck from the United States to China as provided for by law.

"Witness my hand and seal this 23d day of February, 1893.

"[Signed]

Samuel H. Lyman,

"[Seal.]

"Commissioner of the Circuit Court of the United States  
for the Southern District of New York."

Indorsed:

"Warrant of Deportation.

"I hereby depute C. H. Jacobus, A. C. Kennedy & S. Hildreth, or either of them, to execute the within warrant.

"J. W. Jacobus, U. S. Marshal, S. D. N. Y."

"Office of the Collector of Customs, Port of San Francisco.

"March 20, 1893.

"Received of Chas. H. Jacobus, U. S. deputy marshal, Southern district of New York, the following named Chinese person found unlawfully in the United States, and ordered deported from said district to China, the country whence they came: Ung Seck; Luk Lung.

"[Signed]

T. G. Phelps, Collector of Customs."

(8) First. In the said accounts as thus approved were included charges by the marshal for taking possession, on February 11, 1891, of 65 certain lots of articles under a warrant of seizure issued to him for that purpose. Said charges thus made were at the rate of \$2 for the service of said writ upon each of said 65 lots of articles, amounting to \$130. Second. The said 65 lots of articles had been imported from various foreign countries into the United States on different dates and vessels, consigned and addressed to different persons, and had been detained by the collector of the port and collection district of New York in the course of importation. A list of the said 65 lots of articles, of the dates of importation and detention by the collector, and of the names of the persons to whom they were consigned, is attached to the complaint and affidavit of the collector in the proceedings hereinafter mentioned. Third. Service of said warrant of seizure was actually made in pursuance of certain proceedings taken against said 65 lots of articles under sections 2491 and 2492 of the Revised Statutes of the United States. Annexed hereto, as Exhibit D, are true copies of the writs and other papers used in the said proceedings, to wit, the complaint and affidavit of the collector, the warrant of seizure, the return of the marshal to said warrant, the information, the monition and the return of the marshal thereto, the decree of destruction, and the warrant of destruction and the return of the marshal thereto. Fourth. In the said accounts as thus approved were also included charges by the marshal for executing on December 14, 1891, against the said 65 lots of articles, the writ of monition above mentioned, and for attaching the said articles in obedience to said motion, and giving notice to all persons claiming the same to show cause why said articles should not be condemned, forfeited, and destroyed. Said services were actually rendered as set forth by the return of the marshal to said writ of monition, and said charges were at the rate of \$2 for the execution of said writ against each of said 65 lots of articles, amounting to \$130. Fifth. In the said accounts as thus approved were also included charges by the marshal for executing on December 31, 1891, a writ of destruction against said 65 lots of articles, and destroying the same. Said services were actually rendered as set forth in the marshal's return to said writ, and said charges were at the rate of \$2 for the execution of said writ against each of said 65 lots of articles, amounting to \$130. Sixth. Thereafter the said accounts containing the said charges were duly presented to the department of the treasury of the United States for allowance and settlement thereof, and the said charges were each and all of them disallowed by the accounting officers of said department on the sole ground that for all of the said services the marshal was entitled to but \$2 for the service and execution of the warrant to take possession, \$2 for the service and execution of the said monition, and \$2 for the service and execution of said writ of destruction, amounting to \$6 in all. Seventh. Of the said charges of \$390, made by the marshal as aforesaid, the sum of \$384 has never been settled or paid by the United States, and constitutes one of the claims for which the present action was brought.

(9) First. That in the said accounts as thus approved were also included charges made by the marshal for serving and executing on March 16, 1893, a warrant of seizure, and on June 13, 1893, a monition to attach and publish notice, and on June 27, 1893, a writ of destruction against each of 20 other lots of articles. Said 20 lots of articles had been imported from various foreign countries into the United States on different dates and vessels, consigned and addressed to different persons, and had been detained by the collector of the port

and collection district of New York at various different dates. Second. The service of said writs was actually performed as recited in said accounts, in pursuance of certain proceedings taken under and in accordance with the terms of sections 2491 and 2492 of the Revised Statutes of the United States. The said writs so executed, and the return of the marshal thereto, were similar in all respects to those executed by him on the 65 lots of articles last above mentioned, and the proceedings and papers in which said writs were issued were similar in all respects to the proceedings and papers against said 65 lots, as set forth in Exhibit D, except that such proceedings and papers related to 20 instead of 65 lots of articles. Third. The charges thus made by the marshal and approved by the said district court were for \$2 for the service of each of the said three writs upon each of the said 20 lots of articles, amounting to a total of \$120. Fourth. Thereafter the said accounts containing the said charges were duly presented to the department of the treasury of the United States for allowance and settlement thereof, and the said charges were each and all of them disallowed by the accounting officers of said department on the sole ground that for all the said services the marshal was entitled to but \$2 for the service and execution of the warrant of seizure, \$2 for the service and execution of the said monition, and \$2 for the service and execution of said writ of destruction, amounting to \$6 in all. Fifth. Of the said charges of \$120, made by the marshal as aforesaid, the sum of \$114 has never been allowed, settled, or paid by the United States, and constitutes one of the claims under which the present action was brought.

(10) First. That in the accounts as thus approved were also included charges made by the marshal for serving and executing on February 16, 1892, a warrant of seizure, and on March 10, 1893, a monition to attach and publish notice, and on May 22, 1893, a writ of destruction against each of 49 other lots of articles. Said 49 lots of articles had been imported from various foreign countries into the United States on different dates and vessels, consigned and addressed to different persons, and had been detained by the collector of the port and collection district of New York at various different dates. Second. The service of said writs was actually performed as recited in said accounts, in pursuance of certain proceedings taken under and in accordance with the terms of sections 2491 and 2492 of the Revised Statutes of the United States. The said writs so executed, and the return of the marshal thereto, were similar in all respects to those executed by him against the 65 lots of articles above mentioned, and the proceedings and papers in which said writs were issued were similar in all respects to the proceedings and papers against said other lots, copies of which are hereto annexed, marked "Exhibit D," except that such proceedings and papers related to 49 instead of 65 lots of articles. Third. The charges thus made by the marshal and approved by the said district court were for \$2 for the service of each of the said three writs upon each of the said 49 lots of articles, amounting to a total of \$294. Fourth. Thereafter the said accounts containing the said charges were duly presented to the department of the treasury of the United States for allowance and settlement thereof, and the said charges were each and all of them disallowed by the accounting officers of said department on the sole ground that for all of the said services the marshal was entitled to but \$2 for the service and execution of the warrant of seizure, \$2 for the service and execution of the said monition, and \$2 for the service and execution of said writ of destruction, amounting to \$6 in all. Fifth. Of the said charges of \$294, made by the marshal as aforesaid, the sum of \$288 has never been allowed, settled, or paid by the United States, and constitutes one of the claims under which the present action was brought.

"Exhibit D.

"Complaint and Affidavit.

"District Court of the United States for the Southern District of New York.

"To the Honorable Addison Brown, Judge of the District Court of the United States for the Southern District of New York: The complaint of James Carter, of the port and collection district of New York, in said Southern district, respectfully shows that on dates during one thousand eight hundred and ninety certain articles, being then and there articles for the prevention of conception, obscene articles, namely, sixty-five lots of articles for the prevention of conception, obscene books, cards, photographs, manf. of Ivory, etc., were imported into

the United States within said district by various parties as per schedule annexed, having been brought from various a foreign port or place, by the ship or vessel as described in schedule, contrary to the statute of the United States in such case made and provided; that said articles were then and there seized by the collector of the port and collection district of New York in the course of importation, and are now detained by him within the district aforesaid, according to law.  
James Carter."

"Southern District of New York, City and County of New York—ss.: James Carter, being duly sworn, says that the foregoing declaration or complaint is true of his own knowledge, except as to the matters therein stated on his information and belief, and that as to these matters he believes it to be true.  
"James Carter.

"Sworn to before me this 9th day of February, 1891.

"Thos. Alexander, U. S. Commissioner."

Indorsed:

"37-22.

"U. S. District Court, Southern District of New York.

"In the Matter of the Complaint of James Carter That Articles have been Imported Contrary to Sec. 2491, Revised Statutes U. S. Complaint and Affidavit to Ground Warrant.

"Hon. Edward Mitchell, U. S. Attorney.

"Filed Feby. 11, 1891."

Attached to the face of this complaint and affidavit is the following schedule:

No.	Date.	Importer.	Goods.
17,843.	Sept. 24/89.	John Keep.	1 article for prevention of conception.

Then follows a list of 65 other articles, with the numbers, dates of importation, names of importers, and description of goods.

"Warrant to Take Possession.

"The President of the United States of America to the Marshal of the United States for the Southern District of New York: It being made to appear to my satisfaction by the complaint and affidavit of James Carter, sworn to the 9th day of February, 1891, that certain obscene articles and articles for the prevention of conception, namely, sixty-five lots of articles for the prevention of conception, obscene books, cards, photographs, manufactures of Ivory, etc., imported on dates during the year one thousand eight hundred and ninety, by various parties, as per schedule annexed to said complaint and affidavit and a copy thereof annexed hereto, have been imported into the United States within the district aforesaid, contrary to the statute of the United States in such case made and provided, and that the said articles have been seized in the course of importation by the collector of the port and collection district of New York, and are now detained by him, within the district aforesaid, according to law: Now, therefore, under and by virtue of the power vested in me by the fifth section of the act of congress approved March 3, 1873, entitled 'An act for the suppression of trade in, and circulation of, obscene literature and articles of immoral use,' and the acts supplemental thereto and amendatory thereof, I, Addison Brown, Judge of the district court of the United States for the Southern district of New York, do hereby require you, by yourself or deputy, to seize and take possession of the said articles, and to safely keep the same in your possession until the further order of this court; and, as soon as you shall have taken possession of the same, to forthwith thereupon make due and immediate return thereof, and return this warrant, with report of proceedings thereon, to the district court of the United States for the Southern district of New York, as required by law.

"Witness my hand and the seal of said court, at the city of New York, this 11th day of February, one thousand eight hundred and ninety-one.

"Addison Brown,

"Judge of the District Court of the United States for the Southern District of New York.

"Attest: Saml. H. Lyman, Clerk.

"Edw. Mitchell, United States Attorney."

Indorsed:

"37-22.

"U. S. District Court, Southern District of New York.

"In the Matter of Certain Articles Imported Contrary to Sec. 3, Act March 3, 1873, and Acts Supplemental Thereto and Amendatory Thereof. Original Warrant.

"Edward Mitchell, U. S. Attorney.

"I have served the within warrant by taking possession of the articles within named, which I now hold, subject to the further order of this court.

"Dated Feb. 17, 1891.

"John W. Jacobus, U. S. Marshal.

"Filed Feby. 17-1891."

Attached to the face of the warrant of seizure is a schedule in terms the same as the one attached to the face of the complaint and affidavit.

"Information.

"District Court of the United States of America for the Southern District of New York—Of February Term in the Year One Thousand Eight Hundred and Ninety-One.

"Before the Honorable Addison Brown, the District Judge.

"On the 16th day of February, in the year one thousand eight hundred and ninety-one, comes Edward Mitchell, as the attorney of the United States for the said Southern district of New York, in a cause of seizure and forfeiture of property under revenue laws of the United States, and informs the court: That, on the several days set forth in the schedule annexed in the column headed 'Date,' Joel B. Erhardt, the then collector of customs for the port and collection district of the city of New York, seized on land the property described and set forth in the said schedule in the column headed 'Goods,' which he now has within the said Southern district of New York, as forfeited to the United States for the causes propounded in the following articles; that said goods, wares, and merchandise were then and there obscene books, papers, prints, photographs, pictures, match safes, canes, clay figures, glass articles, cigar holders, playing cards, toys, manufactures of ivory and metal, calendars, check pessaries, rubber pessary, articles for the prevention of conception, as specified in said column headed 'Goods,' and were imported into the United States in the port and collection district of New York, from foreign ports and places, contrary to the statute of the United States in such case made and provided, to wit, section 2491 of the Revised Statutes of the United States. And the said attorney of the United States, on behalf of the United States, saith that all and singular the premises are true; and that by reason thereof, and by force of the statutes in such case made and provided, the aforementioned goods, wares, and merchandise became and are forfeited to the use of the said statutes provided. Wherefore he prays that due process issue in that behalf, as well of attachment, to bring the said property within the custody of the court, as of monition, to all parties in interest, to appear on the return of such process, and duly intervene herein, by claim and plea to the premises; and, due proceedings being had thereon, that, for the causes aforesaid, the said goods, wares, and merchandise be condemned by decree of destruction, or such other disposition thereof as the court shall direct according to law.

"[Signed]

Edwd. Mitchell, U. S. Atty."

Indorsed:

"37-22.

"U. S. District Court, Southern District of New York.

"United States versus One Obscene Book and 64 Other Lots of Obscene Articles. Information of forfeiture. In Rem. S. 2,491, R. S. U. S.

"Edward Mitchell, United States Attorney, Attorney for Plaintiff.

"Due service of a copy of the within is hereby admitted.

"New York, ———, 189-.

"———, Attorney for Defendant.

"Filed Feby 16, 1891."

"Sir: You will please take notice that a ———, of which the within is a copy, was this day duly entered in the within-entitled action, in the office of the clerk of the ———.

"Dated, N. Y., ———, 189—.

"Yours, etc.,

"————, U. S. Attorney, Attorney for Plaintiff.

"To ———, Attorney for ———."

"Monition.

"Southern District of New York—ss.:

"The President of the United States of America to the Marshal of the Southern District of New York, Greeting: Whereas, an information hath been filed in the district court of the United States for the Southern district of New York on the 16th day of February, in the year of our Lord one thousand eight hundred and ninety-one, by Edward Mitchell, Esquire, U. S. district attorney, on behalf of the United States of America, against the property mentioned and described in the following schedule: [Here is annexed a schedule in terms the same as the one annexed to the complaint and affidavit, supra],—for the reasons and causes in the said information mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said property may be cited, in general and special, to answer the premises, and all proceedings being had that the said property may, for the causes in the said information mentioned, be condemned and destroyed as forfeited to the United States: You are therefore hereby commanded, as you have been heretofore commanded, to attach the said property, and to detain the same in your custody, until the further order of the court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and destroyed pursuant to the prayer of the said information, that they be and appear before the said court, to be held in and for the Southern district court of New York, on the 29th day of December, 1891, at eleven o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf; and what you shall have done on the premises, do you then and there make return thereof, together with this writ.

"Witness: The Honorable Addison Brown, Judge of the said court, at the city of New York, in the Southern district of New York, this 14th day of December, in the year of our Lord one thousand eight hundred and ninety-one, and of our independence the one hundred and sixteenth.

"Saml. H. Lyman, Clerk.

"Edward Mitchell, U. S. District Attorney."

Indorsed:

"Vol. 37, Page 22.

"Southern District of New York, United States District Court.

"The United States vs. One Obscene Book and 64 Other Lots of Obscene Articles. Alias Monition Ret'ble Dec. 29, 1891.

"Edward Mitchell, U. S. Attorney.

"Filed the 29th day of Dec., 1891."

Attached to this monition are proof of publication of notice as required by law and order of judge directing alias monition:

"In obedience to the within monition, I attached the articles therein described, on the 14th day of December, 1891, and in obedience to the annexed order have given, as appears by the annexed proof of publication, due notice to all persons claiming the same that this court will on the 29th day of December inst. (if that day shall be a day of jurisdiction; if not, on the next day of jurisdiction thereafter) proceed to the trial and condemnation thereof, should no claim be interposed for the same.

John W. Jacobus, U. S. Marshal.

"Dated Dec. 29, 1891."

"Decree of Destruction.

"At a Stated Term of the District Court of the United States of America for the Southern District of New York, held at the United States Court Rooms,

in the City of New York, in the Said District, on the — Day of December, in the Year of Our Lord One Thousand Eight Hundred and Ninety-One.

"Present: The Honorable Addison Brown, District Judge.

"The United States of America vs. One Obscene Book and Sixty-Four Other Lots of Obscene Articles. Final Decree.

"The monition issued in this cause having been heretofore returned, and the usual proclamation having been made, and the default of all persons being duly entered, it is thereupon, on motion of Edward Mitchell, Esq., attorney for the United States, ordered, sentenced, and decreed, by the court, now here, and his honor, the district judge, by virtue of the power and authority in him vested, doth hereby order, sentence, and decree, that the goods, wares, and merchandise above mentioned be, and the same accordingly are, condemned as forfeited to the United States. And upon like motion it is further ordered, sentenced, and decreed that the clerk of this court issue a writ of destruction to the marshal of the district, returnable on the first Tuesday of January next.

"Addison Brown."

Indorsed:

"Vol. 37, Page 22.

"District Court of the United States for the Southern District of New York.

"The United States of America vs. One Obscene Book and Sixty-Four Other Lots of Obscene Articles.

"Edward Mitchell, U. S. District Attorney.

"Final Decree of Condemnation and Destruction. Filed Dec. 30, 1891."

"Warrant of Destruction.

"Southern District of New York—ss.:

"The President of the United States of America to the Marshal of the Southern District of New York, Greeting: Whereas, an information was filed in the district court of the United States for the Southern district of New York on the 11 day of February, in the year of our Lord one thousand eight hundred and ninety-one, by Edward Mitchell, United States district attorney, on behalf of the United States of America, against one obscene book and 64 other lots of obscene articles, and praying that the same may be condemned as forfeited to the said United States; and whereas, the said goods, wares, and merchandise have been attached by the process issued out of the said district court in pursuance of the said information, and are now in custody by virtue thereof, and such proceedings have been thereupon had that by the definite sentence and decree of the said court in this cause, made and pronounced on the 30th day of December, one thousand eight hundred and ninety-one, the said goods, wares, and merchandise were condemned as aforesaid, and ordered to be destroyed by you, the said marshal, according to law, and that you have this writ, at a district court of the United States to be held for the Southern district of New York, on the 1st Tuesday of January, one thousand eight hundred and ninety-two: Therefore, you and the said marshal are hereby commanded to cause the said goods, wares, and merchandise so condemned and ordered to be destroyed to be destroyed in the manner and form upon the notice, and at the time and place by law required; and that you have, pursuant to the aforesaid order or decree, then and there this writ.

"Witness: The Honorable Addison Brown, judge of the said court, at the city of New York, in the Southern district of New York, this 31st day of December, in the year of our Lord one thousand eight hundred and ninety-one, and of our independence the one hundred and sixteenth.

"Sam'l H. Lyman, Clerk.

"Edward Mitchell, U. S. District Attorney."

"In obedience to the above precept, I have destroyed the goods, wares, and merchandise above described.

"Dated this Feb. 10, 1892, day of —.

"John W. Jacobus, U. S. Marshal."

Indorsed:

"Vol. 37, No. 2.

"United States District Court for the Southern District of New York.

"The United States vs. One Obscene Book and Sixty-Four Other Lots of Obscene Articles. Writ of Destruction. Returnable for the first Tuesday of January, 1892.

"Edward Mitchell, U. S. District Attorney.

"Filed the 10 day of Feby., 1892."

The conclusions of law upon the foregoing facts are as follows:

1. The petitioner is entitled to the amount of fees charged in Schedule A for the transportation of prisoners under a final sentence, from New York City to various prisons and penitentiaries in the state of New York, at the rate of 10 cents per mile for himself or his deputy, and for each prisoner and necessary guard, as provided in section 829 of the Revised Statutes. The right to this fee having been determined by the supreme court in *McMahon v. U. S.*, 164 U. S. 81, 17 Sup. Ct. 28, the government withdrew any objection to this part of the petitioner's account, amounting to the sum of \$5,278.41.

2. The petitioner is not entitled to fees for the services named in Schedule B (being for the conveyance of six Chinese persons conveyed from New York to San Francisco in pursuance of orders of deportation from a commissioner of the circuit court of the United States for the Southern district of New York) in excess of the actual expenses of such conveyance, and which actual expenses he has received. The petitioner places his right of recovery upon one of the following provisions of section 829:

"For transporting criminals, ten cents a mile for himself and for each prisoner and necessary guard; except in the case provided for in the next paragraph.

"For transporting criminals convicted of a crime in any district or territory where there is no penitentiary available for the confinement of convicts of the United States, to a prison in another district or territory designated by the attorney general, the reasonable actual expense of transportation of the criminals, the marshal, and the guards and the necessary subsistence and hire.

"For travel, in going only, to serve any process, warrant, attachment, or other writ, including writs of subpoena in civil or criminal cases, six cents a mile, to be computed from the place where the process is returned to the place of service."

It is not claimed by the petitioner that the proceeding against a Chinaman who is found to be unlawfully in this country is a criminal proceeding, or that "the order of deportation is a punishment for crime." The contrary has been expressly stated in *Fong Yue Ting v. U. S.*, 149 U. S. 698, 730, 13 Sup. Ct. 1016. Neither is the order regarded as a process or warrant in a civil case to bring a person or thing within the jurisdiction of the court, for the service of which travel at the rate of six cents a mile is allowed. The proceeding is one sui generis and peculiar, and the marshal's services in the deportation are not described in the fee bill, but it is contended that they are analogous to services for which fees in section 829 are allowed, and that for such analogous services similar fees should be allowed, because otherwise the marshal is compelled to discharge

onerous duties for which he receives no adequate compensation. If, after the Chinese exclusion acts were passed, the statutes had been silent in regard to the payment of expenses for the deportation of Chinamen who are found to be unlawfully in the United States, the argument would have force; for, when the aid and the authority of the courts of the United States are called into requisition for the due enforcement of this class of statutes, the orders of the courts must almost necessarily be executed by the marshals. Inasmuch as these acts placed upon the treasury department the general oversight in regard to their execution and the duty of payment for the services which were performed, the annual appropriation acts made provision for the payment by that department of such expenses, and specified the character of the expenses. Thus, an appropriation was made for the fiscal year ending June 30, 1892 (26 Stat. 948), for the expenses of returning to China all Chinese persons found to be unlawfully within the United States, and in the appropriation acts for the two succeeding fiscal years (27 Stat. 349, 572) appropriations were made for the expenses of returning to China all Chinese persons found to be unlawfully in the United States, including the cost of imprisonment and actual expense of conveyance of Chinese persons to the frontier or seaboard for deportation. These appropriations include the years for which services are charged by the petitioner. It was the apparent intention of congress to limit payments for these services to expenses, and it pointed out in the later acts that it meant to include the actual expenses of conveyance to the seaboard for transportation. Compensation was not to be made for these services upon the system of the fee bill, which, as a rule, gave a remuneration above expenses, but was to be limited to the actual expenses which were incurred. The service was a special one, and the amount of compensation was specially provided. Whether this denial of compensation for the time spent and for the responsibility incurred in the services is or is not a hardship upon the officer is not a question for present consideration. It is the system which congress adopted, and it had a precedent in section 829, which gave to the marshal only the reasonable actual expenses of the conveyance of criminals to a prison in another district or territory, under the circumstances specified in the statute.

3. For the service of a libel in rem, brought under the provisions of sections 2491 and 2492 for the seizure and condemnation of several articles imported by different persons and at different times, the petitioner is entitled to a single fee of two dollars for the service of the warrant of seizure, and not to a fee of two dollars for services upon each article named in the libel. The same rule applies to his fee of two dollars for the service of a monition and to his fee for the service of a writ of destruction.

The district attorney, under the supposed or actual authority of section 978, grouped 65, 20, and 49 several articles which were illegally imported, and which were in the possession of the collector of customs, in three libels, respectively. The accounting officers allowed fees upon three libels; whereas, the petitioner claims that he is entitled to fees upon 134 libels, because they were against sepa-

rate articles imported by different persons. It is not necessary for me to determine whether the procedure of the district attorney was authorized by the statute. The validity of the proceedings was not apparently called in question by any claimant or by the court. There were in fact but three libels, and the same number of warrants of seizure or monitions, and of warrants of destruction, and the services upon the articles named in any one libel were made simultaneously. The petitioner is not authorized to call each article the subject of a separate libel.

4. The petitioner is entitled to a judgment in his favor for the sum of \$5,378.41, and the statutory costs allowed by the fifteenth section of the statute of March 3, 1887.

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BRAGDON v. PERKINS-CAMPBELL CO.

(Circuit Court of Appeals, Third Circuit. April 13, 1893.)

No. 14.

**NEGLECT—SALE OF DEFECTIVE ARTICLES—LIABILITY TO THIRD PERSON.**

In the absence of fraud or deceit in effecting the sale, the maker and seller of an article not inherently dangerous in character is not liable to one, not a party to the contract of sale, who is injured because of defects in the material or construction of the article, arising from negligence of the maker.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

C. C. Dickey and W. K. Shiras, for plaintiff in error.

A. P. Burgwin and Thornton M. Hinkle, for defendant in error.

Before ACHESON and DALLAS, Circuit Judges, and BRADFORD, District Judge.

DALLAS, Circuit Judge. The defendant sold and delivered to Albert R. Bragdon, the husband of the plaintiff, a sidesaddle; and in the statement of claim it is alleged:

"The said defendant then and there promised and agreed with the said Albert R. Bragdon, acting in behalf of the said plaintiff, that the said sidesaddle should be made by defendant especially for the use of the said plaintiff, and, that, by reason of said intended use by the said plaintiff, he would take care to make and deliver a saddle of especial strength and safety, and constructed of the best material, and by means of the best workmanship."

Here there is alleged, simply and solely, an agreement to "take care"; but as the action is not *ex contractu*, but *ex delicto*, this allegation can be regarded only as matter of inducement. The substantial averment, the gravamen of the declaration, is:

"It became and was the duty of the defendant to make and deliver to the said Albert R. Bragdon, for the use of the said plaintiff as aforesaid, a safe, sound, strong, and skillfully made saddle,—made of the best material, and with the best workmanship. But the said defendant, disregarding its duty in the premises, negligently and unskillfully made and delivered to the said plaintiff, by the said husband, an unsafe, unsound, and weak saddle," by reason whereof the plaintiff sustained injury, and was damaged.

It thus appears, not only that the action sounds in tort, but also that the specific wrong declared upon is not deceit, but negligence; and, we may add, the record discloses nothing upon which the plaintiff could have recovered, if she had attempted to do so, either for breach of warranty or for deceit. We have, then, a case in which the essential element consists of a breach of duty; and the burden is on the plaintiff to prove facts sufficient to show what the duty is, and that the defendant owed it to her. 1 Shear. & R. Neg. § 8; Beach, Contrib. Neg. 6; Thomp. Neg. (preface). Dr. Wharton (Whart. Neg. § 24) defines a legal duty thus:

"That which the law requires to be done or forborne to a determinate person, or to the public at large, and is a correlative to the right vested in said determinate person, or in the public."

This definition may be properly applied to this case, and, so applying it, it appears that the supposed right of the plaintiff must be rested upon the affirmance of the proposition that to her, as a determinate person, the defendant owed a duty to carefully construct the saddle in question. But this proposition cannot be sustained. In the leading case of *Langridge v. Levy*, 2 Mees. & W. 519, the father of the plaintiff had bought from the defendant a gun, which was represented by the defendant, who knew it was intended for use by the plaintiff, to have been made by a certain manufacturer, and to be a safe gun. It had not been made by the manufacturer named, and, while the plaintiff was using it, it burst, and wounded him. The court said:

"It is clear that this action cannot be supported upon the warranty as a contract, for there is no privity in that respect between the plaintiff and the defendant"; and "we are not prepared to rest the case upon one of the grounds on which the learned counsel for the plaintiff sought to support his right of action, namely, that wherever a duty is imposed on a person, by contract or otherwise, and that duty is violated, any one who is injured by the violation of it may have a remedy against the wrongdoer."

The plaintiff's right of recovery was accordingly not sustained for breach of warranty or for negligence, but solely upon the ground that there had been fraudulent misrepresentation, and that the injurious consequence to the plaintiff was "the result of that fraud." This judgment was affirmed. 4 Mees. & W. 337. And the appellate court distinctly based its decision upon the same foundation as that which had been relied on by the court below. Thus, it plainly appears that both courts dealt with *Langridge v. Levy* as a case of deceit, and carefully avoided affording any excuse for implication that they would have sustained it as for negligence. The reason for thus distinguishing between these wrongs is not stated in either of the opinions, but it is, we think, quite obvious. Ordinarily, where a vendee accepts the purchased article, the vendor becomes, by reason of such acceptance, relieved from liability to third parties with respect to it. The vendee assumes, and the vendor stands discharged of, responsibility to them. But, where the vendor is chargeable with deceit,—where he has induced the vendee's acceptance by false and fraudulent misrepresentations,—the latter cannot be said to have consciously taken upon himself any duty of care; and that duty, therefore, if existent, is not shifted from the vendor, and he

consequently remains liable. In *Heaven v. Pender* (1883) 11 Q. B. Div. 503, Brett, M. R., sought to lay down the rule:

"That whenever one supplies goods or machinery, or the like, for the purpose of either being used by another person under such circumstances that every one of ordinary sense would, if he thought, recognize at once that unless he used ordinary care and skill with regard to the condition of the thing supplied, or the mode of supplying it, there will be danger of injury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing. And if there be a neglect of such ordinary care or skill, whereby injury happens, a legal liability arises, to be enforced by an action for negligence."

It must be conceded that this proposition, if sound, would lend support to the contention of the plaintiff in error. But it is not sound. It affirms a view of the law which, in *Langridge v. Levy*, the court declined to adopt, and which was repudiated by a majority of the judges (Cotton, L. J., and Bowen, L. J.) in the case in which it was propounded. One of the judges last mentioned delivered, on behalf of both of them, an opinion, in which it is said:

"I am unwilling to concur with the master of the rolls in laying down unnecessarily the larger principle which he entertains, inasmuch as there are many cases in which the principle was impliedly negated. Take, for instance, the case of *Langridge v. Levy*, to which the principle, if it existed, would have applied, but the judges who decided that case based their judgment on the fraudulent representation made to the father of the plaintiff by the defendant. In every case where the decision has been referred to, the judges have treated fraud as the ground of the decision, as was done by Coleridge, J., in *Blakemore v. Railway Co.*, 8 El. & Bl. 1035; and in *Collis v. Selden*, L. R. 3 C. P. 495, Willes, J., says that the judgment in *Langridge v. Levy* was based on the fraud of the defendant; and this impliedly negatives the existence of the larger principle which is relied on; and the decision in *Collis v. Selden* and in *Longmield v. Holiday*, 6 Exch. 761, in each of which the plaintiff failed, was, in my opinion, at variance with the principle contended for. The case of *George v. Skivington*, L. R. 5 Exch. 1, and especially what is said by Kleasby, B., in giving judgment in that case, seems to support the existence of the general principle. But it is not in terms laid down that any such principle exists, and the case was decided by Kleasby, B., on the ground that the negligence of the defendant, which was his own personal negligence, was equivalent, for the purposes of that action, to fraud, on which, as he said, the decision in *Langridge v. Levy* was based."

It is not necessary, for the present purpose, to further comment upon the English authorities. The reference made to some of them in the immediately preceding extract shows, we think, that in *Heaven v. Pender* the majority of the court were clearly right in declining to concur with the master of the rolls in laying down the larger principle which he entertained, and which, so far as it purported to be a deduction from the general rule as to negligence, has been disapproved by Sir Frederick Pollock in his standard treatise upon the Law of Torts. Pol. Torts (2d Ed.) p. 375, note E. Upon careful examination of the decisions of the courts of England, and in view of the conclusion derived from them by so eminent an English lawyer as the author to whom we have just referred, it seems perfectly safe to assume that this action would not have been sustained there; and it appears to be equally clear that there is no material difference in this regard between the law of that country and our own. The judgment of the supreme court of Pennsylvania in the case of *Curtin v. Somerset*, 140 Pa. St. 70, 21 Atl. 244, which

was decided in 1891, is entirely satisfactory to us, and is, in principle, directly applicable. In that case the defendant had contracted to erect a certain hotel, according to plans and specifications. The building was completed and accepted. Thereafter, a girder, which in part supported its porch, gave way and the porch fell, injuring the plaintiff, who was a guest of the hotel. He sued the contractor, but it was held that he had no cause of action against him. His contention was that the accident was caused by the defective construction of the porch; that it was not according to plans and specifications; that the defects were not observable after the building was completed, and, in point of fact, were unknown to the hotel company when it accepted the building from the contractor. The court assumed the verity of these allegations (very like to those of the plaintiff in this cause), but held that the contractor was not liable to the plaintiff upon contract, because there was no contractual relation between them; nor in tort, because such liabilities must be confined "to the parties immediately concerned." The authorities in the several states are not all perfectly clear upon the subject, but it is unnecessary to refer to them further than has been done by the learned judge in the court below. As was said by the learned judge who delivered the opinion in the case last cited by us: "We regard the weight of authority as with the views above indicated. Moreover, they are sustained by the better reason." The supreme court of the United States had before it, in the case of *Bank v. Ward*, 100 U. S. 195, a case involving very similar considerations. A lawyer, who, for his client, had erroneously certified the recorded title of certain real property, was sued by another person, who had suffered loss in consequence of his reliance upon the correctness of the certificate. The judgment of the court, so far as pertinent here, is well condensed in the headnote, where it is said:

"That there being neither fraud, collusion, or falsehood by A., nor privity of contract between him and C., he is not liable to the latter for any loss sustained by reason of the certificate."

The court, in its opinion, applied this language:

"He only who, by himself, or another as his agent, employs the attorney to do the particular act in which the alleged neglect has taken place, can sue for that neglect. \* \* \*"

Three members of the court dissented from the judgment, but apparently upon the ground that the attorney who gave the certificate was chargeable with knowledge that it was to be used, in some transaction of his client with another person, as evidence of the facts certified to, and that, therefore, the attorney should be held liable to such other person, not for negligently performing his contract with his client, but for, in effect, certifying to the person with whom his client was dealing (the plaintiff in the case) a fact as true, which, if he had exercised ordinary care, he would have known to be untrue. In other words, that the attorney was chargeable with culpable ignorance, where it was his duty to be informed, and therefore had committed a legal deceit, not only against his own client, but against the plaintiff as well. The case of *Railroad Co. v. Elliott*, 149 U. S. 266, 13 Sup. Ct. 837, though not directly in point, is worthy of examina-

tion in this connection. What is said in the opinion of the court at pages 271 and 272, 149 U. S., and page 837, 13 Sup. Ct., indicates, we think, that it was assumed that, except under special circumstances, the acceptance by the vendee of the subject of purchase and sale relieves the vendor from liability to a stranger for any injury resulting to him from negligent construction of the thing sold. See, also, *Goodlander Mill Co. v. Standard Oil Co.*, 11 C. C. A. 253, 63 Fed. 400. There are cases which may seem to qualify the principle which we have discussed, but which are quite consistent with it, and which, as is pointed out in *Curtin v. Somerset*, *supra*, have no application to such an one as that with which we are now concerned. They decide that one who deals with a thing which is inherently very dangerous, involving "death or great bodily harm to some person, as the natural and almost inevitable consequence" of lack of care, owes to the public at large the duty of extreme caution. Such a case is *Thomas v. Winchester*, 6 N. Y. 397, which in England has been thought to go too far. *Brett, M. R.*, in *Heaven v. Pender*, *supra*. But it is hard to see in what respect it goes further than *Dixon v. Bell*, 5 Maule & S. 198, which was cited as a strong case, and apparently with hesitating acceptance, in *Longmeid v. Holiday*, 6 Exch. 761, where it was rightly held that, as lamps are not in their nature explosive, liability for sale, without fraud, of an ill-made lamp, which exploded in use, is contractual only, and therefore does not extend to any person who could not sue on the contract, or on a warranty therein expressed or implied. See *Pol. Torts*, p. 440. In our opinion, *Thomas v. Winchester* was rightly decided; but that case, and the others which follow its lead, do not at all conflict with our present judgment. The article here in question is not, like a poisonous drug, which was the harmful agent in *Thomas v. Winchester*, inherently dangerous, but is, like the lamp in *Longmeid v. Holiday*, not in its nature hazardous. The circuit court did not err in refusing to strike off the compulsory nonsuit which it had entered, and therefore the judgment is affirmed.

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MECHANICS' SAV. BANK v. FIDELITY INSURANCE, TRUST & SAFE-DEPOSIT CO.

(Circuit Court, E. D. Pennsylvania. May 7, 1898.)

No. 58.

1. INDIVIDUAL LIABILITY OF STOCKHOLDER — KANSAS STATUTE — REMEDY OF CREDITOR.

Const. Kan. art. 12, § 2, provides that dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder. *Comp. Laws Kan.* p. 221, § 32, provides that, if no property of a corporation can be found upon which an execution can be levied, the court in which the action or proceeding shall have been brought may, upon motion, after reasonable notice, order execution against any stockholder for an amount equal to his stock and the amount unpaid thereon, or the execution plaintiff may proceed by action to charge the stockholders with the amount of his judgment. *Held*, that an action at law by a single judgment creditor lies against a single stockholder to enforce such liability.

2. SAME—FOR THE INDEBTEDNESS OR TO THE CREDITOR—RIGHT TO ENFORCE.  
Where the liability of a stockholder is directly to the creditor, and not simply for the indebtedness of the corporation, the right to enforce it is in the creditor, and not in the corporation or its receiver.
3. SAME—DEATH OF STOCKHOLDER—LIABILITY OF ESTATE.  
The contingent liability of a stockholder to creditors of a Kansas corporation does not abate upon his death, and, upon the happening of the event which renders the liability absolute, his estate becomes chargeable therewith.
4. SAME—ACTION TO ENFORCE—INDEBTEDNESS OF CORPORATION TO STOCKHOLDER—SET-OFF.  
In an action against a stockholder of an insolvent Kansas corporation to enforce his stock liability, he cannot set off against such liability an unmatured indebtedness of the corporation to himself.

This was an action at law by the Mechanics' Savings Bank, a Rhode Island corporation, against the Fidelity Insurance, Trust & Safe-Deposit Company, a Pennsylvania corporation, as administrator d. b. n. c. t. a. of the estate of John G. Reading, deceased. Reading was a stockholder in the Davidson Investment Company, a corporation organized under the laws of Kansas, and the suit was brought to enforce the stock liability of his estate under the Kansas laws. Verdict was given for defendant, and the case is now heard on plaintiff's motion for a new trial.

Russell Duane, for plaintiff.  
Richard C. Dale, for defendant.

DALLAS, Circuit Judge. Section 2 of article 12 of the constitution of the state of Kansas is as follows:

"Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law; but such individual liabilities shall not apply to railroad corporations, nor corporations for religious or charitable purposes."

Chapter 23, p. 221, of the Compiled Laws of Kansas comprises the following:

"Sec. 32. If any execution shall have been issued against the property or effects of a corporation except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

The plaintiff, having obtained a judgment in a court of the state of Kansas against the Davidson Investment Company, a corporation of that state, upon which execution was issued, and return made that no property could be found whereon to levy, brought this action to enforce the stockholders' liability averred to have devolved upon the defendant under the above constitutional and statutory provisions. The principal question in the case is: Does an action at law by a single judgment creditor lie against a single

stockholder by virtue of these provisions? This question is, in my opinion, simply and solely one of construction. If the liability created is not to the creditors, but for the indebtedness, such an action cannot be upheld; but, if the liability created be directly to the creditor, it must be. While in *Patterson v. Lynde*, 106 U. S. 519, 1 Sup. Ct. 432, the supreme court, referring to this distinction, has held that an action of this kind is not maintainable under a provision of the constitution of Oregon that "the stockholders of all corporations and joint-stock companies shall be liable for the indebtedness of said corporation to the amount of their stock subscribed and unpaid, and no more" (article 12, § 3), that court has also decided, in *Flash v. Conn*, 109 U. S. 371, 3 Sup. Ct. 263, that an individual creditor can sustain a suit at law against a single stockholder where the statute by which the stockholder's liability was created is in these terms: "All the stockholders of every company shall be severally and individually liable to the creditors of the company to an amount equal to the amount of stock held by them respectively." In each of these cases, it will be observed, the language for consideration was free from ambiguity, and was, in the one case and in the other, so plainly different as necessarily to lead to the difference in decision which resulted. Unfortunately, the meaning of the provisions with which this court is now required to deal is not so clearly obvious. The Kansas constitution does not define the liability which it imposes, nor direct how that liability shall be enforced. It seems to have been contemplated that this omission would be met by legislation, and, accordingly, there was enacted the statutory provision which is copied at the head of this opinion. Neither does that enactment expressly describe the nature of the stockholders' liability, but in prescribing the manner of its enforcement it does, I think, clearly disclose that the liability created was to constitute an obligation directly to creditors, and not one to be enforced by or through the corporation itself. The remedy provided is twofold and alternative. A plaintiff who has obtained a judgment against an insolvent corporation may either issue execution against any of the stockholders, or he may proceed by action to charge them with the amount of his judgment. In either case the plaintiff, not the corporation, is to be the actor, and in each the proceeding authorized is one in which stockholders only are to be defendants. As was said in *Howell v. Manglesdorf*, 33 Kan. 194, 5 Pac. 759, "The proceeding against the stockholder, whatever remedy may be employed, is an independent one;" and, as was also indicated in that case, the purpose of the final clause of this section was to give to a creditor of an insolvent corporation a remedy against stockholders residing in a state other than Kansas, which should be substantially the same as that which was provided by the first part of the section, but which could be made effective only against stockholders subject to the jurisdiction of the courts of that state. As respects both classes of stockholders the liability was intended to be the same, and a double remedy was supplied only for the purpose of assuring means for the enforcement of that liability in all cases. The proceeding by

action, it has been held, may be brought by a single creditor against a single stockholder, and is transitory. This appears to have been settled by the decisions of the supreme court of Kansas. It is objected that upon these points these decisions were obiter dicta, and not authoritative; but they appear to have received full consideration by the Kansas court, and its opinion is at least entitled to great weight. *Bank v. Whitman*, 76 Fed. 697. If, however, I entertained a doubt as to the propriety of following that court, I would feel constrained to do so, because its views have been acquiesced in and adopted by several of the federal courts. *Howell v. Manglesdorf*, supra; *Bank v. Rindge*, 57 Fed. 279; *Rhodes v. Bank*, 13 C. C. A. 612, 66 Fed. 512; *McVickar v. Jones*, 70 Fed. 754; *Bank v. Whitman*, 76 Fed. 697, and, in error, sub nom. *Whitman v. Bank*, 28 C. C. A. 404, 83 Fed. 288. The case of *Ball v. Reese* (Kan. Sup.) 50 Pac. 875, has been referred to as showing that the proceeding should be in equity, and against stockholders generally. The report is very meager; it contains nothing but the opinion of the court. It does, however, appear that there were several stockholders included in that proceeding; but I am informed by plaintiff's counsel that he has examined a certified copy of the record, which shows that the motions as to the stockholders were "by consent of all parties \* \* \* consolidated and considered as one action, consolidated and tried as one case." It need hardly be said that in dealing with the cases before it in pursuance of the agreement thus indicated the court decided nothing whatever as to whether, in the absence of such an arrangement, the joinder of several stockholders as defendants would have been necessary or even proper. It follows, I think, from what has been already said, that the fact that a receiver of the Davidson Investment Company was appointed on March 30, 1893, is immaterial. *Sterne v. Atherton* (Kan. App.) 51 Pac. 791. If, as has been seen, the liability in question is directly from the stockholder to the creditor, the creditor only, and not the corporation, or its receiver, is the person entitled to enforce it. The claim is not an asset of the corporation, and therefore the receiver could not sue for its recovery.

John G. Reading was the owner of the shares in question at the time of his death. He died before the plaintiff's judgment against the corporation was obtained. After Reading's death, the certificates for these shares were taken into the possession of the defendant, as administrator of his estate, but they still stand in the name of John G. Reading. The defendant contends that, under these circumstances, even if an action such as this might have been maintained against John G. Reading if he were still living, it cannot be maintained against his legal representatives. I have examined the authorities cited to maintain this proposition, but am unable to perceive that they support it. In my opinion, the contingent liability incurred by Reading when he became a stockholder did not abate upon his death, but survived; and that, upon the happening of the event which rendered that liability absolute, his estate became chargeable therewith. *White's Ex'rs v. Com.*, 39

Pa. St. 167; Stumpf's Appeal, 116 Pa. St. 33, 8 Atl. 866; Bailey v. Hollister, 26 N. Y. 116; Chase v. Lord, 77 N. Y. 1; Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788.

Defendant, as administrator of the estate of John G. Reading, holds bonds of the Davidson Investment Company to the aggregate principal amount of \$15,000. The indebtedness evidenced by these bonds it seeks to set off in this action. I am of opinion that this cannot be done. The bonds will not be due until 1899. Therefore the proposal is to set off against a matured liability an indebtedness which is not now demandable, unless, as is contended, the defendant, by accepting a part payment of \$19 on each bond, elected to treat the principal of the bonds as presently due. But I cannot acquiesce in this contention. When the payment relied upon was made and accepted, there was interest due to an amount greater than the sum of such payment. Therefore, to interest, and not to principal, that payment must be applied. Moreover, the debt sought to be set off is not that of the plaintiff, but of the Davidson Investment Company, and consequently cannot be asserted against the former. The defendant, who, of course, could not maintain an action against the plaintiff for its recovery, is not entitled, by setting it up as a counterclaim, to compel it to effect its liquidation. I have carefully examined the case of *Musgrave v. Association*, 49 Pac. 338, but the action of the court of appeals of Kansas in that case does not shake my confidence in the views I have expressed. The third paragraph of the syllabus, which is stated to have been prepared by the court, is in these words:

"Where the stockholder against whom proceedings are had to enforce the payment of his stock liability is himself a creditor of the insolvent corporation, he will be allowed, in equity, to plead the indebtedness of the corporation to himself as a set-off against his liability to other creditors."

I understand that in Kansas equitable defenses may be interposed in all cases; and the opinion of the majority of the court indicates, in accordance with the statement in the syllabus, that the view entertained in this case was that a stockholder had an equitable right to appropriate his individual liability to the satisfaction of an indebtedness of the corporation to himself; in other words, the defense was sustained as an equitable one; but upon the common-law side of a court of the United States this may not be done. Aside from this, however, the judgment in *Musgrave v. Association* is one which I am not called upon to follow. It does not accord with my understanding of the law. It was not founded upon a construction of the constitution or of a statute of Kansas, or upon any principle of law which is peculiar to that state. The decision was not a unanimous one, and the court by which it was rendered is not a court of last resort. The plaintiff's motion for a new trial is granted.

CALIFORNIA SAV. BANK OF SAN DIEGO v. AMERICAN SURETY CO. OF  
NEW YORK.

(Circuit Court, S. D. California. April 18, 1898.)

No. 706.

1. FIDELITY INSURANCE—CLAIM OF LOSS—LIMITATION.

A condition in a fidelity insurance bond that any claim thereunder shall be made as soon as practicable after discovery of the loss, and within six months after the expiration of the bond, is a material stipulation, and a condition precedent to recovery thereon.

2. SAME.

The fact that an insurer in a bond of fidelity insurance has actual knowledge of a loss does not excuse the insured from giving notice thereof within the time prescribed by the conditions of the bond.<sup>1</sup>

This was an action by the California Savings Bank of San Diego against the American Surety Company of New York upon a bond of indemnity insurance. The case was heard on a demurrer to the amended complaint.

McDonald & McDonald and D. C. Collier, Jr., for plaintiff.  
Allen & Flint, for defendant.

WELLBORN, District Judge. A demurrer to the complaint in this action was sustained October 18, 1897. Thereafter, by leave of the court, the plaintiff filed certain amendments, and the present hearing is on a demurrer to the complaint as thus amended. The general nature of the action is shown in the following extract from my opinion on the former demurrer:

"This action is upon two bonds, each of which obligates the defendant, subject to certain provisions, to reimburse any loss sustained by plaintiff through the fraud or dishonesty of the employes therein named; the employé named in one bond being John W. Collins, plaintiff's vice president, and in the other Frederick T. Hill, plaintiff's cashier. The amounts sued for are \$18,000 on one of the bonds (that of Collins), and \$15,000 on the other, making a total of \$33,000. There are three counts in the complaint. The first and second counts are based, respectively, on said bonds, while the third count is virtually a union of the causes of action set forth in the two preceding counts. A demurrer on numerous grounds has been interposed to each count. As the three counts are identical, except as to amounts and names of employes, it will only be necessary to particularly notice the first one." 82 Fed. 866.

The bond sued on in said first count contains, among other provisions, the following:

"Now, therefore, in consideration of the sum of ninety dollars, lawful money of the United States of America, in hand paid to the company as premium for the term of twelve months ending on the first day of July, one thousand eight hundred and ninety-two, at 12 o'clock noon, it is hereby declared and agreed: That, subject to the provisions herein contained, the company shall, within three months next after notice, accompanied by satisfactory proof of a loss as hereinafter mentioned, has been given to the company, make good and reimburse to the employer all and any pecuniary loss sustained by the employer of moneys, securities, or other personal property in the possession of the employé, or for the possession of which he is responsible,

<sup>1</sup> As to fidelity insurance generally, and requirements as to notice of loss, see note to *Indemnity Co. v. Wood*, 19 C. C. A. 273.

by any act of fraud or dishonesty, on the part of the employé, in connection with the duties of the office or position hereinbefore referred to, or the duties to which in the employer's service he may be subsequently appointed, and occurring during the continuance of this bond, and discovered during said continuance, or within six months thereafter, and within six months from the death or dismissal or retirement of the employé from the service of the employer. \* \* \* That the company shall be notified in writing, at its office in the city of New York, of any act on the part of the employé which may involve a loss for which the company is responsible hereunder, as soon as practicable after the occurrence of such act shall have come to the knowledge of the employer. That any claim made in respect of this bond shall be in writing, addressed to the company as aforesaid, as soon as practicable after the discovery of any loss for which the company is responsible hereunder, and within six months after the expiration or cancellation of this bond, as aforesaid; and upon the making of such claim this bond shall wholly cease and determine as regards any liability for any act or omission of the employé committed subsequent to the making of such claim, and shall be surrendered to the company on payment of such claim. \* \* \* That the employer shall, if required by the company, and as soon thereafter as it can reasonably be done, give all such aid and information as may be possible (at the cost and expense of the company), for the purpose of prosecuting and bringing the employé to justice, or for aiding the company in suing for and making effort to obtain reimbursement, by the employé or his estate, of any moneys which the company shall have paid or become liable to pay by virtue of this bond. That no suit or proceeding at law or in equity shall be brought to recover any sum hereby insured, unless the same is commenced within one year from the time of the making of any claim on the company. That no one of the above conditions, or of the provisions contained in this bond, shall be deemed to have been waived by or on behalf of the said company, unless the waiver be clearly expressed in writing over the signature of its president and its secretary, and its seal thereto affixed."

After setting out said bond in full, and alleging the breaches thereof, said count, as amended, proceeds thus:

"That said Collins committed suicide on or about the 7th day of March, 1892, and that all of his above-stated fraudulent and dishonest acts, and the loss thereby occasioned to the plaintiff, were discovered by it within the period of six months next ensuing after the death of said Collins. That the plaintiff duly kept and performed all the conditions of said bond on its part to be kept and performed, and on the 16th day of December, 1895, notified the defendant in writing at its office in the said city of New York of each and all of the above stated breaches of said bond by said Collins, including the date and manner thereof, and the resultant loss to the plaintiff by and from said breaches, and at the same time and place served upon the defendant proof of the loss referred to in said notice, by delivering to it a written itemized statement of such loss, based upon the accounts of the plaintiff, certified by the president of the plaintiff and under its corporate seal, to be correct and true in every particular, and that the same was based upon the accounts of the plaintiff, and demanded from the defendant payment of the full penalty of the said bond; but to pay the same or any part thereof the defendant then and there failed, neglected, refused, and has ever since failed, neglected, and refused. But the plaintiff avers that, although it did not notify the defendant of said acts of said Collins and the loss thereby occasioned to the plaintiff, nor make proof of said loss or demand payment thereof, until the 16th day of December, 1895, as aforesaid, that the defendant became and was fully advised and informed in the month of May, 1892, of and concerning all the aforesaid breaches of said bond by said Collins, and the loss thereby occasioned to the plaintiff, and acted upon such knowledge, and in pursuance thereof did every act and thing that it might, would, or could have done to protect its interests in the premises if formal notice of such loss had been given it by the plaintiff in said month of May, 1892."

Defendant rests its demurrer upon numerous grounds, among them the following: First, that no claim in respect to the bond

sued on was made on the company within six months after the expiration of the bond; second, that the company was not notified of the alleged fraudulent and dishonest acts of the employé, nor was proof of loss furnished, as required by the bond.

1. Plaintiff contends that, inasmuch as said bond was executed at San Diego, Cal., it is a California contract, and governed by the laws of said state; citing *Wall v. Society*, 32 Fed. 275, 276; *Berry v. Indemnity Co.*, 46 Fed. 441, 442; *Indemnity Co. v. Berry*, 1 C. C. A. 561, 50 Fed. 511; *Insurance Co. v. Robison*, 54 Fed. 582, 588; and *Society v. Clements*, 140 U. S. 226, 11 Sup. Ct. 822. This contention, doubtless, is well taken. Following out the line of argument indicated, plaintiff quotes, as applicable here, the following: "A policy may declare that a violation of specific provisions thereof shall avoid it; otherwise the breach of an immaterial provision does not avoid the policy." Civ. Code Cal. § 2611. The implication, of course, from this section, is that the breach of a material provision does avoid the policy. Conceding the applicability of said section, which, although a local enactment, is simply declaratory of general principles, the question involved in the first of the above-mentioned grounds of demurrer may be stated thus: Is the requirement of the bond, as to the time within which any claim in respect thereto must be presented, a material provision?

No case in point has been called to my attention, although the parties have cited many decisions, hereinafter referred to, construing the requirements of the bonds or policies respectively involved as to notice and proof of loss. Under the peculiar terms of the bond in the case at bar, however, I think no other than an affirmative answer to the question above stated is possible. Said bond provides "that no suit or proceeding at law or in equity shall be brought to recover any sum hereby insured unless the same is commenced within one year from the time of the making of any claim on the company." This provision, without doubt a material one, is valid. *Riddlesbarger v. Insurance Co.*, 7 Wall. 386; *Davidson v. Insurance Co.*, 7 Fed. Cas. 37; 2 May, Ins. (3d Ed.) § 478. In order to be effective, however, according to the obvious intent of the parties, it must be aided by the other requirement, now under consideration, that any claim in respect to the bond shall be made as soon as practicable after the discovery of the loss, and within six months after the expiration of the bond. Thus the parties, by their contract, have made the requirement, as to the time within which the claim for a loss shall be presented, a material provision. To hold that said requirement is immaterial would, in effect, annul the former unquestionably material clause, limiting the time for the commencement of suit. The bond expired June 30, 1892. No claim was made upon the company until December 16, 1895, so that the only claim made upon the company was made more than three years after the time when, by the contract, it should have been presented. The failure of the plaintiff to make claim within the time prescribed by the bond I think fatal to its case.

2. The bond in the case at bar does not prescribe any time within which the proof of loss shall be furnished, but simply that the

right of action shall not accrue until 90 days after such proof is furnished. The bond, however, does expressly provide "that the company shall be notified in writing, at its office in the city of New York, of any act on the part of the employé which may involve a loss for which the company is responsible hereunder, as soon as practicable after the occurrence of such act shall have come to the knowledge of the employer." The fraudulent acts of the employé, as alleged in the amendments to the complaint, were discovered by plaintiff within six months next after March 7, 1892,—that is, not later than September 7, 1892, or, construing the allegations most strongly against the pleader, March 8, 1892,—and yet the written notice of such acts was not given to the defendant until December 16, 1895, more than three years after the time within which, according to the terms of the bond, it should have been given. Was this such a failure of performance on the part of the plaintiff as will defeat a recovery?

Plaintiff contends that the requirement of the bond, as to notice, was "formal,"—that is, "immaterial,"—in the sense of the section of the California Code hereinbefore quoted, citing the following authorities: 7 Am. & Eng. Enc. Law, pp. 1048, 1049, subd. 8; Ostrand. Ins. (2d Ed.) p. 523; Insurance Co. v. Downs (Ky.) 13 S. W. 882; Insurance Co. v. Brown (Ky.) 29 S. W. 313; Tubbs v. Insurance Co. (Mich.) 48 N. W. 296, 298; Hall v. Insurance Co. (Mich.) 51 N. W. 524, 526; Vangindertaelen v. Insurance Co. (Wis.) 51 N. W. 1123; Steele v. Insurance Co. (Mich.) 53 N. W. 514, 515; Rynalski v. Insurance Co. (Mich.) 55 N. W. 981, 982; Peninsular Land Transp. & Mfg. Co. v. Franklin Ins. Co. (W. Va.) 14 S. E. 240; Association v. Evans, 102 Pa. St. 281; Kahnweiler v. Insurance Co., 57 Fed. 562, 563. All of these cases, except Peninsular Land Transp. & Mfg. Co. v. Franklin Ins. Co. and Association v. Evans, relate to proof, not notice, of loss, and are inapplicable. Notice of the fraudulent acts of an employé, involving a loss, is quite a different thing from proof of the loss; and, as shown by the terms of the contract in the case at bar, the parties themselves deemed such notice "material," although they may have intended otherwise as to proof of loss. With reference to the latter,—that is, proof of loss,—the bond merely provides that the company's liability shall accrue 90 days after the proof has been furnished; and this provision, according to many authorities, does not require proof to be furnished within any particular period, but merely postpones the right of action until such proof is furnished. Notice, however, of the fraudulent acts of the employé, is placed upon an entirely different footing. The contract or bond expressly provides that such notice shall be given as soon as practicable after the occurrence of the fraudulent acts comes to the knowledge of the employer, and the importance—the materiality—of prompt notice, as a matter of protection to the company, is clearly suggested in a subsequent provision of the bond, as follows:

"That the employer shall, if required by the company, and as soon thereafter as it can reasonably be done, give all such aid and information as may be possible (at the cost and expense of the company), for the purpose of prose-

cuting and bringing the employé to justice, or for aiding the company in suing for and making effort to obtain reimbursement, by the employé or his estate, of any moneys which the company shall have paid or become liable to pay by virtue of this bond."

*Insurance Co. v. Downs*, supra, which is the leading case upon the point that failure to make proof of loss within the time prescribed will not avoid the policy, unless expressly so provided, is inapplicable to the point now under consideration, not only because it relates exclusively to proof of loss, but also for other reasons. In that case the supreme court of Kentucky says:

"The policy before us, like many others, contains stipulation after stipulation rendering the policy void and forfeiting all claim on the part of the insured to a recovery. \* \* \* The contract then proceeds to specify the manner in which the insured shall proceed in case of loss: 'Proceedings in case of loss: He shall forthwith give written notice of such loss or damage to this company, and shall within 30 days render a particular account of such loss or damage, signed and sworn to by them,' etc. \* \* \* It is further provided that the loss shall not be payable until 60 days after the proof of loss has been furnished. The contract then closes with a stipulation 'that no suit or action for the recovery of any claim by authority of this policy shall be commenced until after the amount of such claim has been ascertained by arbitration, as provided, nor until all the conditions, provisions, and requirements of this policy have been complied with by the assured.'"

The court there held that the action was maintainable—First, because the facts that the policy specifically mentioned numerous causes of forfeiture, and that failure to make proof of loss was not among them, indicated that the parties did not intend such failure to be a cause of forfeiture; and, second, because the use of the word "until," in the clause that no suit or action on the policy should be brought until after full compliance by the insured with all the requirements of the policy, showed an intention to make proof of loss a prerequisite to the commencement of suit, rather than an intention to make the furnishing of such proof within the specified period the essence of the requirement. Neither of said reasons which were controlling in *Insurance Co. v. Downs* exist in the case at bar. Here there is no clause which, in terms, provides for a forfeiture, nor is there any phraseology which implies that the notice to be given the company of the fraudulent acts of the employé was merely a condition precedent to the commencement of suit. On the contrary, the giving of such notice is an unqualified obligation, which the contract imposes upon the plaintiff, and, as I have already shown, of vital importance to the company's protection. Referring to *Insurance Co. v. Downs*, Mr. Ostrander says:

"In justice to the court of appeals in Kentucky, who heard that case, it is proper that we should mention that, so far as the report discloses, the policy in that suit did not make its conditions and requirements a part of the consideration, nor did it appear that there was any general clause making the liability of the company to pay a loss contingent upon the performance by the insured of all or any of the requirements concerning proofs." Ostr. Ins. (2d Ed.) § 338.

For the reasons above indicated, the case at bar is clearly distinguishable from *Insurance Co. v. Downs*, and also from most, if not all, of the other cases cited by plaintiff in this connection.

Against the proposition that notice is material, plaintiff quotes as

follows: "In case of loss upon an insurance against fire, an insurer is exonerated, if notice thereof be not given to him by some person insured or entitled to the benefit of the insurance, without unnecessary delay." Civ. Code Cal. § 2633. Plaintiff's argument is that, because the provisions of this section are limited to fire insurance, therefore, under the maxim, "Expressio unius," etc., the failure to give notice without unnecessary delay in the case of any other kind of insurance does not exonerate the insurer, and, consequently, that in all other kinds of insurance policies the requirements as to notice of loss, etc., are immaterial provisions. This last part of the argument, as shown in defendant's reply brief, is a non sequitur. Said section does not purport to construe or deal with contracts which expressly require notice to be given, but it makes notice obligatory upon the insurer, in fire insurance, where the contract fails to provide therefor. Whether or not in other kinds of insurance notice is essential depends upon the contracts which the parties make. Said section, however, does emphasize, in the strongest possible manner, the materiality of notice in the case of fire insurance; and it is believed that in fidelity insurance, which is of recent origin, notice of the fraudulent acts of the employé is of equal, if not greater, importance, for the reason that prompt notification may often enable the insurer to avoid, or secure indemnity for, losses which otherwise would be inevitable or irremediable. The authorities cited by defendant, to the effect that the requirement as to notice of loss is a material provision, and must be strictly complied with in order to enable the employer to recover, are numerous. *Ermentrout v. Insurance Co.* (Minn.) 65 N. W. 635; *Quinlan v. Insurance Co.*, 133 N. Y. 356, 31 N. E. 31, affirming *Id.* (Sup.) 15 N. Y. Supp. 317; *Insurance Co. v. McGookey*, 33 Ohio St. 555; *Ostr. Ins.* (2d Ed.) §§ 221-223; 2 *Wood, Ins.* §§ 436, 437; 2 *May, Ins.* § 461; *Taylor v. Insurance Co.*, 9 How. 403; *Riddlesbarger v. Insurance Co.*, 7 Wall. 390; 4 *Enc. Pl. & Prac.* 640.

Appended to *Ermentrout v. Insurance Co.*, *supra*, there is a note as follows:

"The above case is said by counsel to be the only one that covers the precise point in regard to notice, although there are many cases in respect to proofs of loss."

In *Riddlesbarger v. Insurance Co.*, *supra*, the supreme court of the United States says:

"The conditions in policies requiring notice of losses to be given, and proofs of the amount, to be furnished the insurers within certain prescribed periods, must be strictly complied with to enable the assured to recover. And it is not perceived that the condition under consideration stands upon any different footing. The contract of insurance is a voluntary one, and the insurers have the right to designate the terms upon which they will be responsible for losses."

In *Quinlan v. Insurance Co.* (Sup.) 15 N. Y. Supp. 317, the policy provided, among other things, that if a fire occurred the assured should give immediate notice in writing to the company of any loss thereby. It also contained the following provision:

"This policy is made and accepted subject to the foregoing stipulations and conditions; \* \* \* and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy

except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto; and, as to such provisions and conditions, no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

It will be observed that the first clause of the above quotation, "This policy is made and accepted subject to the foregoing stipulations and conditions," and also the clause as to the waiver of such stipulations and conditions, are substantially identical with the provisions in the case at bar on the same subjects, and, in the former case, the court held that the requirement as to notice was a condition precedent, and its nonperformance a bar to plaintiff's recovery. From the opinion of the court I extract the following:

"The condition in the policy requiring immediate notice of loss was a precedent one, and its nonperformance was a bar to the plaintiff's recovery. *Sherwood v. Insurance Co.*, 10 Hun, 593, 595; *Insurance Co. v. McGookey*, 33 Ohio St. 555. If it were admitted, which it is not, that the letter of Kelsey to the defendant constituted a notice of loss, still, as it was not written until 33 days after the fire occurred, it was not a compliance with the requirements of the policy to give immediate notice. *Inman v. Insurance Co.*, 12 Wend. 460; *Brown v. Assur. Corp.*, 40 Hun, 101; *Trask v. Insurance Co.*, 29 Pa. St. 198; *Edwards v. Insurance Co.*, 75 Pa. St. 378; *Roper v. London*, 1 El. & El. 825; *Cornell v. Insurance Co.*, 18 Wis. 387; *Whitehurst v. Insurance Co.*, 52 N. C. 433; *Assurance Co. v. Burwell*, 44 Ind. 460. In most of the cases cited the provision in the policy was that the insured should 'forthwith' give notice of loss, while in the policy in suit the insured was required to give 'immediate' notice; yet it was held in those cases that an omission to give such notice for a time varying from 6 to 40 days was not a compliance with the requirements of the policy, and barred a recovery. We think the plaintiff failed to give the defendant the notice of its loss required by the policy, and that such a failure was a bar to this action."

This decision, made by the supreme court of the state of New York, was affirmed by the court of appeals of said state.

In *Ostrand Ins.* § 221, above cited, it is said:

"It is almost without exception a requirement of the insurance policy that, on the occurrence of a loss, the insured shall give immediate notice in writing. In some policies, a definite time is specified within which the notice must be given, as 'five days' or 'ten days.' If the insured neglects to comply with the terms of this condition, it will be at his peril. The requirement is as reasonable as it is imperative, and has been enforced with great strictness by the courts."

The allegations of the complaint, that the defendant was, in the month of May, 1892, fully advised and informed of the breaches of the bond, and the loss resulting therefrom, do not, in my opinion, excuse plaintiff's failure to give the prescribed written notice of the fraudulent acts of the employé, and said failure is such nonperformance of the contract on the part of the plaintiff as to defeat its recovery.

The conclusions above announced make it unnecessary for me to pass upon the other objections to the complaint. Demurrer will be sustained, and leave granted to the plaintiff to amend within 10 days, if it shall be so advised.

## DAY et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. May 9, 1898.)

No. 981.

**1. CONTRACTS—BREACH—RIGHT OF PROMISEE TO COMPLETE.**

Where a contract to furnish horses for the United States cavalry is not completed, and the contract gives the government the right to complete it at the contractor's expense, if sufficient suitable horses cannot be obtained at the stipulated place of performance the government may purchase wherever it can secure the best terms.

**2. EVIDENCE—COMPETENCY OF WITNESS—PURPOSE OF OBTAINING INFORMATION.**

Upon an issue as to how many horses arriving at a certain place during a specified time satisfied the requirements of a contract, it was error to reject the testimony of a witness who examined such horses with sufficient care to know whether they complied with the requirements, on the ground that his examination was not made with a view of ascertaining whether such requirements were satisfied.

**8. SAME.**

The test of the competency of a witness is the extent of his knowledge, not the purpose with which he acquired it.

In Error to the District Court of the United States for the Eastern District of Missouri.

J. D. Johnson, for plaintiffs in error.

Walter D. Coles, for the United States.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

SANBORN, Circuit Judge. John J. Day, Thomas T. Rubey, and Charles G. Knox, the plaintiffs in error, sued out this writ of error, to reverse a judgment against them on a bond which they gave to the United States, on September 12, 1895, conditioned for the faithful performance by Day of a contract he had made with the government to furnish it 78 cavalry horses, possessing the qualifications named in certain specifications, at the city of St. Louis, in the state of Missouri, on or before November 9, 1895. He failed to furnish a sufficient number of the specified horses, and the contract provided that, in case of his failure to perform it, the United States might supply the deficiency by purchase in open market or otherwise, and that the contractor should be charged with any loss which the government sustained by his failure. Pursuant to this provision of the contract, the government purchased in the state of Kentucky and in the city of Chicago 76 horses to supply the deficiency caused by the failure of the contractor, and charged him with the excess of their cost above the contract price, which was \$3,063.50. The United States then sued the plaintiffs in error on their bond to recover this amount, and set forth in their petition the facts we have stated. The plaintiffs in error answered that the contractor, Day, had tendered to the government horses of the character described in the contract, but that the United States had refused to accept them, and denied that they had been compelled to expend \$3,063.50 above the contract price in order to obtain the horses which he had agreed to furnish.

It is insisted that it was error for the court below to permit the government to prove at the trial the prices which it paid for the horses it purchased in Kentucky and in Chicago, because the contract was to be performed in St. Louis; and it is contended that the measure of damages was the difference between the contract price and the market value of the horses in that city. There was no error in this ruling, however, because the United States produced evidence tending to prove that the requisite number of cavalry horses of the character called for by the contract could not be procured within a reasonable time in the city of St. Louis or in its vicinity, and the contract expressly provided that, upon the default of the contractor, the government might purchase them in open market or otherwise, and charge the loss to the contractor. Under this agreement, the officers of the United States had the right to go to the place or places where they could obtain the number and character of horses required at the lowest prices. They had the right to buy the horses there, and to charge the expense of their purchase and of their transportation to St. Louis to the contractor, by the express terms of the contract.

In order to rebut the testimony to the effect that these horses could not be found within a reasonable time in the city of St. Louis, and for the purpose of proving that they might have been obtained in that city at lower prices than those paid for them in Kentucky and in Chicago, and for the purpose of diminishing the damages, the plaintiffs in error produced a witness who testified that he had been deputy sheriff of the National Stock Yards in St. Louis for about 2 years; that for 35 years prior to that time he had been engaged in buying and selling horses; that he was present at the inspection of horses tendered to the government by Day; that he knew about the number of horses that arrived daily at the stock yards at St. Louis; that he was in a position where he saw most of them come in; that he closely inspected daily all the horses that came into these stock yards, except perhaps one or two loads that came in early before he arrived; and that about 2,000 horses arrived there each week. Thereupon the following questions were propounded to him by counsel for plaintiffs in error:

"Did you observe them closely enough to be able to state what number of those received possessed the qualifications set forth in these specifications [the specifications describing the horses required under the contract] in the fall of 1895?" "Are you able to state from the observation you made of them about how many of them were up to the requirements of the specifications?" "I will get you to state how many horses you observed that did possess the qualifications mentioned in these specifications that arrived in the stock yards weekly during the fall of 1895."

No objections were interposed to any of these questions; but, after the witness had said that he did not examine all the horses for the purpose of determining whether they came up to the specifications, the trial court refused to permit him to answer any of these questions, unless he based his answer upon an examination made with a view of ascertaining whether or not the horses filled the requirements of the specifications; and, as he had never made any examination of them for that express purpose, he was not allowed to answer

the questions. The effect of this ruling was to restrict the number of possible witnesses relative to the number and value of cavalry horses in St. Louis in the fall of 1895 to those who had examined the horses arriving there for the express purpose of determining whether or not they complied with the government specifications for cavalry horses, and it is not probable that any one who was not interested in filling Day's contract ever made any examination for that express purpose. In other words, the ruling of the court made the purpose of the examination, and not the knowledge obtained by that examination, the test of the competency of the witness. But the measure of the competency of a witness is not the view or purpose with which he obtained his information, but the extent and character of the knowledge which he obtained. The question is not why he obtained his knowledge, but what amount of knowledge he acquired. And the question here was not why this witness examined the horses and knew whether or not they complied with the specifications, but it was whether or not he had so examined them that he did know. The court refused to let him tell whether or not he had made such an examination that he had acquired this knowledge. It refused to permit him to answer this question even with a simple "Yes" or "No." Yet if he had made the requisite examination, and had acquired the knowledge, he was equally competent to testify, whether he had obtained this knowledge with a view of purchasing the horses, or for the purpose of raising or selling them in the open market, or for the express purpose of determining whether they filled the specifications of this government contract. The court not only refused to let him answer the question we have been considering, but it declined to let this witness testify how many horses he observed that did possess the qualifications mentioned in the specifications. If he observed any so closely that he knew that they possessed these qualifications, the plaintiffs in error were undoubtedly entitled to prove that fact; and, if he did not so observe them, they were entitled to an answer to their question to that effect. No tenable objection to these questions and their proper answers seems to us to exist, and the judgment below must be reversed, and the cause must be remanded to the circuit court, with directions to grant a new trial. It is so ordered.

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LINEHAN RAILWAY TRANSFER CO. v. MORRIS et al.

(Circuit Court of Appeals, Seventh Circuit. June 3, 1898.)

No. 474.

1. APPEAL AND ERROR—FAILURE TO SAVE EXCEPTIONS.

No advantage can be taken in an appellate court of alleged errors in the charge of the court below, where no exception has been taken.

2. SAME—SERIES OF INSTRUCTIONS—GENERAL EXCEPTIONS.

Where only a general exception is taken to the refusal of a series of instructions, it will not be considered, if any one of the propositions is unsound.

In Error, to the Circuit Court of the United States for the Southern District of Illinois.

These were personal injury cases brought severally by the defendants in error, and consolidated on the trial. They were ship carpenters, and, at the time of receiving the injuries complained of, in the employment of the Marine-Ways Company, at Paducah, Ky., repairing a steamboat, and were working under the guards of the boat, on a scaffold built by the Marine-Ways Company. The plaintiff in error was at the same time engaged in hoisting heavy, squared timbers upon the deck of the boat, over the scaffold, by means of pile-driving machinery run by steam power and a derrick. The substance of the allegation in the declaration as to negligence is that while the plaintiffs were so engaged in hoisting a piece of timber, and when one end of the stick was suspended in the air, over the scaffold, the said stick of timber, by reason of the negligence of the defendant in attaching the same to the derrick, became detached from the derrick, and fell with great force upon the scaffold, where the plaintiffs were standing, and crushed it to the ground, thereby injuring the plaintiffs. There was a verdict for the plaintiff Morris for \$2,500, and for Morgan for \$100. The writs of error are brought to reverse the judgments severally rendered upon these verdicts.

James A. Connolly and Thomas C. Mather, for plaintiff in error.

James C. Courtney, for defendants in error.

Before WOODS and SHOWALTER, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge (after stating the facts as above). There are several assignments of error, only two of which are discussed and relied upon by the plaintiff in error in the brief of counsel, oral arguments having been waived. One of these relates to the general instructions given by the court to the jury, and the other to a series of special instructions asked for by the defendant on the trial, and which were refused by the court. But the difficulty with the case for the plaintiff in error is that these assignments of error are not supported by proper exceptions taken on the trial. The general charge of the court, printed in the record, seems intended to present the issue fully and fairly to the jury, in so much that no exception whatever was taken to it by either party on the trial. No exception being taken on the trial, no advantage can be taken here of any supposed errors in the charge. *Hana v. Maas*, 122 U. S. 24, 7 Sup. Ct. 1055; *Stewart v. Cattle-Ranche Co.*, 128 U. S. 383, 9 Sup. Ct. 101.

The plaintiff in error is in no better condition as regards the special instructions requested. There were quite a number of special instructions asked for in mass, which were refused, perhaps, because the general charge was so full. A general exception only was taken to such refusal. It is the well-settled rule of this court that, where only a general exception is taken to the refusal of a series of instructions, it will not be considered if any one of the propositions is unsound. *Railroad Co. v. Callaghan*, 161 U. S. 91, 16 Sup. Ct. 493; *Newport News & M. V. Co. v. Pace*, 158 U. S. 36, 15 Sup. Ct. 743. Supposing, but not conceding, that this rule casts the burden upon the court to run through all these special requests, to find one that was properly refused, the court has not far to look in this case to find such an instruction. We think all of those relating to the use of the rope instead of a chain to hoist the logs are of this character, as the gist of negligence charged, as we have seen, did not lie in that direction. The first instruction asked was as follows:

"You have nothing to do with the question whether these timbers or squared logs might have been raised to the deck of the steamer H. S. McComb by some other means than a steam derrick. The plaintiffs complain that the defendant was guilty of negligence in using a rope instead of a chain while hoisting the timbers by means of a steam derrick."

This instruction was not sound, because not true, as no such issue was made by the pleadings. Under the declaration, the negligence may just as well have consisted in a negligent and improper use or handling of the rope, as in the use of a rope instead of a chain. There are other instructions, also, which will not bear close scrutiny, but it is not necessary to specify. If counsel are content with taking only a general exception to the refusal to give a series of special instructions, they cannot complain if the court does not exert itself extraordinarily in pointing out seriatim all the defects contained in such a series. Judgments affirmed.

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### NORTHERN PAC. R. CO. v. HAYES.

(Circuit Court of Appeals, Seventh Circuit. June 3, 1898.)

No. 437.

#### 1. EVIDENCE—OPINION—SPEED OF TRAIN.

It is reversible error to allow the plaintiff to give his opinion as to the speed of the train that struck him,—that being a material issue,—where he did not see the train at all, and formed his opinion only from the force of the blow, and the distance to which he was thrown.

#### 2. WITNESSES—CREDIBILITY—INSTRUCTIONS.

An unqualified instruction to a jury, that if they are satisfied from the circumstances, or from the appearance of a witness, that he has not testified to the truth, or to the whole truth, they are at liberty to reject his testimony, leaves too much to the arbitrary discretion of the jury, and is reversible error.

### In Error to the Circuit Court of the United States for the Northern District of Illinois.

This is an action on the case, to recover damages for personal injuries alleged to have been sustained through negligence in the operation of a train of cars belonging to the plaintiff in error. The facts, as stated by this court when the case was here on a former writ of error (20 C. C. A. 52, 74 Fed. 279), are as follows: "The accident occurred in the Central Avenue yards, in the city of Chicago, and south of the main tracks of railway owned by the Chicago & Northern Pacific Railroad Company, which railway had, long prior to the injury, been leased for a term of years by the Chicago & Northern Pacific Railroad Company to the Wisconsin Central Company, a corporation owning or operating a line of railway through the state of Wisconsin to the state line dividing the states of Illinois and Wisconsin, and which line of railway first mentioned had prior to the accident been leased by the Wisconsin Central Company, together with its own lines of railway, for a term of years, to the Northern Pacific Railroad Company. The latter company operated, by means of its own line and the leased lines, a continuous line of railway from the city of Chicago, through the state of Wisconsin, to the Pacific Coast. At the Central Avenue yards there were two main tracks running east and west; the north track being the out-bound main track; the south track being the in-bound main track. These two tracks were used by the Northern Pacific Railroad Company and by the Chicago, St. Paul & Kansas City Railroad Com-

pany for all of their trains entering or leaving the city of Chicago. Central avenue crosses the main tracks substantially at right angles. West of Central avenue is located a switch in the out-bound track, and also a switch in the in-bound track, with a cross-over connecting the two tracks at these switches. Near the east line of Central avenue is a switch in the in-bound track, from which a track leads to the southeast. A short distance east from this switch in the track projecting from the in-bound main track is another switch, from which diverge two tracks running east and west, parallel with each other. Of these, the north track is called the 'Wisconsin Central,' or 'W. C. Lead,' and extends for some distance east into that part of the yard appropriated for the use of the Northern Pacific Railroad Company, or, as was commonly known, the 'Wisconsin Central Line.' The south one of these tracks was known as the 'Kansas City,' or 'K. C. Lead,' from which branched, at short intervals, switch tracks towards the southeast, forming the K. C. yard. The distance between the centers of tracks at this locality is thirteen feet; the distance between the nearest rails of adjoining tracks being eight feet. The appellant was the general night yard master of the Chicago, St. Paul & Kansas City Railroad Company. At half past eight of the night in question, in company with one Roth, a servant under him, he left the station, which was about 150 feet west of Central avenue, for the purpose of going down into the yard of that company to give certain orders. They walked east between the in-bound main track and the K. C. lead to the track connecting these two tracks. At a point near No. 2 switch it occurred to him to send a message to the city, and the two men stopped there for a few moments while the appellant gave Roth directions with reference to the message. While so standing, appellant was looking to the west, in the direction from which the train causing the injury came, but saw no train approaching. Upon separating, Roth crossed the W. C. lead towards the north, and started west towards the station. The switch stands placed between the tracks are within three feet of the south rail of the W. C. lead. At this time a K. C. train was switching on the K. C. lead. When that lead is occupied by a train, one can only pass on the north side of the switch stand; and, to do so, it is necessary for him to walk on the ties of the W. C. lead. The appellant, upon separating from Roth, walked easterly upon the ends of the ties, carrying a lighted lantern. He had covered a distance of from forty-five to sixty feet from the spot where he left Roth, and was about to leave the end of the ties for the narrow space between the two leads, when he was struck by a train of the Northern Pacific Company backing eastwardly on the W. C. lead, and was thrown under the Kansas City train, and received the injury complained of. The train that struck the appellant was a west-bound freight train of the Northern Pacific Company, consisting of an engine and six cars, which was backing upon the track in question. The train had come from the city, and gone west of the station, on the main track, and for some purpose was backing into the yard upon the W. C. lead. It had probably passed the station while the appellant was there, before he had gone east into the yard; but, for some reason (probably owing to the passage of the K. C. train upon the other track), he was not aware of the fact. The rules of the company require that, in backing the train through the railroad yard in the nighttime, a man should be stationed on the rear car, displaying a bright light. The evidence for the appellant tended to show that there was no man or light upon the rear car of this train, and that no signal or warning of any kind was given of its approach, that it was moving at a speed of from fifteen to twenty miles an hour, and that the night was dark and foggy. From the time he left Roth until he was struck, the appellant did not again look back to the west. The cars varied in width from eight feet two inches to nine feet two inches. The bolt heads, hand holds, and car door projected some four inches in addition, so that a car of the greatest width would extend over the rail some two feet and three inches, or, including the space occupied by the bolt heads, etc., two feet and seven inches. When both tracks were occupied by cars, there would be not to exceed three-foot clearance between the two tracks. The accident occurred about 8:30 o'clock in the evening. There was evidence tending to show (but it was not undisputed) that this second section, or extra train, was only occasionally run, and when there was too much freight for

the regular train to carry. It is left somewhat obscure by the evidence how far he had passed beyond the switch No. 2 upon the end of the ties before he sought to turn; that is, whether the distance was fifteen to twenty paces from the point where he left Roth, or fifteen to twenty paces from the switch. At one point in the evidence the appellant states that he had gone some fifteen or twenty feet from the switch at the time he was struck by the train."

Chas. B. Keeler, K. K. Knapp, and Burton Hanson, for plaintiff in error.

James C. McShane and Russell M. Wing, for defendant in error.

Before WOODS and SHOWALTER, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge, after stating the facts as above, delivered the opinion of the court.

There are three assignments of error made by the plaintiff in error and insisted upon in the argument: (1) That the court below erred in overruling the defendant's request to instruct the jury to find a verdict in its favor upon the ground that the undisputed evidence showed that the plaintiff was guilty of negligence which contributed to produce the injury. (2) That the court erred in permitting the plaintiff, against the defendant's objection, to state his opinion as to the speed of the train which struck him at the time of the accident. (3) That the court erred in charging the jury as follows: "You have a right to reject the evidence or testimony given by one witness, if you are satisfied from his appearance, or from the circumstances, that he has not testified truly, or to the whole truth." Exceptions supporting these several assignments of error are duly preserved, and appear in the record.

The speed of the train which backed into the yard that night, and which struck the plaintiff, was a material question at issue, and much disputed on the trial. The plaintiff did not see the train at all. He was walking in the same direction, ahead of it, and was struck in the back, and thrown, he thinks, 20 or 30 feet; and he says he was never struck by a train before in that way, and had nothing to judge of as to the speed, except that one blow. Nevertheless he was allowed, against the defendant's objection, to give his opinion of the speed of the train, which he says was very fast, and, he would judge, between 15 and 20 miles an hour. We think this was error. He was simply guessing at the distance he was thrown, and from this, and from the force of the blow on his shoulder, he guessed at the speed of the train. It can hardly be assumed that the jury would not be influenced in any degree by such testimony. Indeed, the very fact that it was held competent, and permitted to be given to the jury, would naturally be taken by them as a warrant that some credit might or should be given to an opinion so poorly founded. It is elementary that the admission of illegal evidence over objection necessitates a reversal. *Waldron v. Waldron*, 156 U. S. 380, 15 Sup. Ct. 383, and cases cited. In order that the court may not disturb a judgment for error, it should appear beyond a doubt that the error complained of did not and could not have prejudiced the rights of the party objecting. *Railroad Co. v. O'Reilly*, 158 U. S. 337, 15 Sup. Ct. 830.

The third assignment of error, made upon the charge of the court as to rejecting the evidence of witnesses, is also well made. The instruction is too broad and unqualified, and would give the impression to the jury that they were quite at liberty to reject the testimony of any witness, at their own unrestricted will and pleasure. Nor is the instruction helped out by any other given on the same subject. It is true, the rule is better stated in another place; but the instruction to which exception was taken is in addition to that, and would be taken independently by the jury. The jury were told that they had the right to reject the evidence or testimony given by a witness if they were satisfied from his appearance, or from the circumstances, that he had not testified truly, or to the whole truth. What appearance or what circumstances would the jury understand that the court referred to? Could the jury reject a witness' evidence on account of his dress or color? Should the circumstances be those disclosed on the trial, or would it also include those within the knowledge of the jury, derived from other sources? Would the whole truth, which the witness must testify in order to be believed, include those in regard to which he is not interrogated on the stand, or which by inattention or inadvertence have been omitted? The instruction seems quite too unguarded and unqualified, leaving too much to the arbitrary discretion of the jury. The jury might well understand from such an instruction that it was left unrestrictedly to them whether to believe or disbelieve any witness. *Insurance Co. v. Gray*, 80 Ill. 31; *Evans v. George*, Id. 53. In the latter case the court say:

"The proposition that the jury have the right to disbelieve such witnesses as, in their judgment, under all the circumstances, are worthy of belief, is not the rule. The jury, although they are judges of the credibility of the witnesses, have no right to disbelieve arbitrarily the testimony, unless where such witnesses have willfully sworn falsely to material facts in the case."

In *Little v. Railway Co.*, 88 Wis. 402, 60 N. W. 705, the charge under consideration was this:

"If you find a witness—conclude a witness—has testified falsely as to any material fact in the case, you are permitted to disregard all of that witness' testimony, unless it is supported by other evidence."

The court, in commenting upon this instruction, says:

"This instruction authorized the jury to disregard all the uncorroborated testimony of any witness, if they reached the conclusion that he had, even through inadvertence or mistake, sworn falsely as to any material fact. This was error. As a general rule, the question of the credibility of witnesses is for the jury. If they find that a witness has testified falsely as to a material fact, they are, of course, at liberty to disregard such false testimony. But before they should apply the maxim, 'False in one thing, false in all things,' they should find that the witness knowingly or intentionally or corruptly swore falsely as to a material fact,"—citing *Mercer v. Wright*, 3 Wis. 645; *Morely v. Dunbar*, 24 Wis. 185; *Loucheine v. Strouse*, 49 Wis. 624, 6 N. W. 360; *Black v. State*, 59 Wis. 471, 18 N. W. 457; *People v. Evans*, 40 N. Y. 5; *Pease v. Smith*, 61 N. Y. 483; *People v. Chapleau*, 121 N. Y. 276, 24 N. E. 469.

The conclusions reached by the court in regard to these two assignments of error render the consideration of the first assignment,

relating to the refusal of the court to take the case from the jury, unnecessary. The judgment of the court below is reversed, with instructions to grant a new trial.

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CONTINENTAL TRUST CO. OF NEW YORK et al. v. TOLEDO, ST. L. & K. C. R. CO.

(Circuit Court of Appeals, Seventh Circuit. May 25, 1898.)

No. 464.

**1. MASTER AND SERVANT—NEGLIGENCE OF MASTER.**

It is negligence for a railway company or its receiver to store heavily loaded cars upon a side track having a sharp grade, without taking any precaution to prevent their escape onto the main track other than setting the brakes on the car nearest thereto.

**2. SAME—CONTRIBUTORY NEGLIGENCE OF SERVANT.**

It is not contributory negligence for a railway employé, without actual or imputed knowledge of the condition of a side track, to act on the assumption that it is reasonably safe and suitable for use, and that the cars thereon are safely secured.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

Clarence Brown, for appellant.

R. E. Hamill, for appellee.

Before WOODS and SHOWALTER, Circuit Judges, and BAKER, District Judge.

BAKER, District Judge. This is an appeal by the receiver from a decree on an intervening petition filed by Walter Bartlett, administrator of the estate of Michael Delaney, deceased, to recover for damages sustained by the next of kin on account of the death of the decedent. The alleged negligence consisted in the construction and maintenance of a side track used for storing loaded coal cars having a dangerous grade, extending from a coal shaft for about 600 feet to its point of junction with the main track, and in failing to provide suitable means to secure such loaded cars on the said track, in consequence of which one of them ran down upon or so near the main track that the decedent, a brakeman, who was standing on the step on the side of the engine, was struck thereby, and instantly killed. The accident occurred on the night of December 15, 1893. Delaney, at the time he was killed, was an extra freight brakeman, employed on the west end of the road. He had been employed in that capacity less than two months, and had made but a few trips over the road. Prior to that time he had been employed in the yards at Charleston. He was a strong, capable, and bright young man, about 20 years of age, but with little experience as a brakeman. At the time of his death, he was braking on a local freight train which handled the output of a coal mine on the line of the railroad at Sorrento, Ill. The mine was near the main track, and it had a daily output of about 400 tons. The scale level at the mine was 2

feet and 7 inches higher than the main track at the point where the coal track joined it. The cars were placed on the scale level at the mine, and, when loaded, they were moved down the coal track to the east towards the point of junction with the main track. This coal track, having a length of about 600 feet and a descending grade of 2 feet 7 inches, was used for storing heavily loaded coal cars. It had no derail switch, and no blocks were provided to prevent the loaded cars from running onto the main track. The grade was in the upper two-thirds of the coal track, and loaded cars were habitually left standing upon this grade without being blocked, and without their brakes being set. The car nearest the main track had its brake set, and it was relied upon to hold the other cars which were run down against it. On the night of the accident, there were 15 or 16 loaded coal cars thus placed on the coal track, covering almost its entire length. The train on which the decedent was employed had been directed to take up some cars at this place, and for that purpose the engine had gone onto the coal track, and coupled onto the nearest coal car. It is claimed that the decedent loosened the brakes on this car, and that when it was found that none of the cars wanted were on the coal track, and the engine was detached, the decedent neglected to set up the brake on the coal car, and that this failure caused the car to move down onto of near the main track, and thus brought about the accident.

Many errors are assigned, but all that are available present only two questions: First. Was the appellant chargeable with negligence in the construction and maintenance of the coal track, and in failing to provide suitable means to secure the loaded cars placed thereon? Second. Was the appellee's intestate guilty of contributory negligence? The master's duty is to exercise ordinary and reasonable care to furnish a reasonably safe working place for his employé, having regard to the danger of the service and the peril to which the employé will be exposed from the failure to exercise such care. From the brief review of the facts which we have given, we feel no doubt that the master failed in the performance of his duty. The grade of the coal track rendered it a dangerous location on which to place 15 or 16 heavily loaded cars without any means of preventing their escape onto the main track, except by the setting up of the brake on the car nearest thereto. The appellant, even if a derail switch or blocks were not necessary, might and ought to have secured the cars by having the brakes set up on each one of them. Instead of that, the rule of the appellant only required the brakes to be set up on the one car nearest to the main track. He knew the character of the grade on the coal track, and the danger of cars escaping therefrom onto the main track, and, with this knowledge, he failed to exercise proper care to guard against it. The decedent had never been on this coal track but once before the night on which he was killed, and that in the nighttime, and he had no notice or knowledge of its dangerous condition. This danger was not one of the ordinary hazards of the service, and it was not one assumed by the decedent. The burden is on the appellant to show contributory negligence on the part of the appellee. This

he has failed to do. Even if the appellee neglected to set up the brake when the engine pulled out onto the main track, still the evidence fails to show that he knew the condition of the coal track, or that the brakes had been set up only upon one of the cars. Being in ignorance of the appellant's negligence, he had a right to act on the assumption that the coal track was reasonably safe and suitable for the use to which it was put, and that the cars stored thereon were so secured that they would not run out upon the main track. Especially is this so in view of the fact that that part of the coal track where the decedent was employed on the night of the accident was on a level grade, and he had no knowledge but that the entire coal track was on the same grade.

On the argument at bar it was suggested that the damages were excessive. No such question was presented in the motion for a new trial in the court below, nor has it been assigned as an error in this court. Under these circumstances, we do not feel called upon to examine this question. We find no available error in the record. The decree of the court below is affirmed, at the cost of the appellant.

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FITCHBURG R. CO. v. DONNELLY.

(Circuit Court of Appeals, Seventh Circuit. June 3, 1898.)

No. 477

**DAMAGES—PLEADING SPECIAL DAMAGES.**

In an action for personal injuries, plaintiff cannot show his occupation and rate of wages, in the absence of an allegation of special damage.

**In Error to the Circuit Court of the United States for the Northern District of Illinois.**

This action was brought to recover damages for a personal injury sustained by the defendant in error while riding in a caboose of the plaintiff in error, attached to the rear end of a stock-car train operated by it. Several of the cars composing the train contained live stock which was being shipped by Swift & Co. from Chicago to Boston. The defendant in error, who was the plaintiff below, was in charge of the stock for Swift & Co. The contract of shipment was not made with the plaintiff in error; the cattle being shipped at Chicago on another road, and received by the plaintiff in error at Rotterdam Junction, N. Y., from which point it operated a railroad to Boston. The defendant in error alleges that, while riding on this road with the stock, the train suddenly slackened its speed from about 15 to 4 miles per hour, producing a jolt by which he was thrown from a seat in the rear end of the caboose, causing him to fall upon the floor of the car, fracturing his hip, and causing a permanent impairment of the limb. The jury rendered a verdict in his favor for \$12,500, for which sum judgment in his favor was rendered. The writ of error is brought to reverse this judgment.

John H. Coulter, for plaintiff in error.

A. W. Bulkley, for defendant in error.

Before WOODS and SHOWALTER, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge (after stating the facts). There are 33 assignments of error, only one of which it will be necessary to consider.

On the trial, without any allegation of special damages in the declaration, the defendant in error was allowed to prove that he had been engaged for several years in the occupation of accompanying stock from Chicago to Philadelphia, and other Eastern markets, that for three years he had earned \$75 a week, that at and before the time of the accident he was allowed the fixed sum of \$50 for each trip, and that he made a trip nearly every week. Objection was made and proper exception taken to this proof, and a motion made to strike it out as being incompetent under the issues; but the objection and motion were overruled, and exceptions properly preserved. This was error for which the judgment must be reversed. It was showing special damages without any allegation of special damages in the declaration, which is contrary to the well-settled rule. General damages, or such damages as the law holds to be the necessary result of the cause of action set forth, need not be specially pleaded, but may be recovered under the general allegation of damage. Special damages, which are the natural, but not necessary, result of the injury complained of, must be specially alleged. Such injuries do not necessarily result from the defendant's wrongful act; hence they must be specially alleged, in order that the defendant may have notice thereof, and be prepared to meet the same upon the trial. 5 Enc. Pl. & Prac. pp. 717, 719, and cases cited. The rule as laid down by Chitty in his Pleading (page 385), and adopted by the supreme court of New York in *Squier v. Gould*, 14 Wend. 159, is still the general rule both in this country and in England:

That "when the damages actually sustained do not necessarily arise from the act complained of, and consequently are not implied by law, in order to prevent surprise to the defendant the plaintiff must state in his declaration the particular damage that he has sustained, or he will not be permitted to give evidence of it upon the trial."

In *Taylor v. Town of Monroe*, 43 Conn. 36, in a personal injury suit, where the allegation in the declaration was similar to this,—that the plaintiff had been prevented from attending to her ordinary business,—it was held error to allow the plaintiff to prove that by reason of the accident she had been unable to attend to her regular business as a button maker in a button shop, where she had been many years employed, and was earning from \$300 to \$350 a year. In *Tomlinson v. Town of Derby*, Id. 562, under a similar allegation, it was held that the plaintiff could not show that he was earning \$100 a month in carting and sawing timber. In *Baldwin v. Railroad Corp.*, 4 Gray, 333, in an action against a railroad for damages received at a railroad crossing, it was held that the plaintiff, without alleging special damages, could only recover such damages as any other person as well as the plaintiff might, under the same circumstances, have sustained, and that it was error to allow the plaintiff, in order to enhance the damages, to show that she was a school teacher. In *Railway Co. v. Friedman*, 146 Ill. 583, 30 N. E. 353, and 34 N. E. 1111, it was held error for the court to admit evidence tending to prove that the plaintiff at the time of the injury was receiving for his services as a traveling salesman \$3,000 per year.

In the case at bar the better course would have been, when objec-

tion was made to the testimony, to obtain leave to amend the declaration; but, the plaintiff choosing to abide by his allegations, the defendant had no other course open but to rely upon its exceptions to the testimony. The judgment below is reversed, with instructions to grant a new trial.

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LYON COUNTY v. ASHUELOT NAT. BANK OF KEENE, N. H.

(Circuit Court of Appeals, Eighth Circuit. May 9, 1898.)

No. 1,024.

1. COUNTIES—LIMITATION UPON INDEBTEDNESS—EXCESS.

Bonds issued by a county in violation of a provision in the state constitution, limiting the indebtedness of counties to a certain proportion of the value of their taxable property, constitute no enforceable obligation of the county; and bonds subsequently issued, at a time when such issue did not bring the total indebtedness of the county, excluding the invalid bonds, up to the constitutional limit, are valid, although the county may afterwards voluntarily pay the invalid bonds. 81 Fed. 127, affirmed.

2. SAME—INVALID BONDS—VOLUNTARY PAYMENT—SUBROGATION.

Where invalid county bonds are voluntarily paid by the county, the funds being secured by sale of other similar bonds, which are subsequently repudiated for the same illegality, equities, if any existed, of the holders of the first issue, are extinguished by the payment, and the holders of the second issue cannot be subrogated thereto. 81 Fed. 127, affirmed.

In Error to the Circuit Court of the United States for the Northern District of Iowa.

E. C. Roach and E. Y. Greenleaf (Simon Fisher on brief), for plaintiff in error.

J. M. Parsons, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge. This action was brought to recover the amount of eight bonds of the defendant county, issued and dated November 12, 1880, and payable on or before November 12, 1890, four being for the sum of \$500 each, and four for the sum of \$100 each, together with the last eight coupons for the semiannual interest at 7 per cent. on each of the said bonds. These bonds purport to have been issued by the board of supervisors of said county of Lyon, under legislative authority referred to in the recitals, and in conformity with a resolution of said board of April 5, 1880. The coupons were paid by the county as they matured, to and including those which came due November 12, 1886. The execution of the bonds, and the sale and delivery of them to the plaintiff, for full consideration received by the county, is not questioned; and the only defense urged is that the bonds were, in their inception, illegal and void, and issued in contravention of section 3 of article 11 of the constitution of the state of Iowa, which ordains:

"No county or other political or municipal corporation, shall be allowed to become indebted in any manner or for any purpose, to an amount in the aggregate exceeding five per centum of the value of the taxable property within

such county or corporation—to be ascertained by the last state and county tax lists, previous to the incurring of such indebtedness.”

The findings of fact by the court upon the trial of this cause, set out in the record, and reported in 81 Fed. 127, show that on July 1, 1879, Lyon county issued a series of refunding bonds, commonly known as the “Shade Bonds,” in the sum of \$100,000, which were sold, and the proceeds used to pay in full \$55,000 of judgment bonds, and \$47,300 of refunding bonds previously issued by the county, and till then unpaid. As the taxable value of the property in Lyon county, as shown by the state and county tax lists for the year 1879, was \$915,133.28, and a less amount for the year 1878, it was conceded by counsel for the defendant on the argument that the finding of the court below that these Shade bonds were void and unenforceable against the county, because their issue was in plain contravention of the constitutional limitation, was correct. From this concession the conclusion inevitably follows that these bonds constituted no indebtedness of the county. Indeed, this conclusion is simply another form of stating the proposition conceded.

The findings further show that the value of the taxable property of Lyon county, as shown by the proper tax lists for the year 1880, was \$1,066,707. Therefore, on November 12, 1880, when the bonds in suit were issued, said county could, within said constitutional limitation, lawfully have and contract indebtedness to the amount of \$53,335. On that day, and prior to the issue of bonds to the amount of \$2,400, being the bonds in suit, the indebtedness of said county (disregarding said Shade bonds) consisted of outstanding bonds to the amount of \$27,000, judgments to the amount of \$15,772.88, and warrants to the amount of \$2,400,—an aggregate of valid indebtedness amounting to \$45,172.88; so that, when the bonds in suit were issued on that day, they did not increase the indebtedness of said county up to the constitutional limit. The bonds in suit were therefore valid when issued and sold to the plaintiff; and no subsequent action of the county in respect to its obligations, legal or moral, could affect their validity. The fact that the Shade bonds, which were not obligatory on the county, and, which its counsel upon the argument here admits, were not enforceable at law, were afterwards voluntarily paid by the county, was commendable, as the county had received full consideration for them; but such voluntary payment cannot relate back, and give any validity to the Shade bonds, as of any date prior to such payment, nor so as to render illegal the bonds in suit, which at all times before such payment were perfectly valid. The fact that the Shade bonds were not paid from the taxes or funds of the county, but from moneys obtained by it from financial institutions, whom its officials duped into purchasing a later like illegal issue of bonds of the county, to the amount of \$120,000, which the county now repudiates, may lessen the commendation it would otherwise be entitled to for acknowledging its moral obligation in respect to the Shade bonds, but cannot otherwise affect this case. If the holders of the Shade bonds had any enforceable equitable rights against the county, such rights were extinguished by the payment of those bonds; and we agree with the learned judge, whose decision

we are reviewing, that the purchasers of the last issue of bonds cannot be subrogated to the rights and equities, if any, of the holders of the Shade bonds. *Ætna Life Ins. Co. v. Town of Middleport*, 124 U. S. 534, 8 Sup. Ct. 625.

Even if the county, since the issue and sale of plaintiff's bonds, by its voluntary payment of the Shade bonds with the money received from the last issue of bonds, has given rise to any enforceable equity in favor of the purchasers of that last issue, then, as there was no transfer by subrogation of the previous equities of the holders of the Shade bonds, the equities of the holders of such last issue must rest upon facts and transactions subsequent to the issue of plaintiff's bonds, which are therefore not affected by such equities. The judgment of the circuit court is affirmed.

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HAINES v. FRANKLIN et al.

(Circuit Court, E. D. Pennsylvania. May 11, 1898.)

1. FALSE REPRESENTATION OF CORPORATION—STATEMENT OF CAPITAL PAID IN—CAUSE OF ACTION.

The cause of action of one who suffers loss in consequence of the false representation, in the sworn statement of the incorporators of a Pennsylvania corporation, in their application for letters patent, that 10 per centum of the capital stock is paid in, arises out of the fraud, and an action *ex contractu* for such loss will not lie.

2. SAME — ASSIGNEE OF JUDGMENT — INDUCEMENT TO PURCHASE — RIGHTS ACQUIRED.

The assignee of a judgment against a Pennsylvania corporation does not acquire the judgment creditors' right of action against the incorporators for false representations in the sworn application for letters patent; and he has no such cause of action unless his acquisition of the judgment was induced by his belief, and in reliance on such representations.

Henry Budd, for plaintiff.

H. M. North, Brown & Hensie, and B. C. Kready, for defendants.

DALLAS, Circuit Judge. In *Patterson v. Franklin*, 35 Atl. 205, the opinion of the supreme court of Pennsylvania begins with this statement:

"The defendants were the incorporators and holders of the stock of the Keystone Standard Watch Company. In their application for letters patent, they set forth, among other things, that the capital stock of the corporation was five hundred thousand dollars, divided into five thousand shares of the par value of one hundred dollars each; and 'that fifty thousand dollars, being ten per cent. of the capital stock, has been paid in cash to the treasurer of said corporation, whose name and residence are William Z. Sener, Lancaster, Pa.' The statement is the method prescribed by law for assuring the executive department of the state government that the requirements of the law have been complied with by the corporators, and that they are entitled to be made a corporation. After letters patent have been issued, the statement, with all its indorsements, must be recorded in the proper county, for the information of the public, in order that the fact of incorporation may be known, and the credit to which the corporation is entitled may be intelligently judged of by all persons who may have occasion to do business with it. This statement, made and sworn to in the usual manner, is now alleged to have been false in so far as it asserted the payment of fifty thousand dollars to the treasurer of the corporation, and it is asserted that not

one dollar in cash was so paid. It is certain that, after a short business career, the corporation, being unable to pay its debts, made an assignment for the benefit of creditors. The plaintiff in this action is the assignee. The defendants are the corporators by whom the alleged false certificate was signed. The right to recover is rested on the alleged fraud committed by means of the false representation contained in the certificate."

In that case it was held that "the corporation had no right of action against the defendants growing out of the false statement in the certificate, and the plaintiff, its assignee, has none." The decision has this extent, no more; but it having been suggested that, if the assignee could not recover in the right of his assignor, he might do so in the right of creditors, the court further said:

"But the creditors have no joint action against the defendants. If a right of action exists, it is several to those injured, and extends no further than the individual loss of the creditor who sues. The question of the defendants' liability to those who were led to trust the corporation because of the false certificate is not before us. What we say is that, if they had a right of action, it is not an asset, the proceeds of which are for general distribution. The action is misconceived, and there can be no recovery in this case, though the fraud was admitted on the record in the terms in which it is charged. The right to complain is in the individuals who suffer, and the right of action extends only to the individual loss of the particular person injured, if the right of action exists."

The present action is a several one. It is founded upon the same certificate, and is brought for recovery of the alleged individual loss of the plaintiff, who claims as a particular creditor of the corporation. Can it be maintained? As we have seen, *Patterson v. Franklin* did not decide that it could be, and the court carefully abstained from intimating any opinion upon the subject. The question is therefore an open one.

The statement of claim to which the defendants have demurred is framed *ex contractu*. It alleges that the representation made by the defendants, that 10 per centum of the capital stock had been paid in in cash, was "altogether false and untrue, and was a fraud upon the commonwealth of Pennsylvania, and upon all persons who might thereafter deal with the said Keystone Watch Company upon the faith of the charter or letters patent granted by the commonwealth, and further constituted a joint and several covenant with such persons that said money had been paid, or would be, into the treasury of said company, to answer the claims of the said persons who might so deal with the said corporation." Now, if the contractual liability thus averred exists, it must arise out of the Pennsylvania statute under which the certificate was filed. No independent and direct contract between the plaintiff and the defendants is asserted. Ordinarily, all contracts, whether express or implied, rest upon intent; and therefore, to establish a contract of the latter class, it is necessary that facts should be alleged and proved from which an intention to contract may be implied. No such facts are present in this case. A contract, or quasi contract, may, it is true, be founded upon statutory provisions, as where, by statute, the stockholders of a company are made individually liable to its creditors to an amount equal to the amount of stock held by them respectively. *Flash v. Conn*, 109 U. S. 371, 3 Sup. Ct. 263. The liability thus created is directly to the several creditors, and is held to be contractual because the stockholders, by their acceptance

of the stock taken by them respectively, are assumed to have intended to enter into the obligation which the statute attached to such acceptance. But a right of private action under a statutory provision must always be dependent upon the scope and language of the particular enactment, and the statute here in question creates no contractual liability whatever. I do not mean to say that one who has suffered legal injury in consequence of the false representation alleged to be contained in this certificate may not sue for redress of that injury. On the contrary, I think the right to do so results from a correct perception of the purpose of the Pennsylvania legislature in providing for its recording; that purpose, as was said by the supreme court of that state, in *Patterson v. Franklin*, *supra*, being, to supply means "for the information of the public, in order that \* \* \* the credit to which the corporation is entitled may be intelligently judged of by all persons who may have occasion to do business with it." The right thus resulting, however, is one which, under the old system of pleading, could have been enforced only through the appropriate action of tort, and the innovations which have been made upon that system have not gone to the extent of obliterating the broad distinction between actions *ex delicto* and actions *ex contractu*. In *Patterson v. Franklin* it was said, "The right to recover is rested on the alleged fraud;" and some of the language which follows this statement quite plainly indicates that the court had in mind a wrong committed, and not a contract broken, as the ground upon which an individual creditor might possibly recover. It referred to those "injured" by the "false certificate" as being the persons entitled to sue, and to "the fraud" as being the basis of their complaint, "if the right of action exists."

It is contended, however, that a plaintiff may waive a fraud and sue in contract; and this, of course, may be done in some cases. Where, from the same facts, the violation both of a duty and of a contract appears, the party aggrieved may elect upon which ground he will proceed; but I do not understand that a fraud, pure and simple, can, at the choice of either party, be converted into a contract, or that it is possible for a plaintiff, by any device of form, to charge a defendant with breaking a promise which neither in fact nor by implication of law he had ever made. The true inquiry is not as to the remedy, but as to the nature of the right. Here, the defendants did not say, "We warrant," which would be a contract, but they said, "The fact is;" and this, if untrue, was a false representation, and therefore the case, aside from any question of pleading, is essentially one of deceit. *Mahurin v. Harding*, 28 N. H. 128; *Derry v. Peek* (1889) 14 App. Cas. 337; *Bragdon v. Perkins-Campbell Co.*, 87 Fed. 109. "Deceit consists in leading a man into damage by willfully or recklessly causing him to believe and act on a falsehood." When you have alleged that the statement was false, you must further allege that the plaintiff believed and acted upon it, and has sustained damage by so doing. *McHose v. Earnshaw*, 3 U. S. App. 545, 5 C. C. A. 210, and 55 Fed. 584. And the existence of these essential facts may not be left to inference or conjecture from vague and indefinite language, but must be alleged with convenient certainty; that is to say, so dis-

tinctly and explicitly as to preclude any reasonably possible misunderstanding of what is meant.

With these principles in mind, I turn to the statement of claim, and find that it nowhere alleges that the plaintiff believed and acted upon the representation in question, unless such an allegation may be supposed to be deducible from the statement that the plaintiff, in the year 1891 (more than four years after the representation was made), purchased a judgment against the Keystone Standard Watch Company, "in the full belief that everything necessary for the proper organization of the company had been complied with, and on the bona fides of all actions of the persons concerned in the organization of the same." It is impossible to regard this as amounting to a distinct and explicit allegation that the plaintiff believed and acted upon the particular statement that 10 per centum of the company's capital had been paid in, in cash, and that he sustained damage in consequence. Nothing could have been more easy than to say this plainly; and it is not unfair to presume that it was not said simply because it was known that it could not be proved.

In the plaintiff's brief it is said that he stands in the shoes of the original judgment creditor. As respects the defendant in the judgment, the corporation itself, this may be conceded; but I cannot agree that the plaintiff, as assignee of the judgment, became clothed with any rights which his assignor may have had against these defendants. Their obligation, if any, was, though collateral, an independent one. The plaintiff's alteration of his condition consisted solely in his acquisition of the judgment, and, if this was not induced by his belief in and reliance on the defendants' representation, his supposed cause of action against them is palpably defective and incomplete. This was exemplified by Lord Cairns, in *Peek v. Gurney* (1873) L. R. 6 H. L. 377. He put the case of a person having built a house, and desiring to sell it, and said:

"He comes to me, and wishes me to purchase it. He describes it as a highly advantageous purchase, and makes statements of fact to me with regard to the house which are untrue and are misrepresentations; but I decline to purchase, and our overtures come to an end. He subsequently sells it to some other person, upon what terms I know not. That other person completes the purchase, and that other person, desiring to raise money on mortgage, applies to me to lend him money. I lend him money upon a mortgage of the house. The facts stated to me originally turn out to be untrue, and are so material as that the house, not being as represented, becomes comparatively worthless. I then apply to the original vendor, remind him of what he told me, and complain to him that my money lent upon mortgage had been lost; and I commence an action against him for damages to recover my loss. I ask, could such an action be maintained? I know of no authority for it, and I am of opinion that an action of that kind would not lie."

In the instance thus suggested, the transaction of mortgage was much more nearly connected with the false representations than is the purchase of the judgment with the alleged false certificate in this case. In *Peek v. Gurney* the bill alleged misrepresentations of facts and concealment of facts on the part of the directors, in a prospectus they had issued, by which the complainant had been induced to purchase shares; and it was held, the case being treated as one of deceit, that, assuming the falsity of the representations, there was no liability to

one who had purchased shares of the corporation in the market, notwithstanding that the purchase had been induced by the representations complained of. That case seems to me to closely resemble the present one. It was fully considered by very able judges, both in the first instance and on appeal; and the reasoning upon which the complainant there was denied recovery is, I think, conclusive against the plaintiff here. Furthermore, there was in that case no denial that the plaintiff had bought in reliance on the prospectus, whereas in this one there is no sufficient allegation that the plaintiff either believed or relied upon the certificate which he says was false. Upon the whole case, I am persuaded that the averment of the demurrants that the plaintiff has not, by his said declaration, alleged a state of facts entitling him to recover from them, is well founded in law; and therefore judgment for the defendants will be entered.

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LOUISVILLE TRUST CO. v. KENTUCKY NAT. BANK et al.

(Circuit Court, D. Kentucky. March 21, 1898.)

1. USURY PAID TO NATIONAL BANKS—RECOVERY—ASSIGNEE FOR CREDITORS.

An assignee for the benefit of creditors under the Kentucky statutes, who, in order to get possession of collaterals, pays to a national bank a note of his assignor, which includes usurious interest, may maintain an action to recover it back, under Rev. St. § 5198. The assignee is the assignor's "legal representative" in the meaning of that section.

2. LIMITATION OF ACTIONS—USURY—RENEWAL NOTES.

Usurious interest on a note is not paid, so as to set running the statute of limitations against an action to recover it back, by giving a renewal note which includes the interest. The statute only begins to run from the time the renewal note is paid.

3. USURY—AMOUNT OF RECOVERY.

Under Rev. St. § 5198, which provides that one paying usurious interest to a national bank may recover back twice the amount of the interest thus paid, it seems that the recovery allowed is twice the amount of the entire interest, and not merely of the excess over the legal rate.

Helm & Bruce, for plaintiff.

Humphrey & Davie, for defendants.

**BARR**, District Judge. This is a suit brought by the Louisville Trust Company, as general assignee of Thomas & Son, to recover from the Kentucky National Bank usury which is alleged to have been paid that bank. It appears from the allegations of the petition that Thomas & Son, who were large whisky dealers in the city of Louisville, on April 18, 1894, made a general assignment to the plaintiff, the trust company, for the benefit of their creditors, assigning and transferring to it all of their property of every description, choses in action, etc., except such property as is exempt from execution by the laws of the state of Kentucky. The petition sets out various loans made by the Kentucky National Bank to Thomas & Son, for which they executed their notes, and, as they matured, renewed them; sometimes increasing the amount by additional borrowings, and at other times renewing for the same amount less the discount, and at

other times paying something and renewing the balance. The renewed obligations were unpaid at the time of the assignment, in April, 1894, and, as the bank held a large amount of collateral, alleged to be twice as much in value as the debt for which it was pledged, the trust company paid to the bank several debts, and received the collateral. These payments were made a few days after the deed of assignment, to prevent a sacrifice of the collateral, as the bank threatened to sell the same on the board of trade; and the plaintiff, as assignee, seeks to recover double the amount of interest on the several notes which were given by Thomas & Son, and paid by the plaintiff as assignee. The suit was filed December 13, 1895, and within two years of the time the trust company paid the several debts. The demurrer, which is to each paragraph of the petition, is, because—First, there is no cause of action in favor of the plaintiff, the Louisville Trust Company; and, second, because the petition seeks to recover double penalty for the alleged payment of usury, made more than two years before the bringing of the suit.

Counsel for the defendant has filed a most elaborate brief, in which he presents quite a number of questions, some of which are not raised by the demurrer. The national banking act (section 5197) provides that:

"Any association may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the state \* \* \* where the bank is located and no more, except that where by the laws of any state a different rate is limited for banks of issue organized under the laws of the state the rate so limited shall be allowed for associations organized or existing in any such state under this title. When no rate is fixed by the laws of the state, \* \* \* the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days from which the note, bill or other evidence of debt, has to run:"

And by section 5198 it is provided that:

"The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid the person by whom it has been paid, or his legal representative, may recover, back, in any action in the nature of an action of debt, twice the amount of the interest thus paid, from the association taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred."

The petition, as originally brought, included in paragraphs 2 and 3 a claim for usury for debts which had been paid in full before the deed of assignment was made to the plaintiff; but that has been stricken out on motion of the plaintiff, and all of the remaining paragraphs set up claims for usury on debts which were finally paid by the plaintiff as the general assignee of Thomas & Son. It is claimed that the plaintiff has no right of action, because it was not the original borrower, and is not the legal representative of Thomas & Son, within the meaning of the statute. Authorities are cited to sustain the general proposition that assignees under the state law cannot sue and recover usury which has been paid by their assignors, as in such cases they are not the legal representatives of the bor-

rowers who have paid the usury. The contention is that the legal representative must mean an executor or administrator of a deceased party who would be entitled to recover the usury. This contention makes it necessary for us to examine somewhat into the legal right and duty of a general assignee under the laws of the state of Kentucky. The Kentucky law requires that voluntary assignments of a debtor in trust for his creditors shall be for the benefit of all his creditors in proportion to their debts and claims, and prohibits any preference given by a person insolvent or in contemplation of insolvency, under penalty that such preferential transfer and assignment shall transfer and assign all of the debtor's property for the benefit of his creditors, to be equally distributed, except that certain named fiduciary claims are given preference. A general assignee is given the right, and it is made his duty, to institute proceedings to set aside a preferential or fraudulent transfer, conveyance, or gift, of the assignor's property, or that of a fraudulent purchase of property in the name of another person. Therefore an assignee under a general assignment is in the nature of a general liquidator of the estate of the debtor, and as such, we think, the plaintiff had a right, and it was its duty, if the estate of Thomas & Son required it, to pay these debts to the defendant the Kentucky National Bank, and thus get control of the collateral held by the bank, and save it from being sacrificed. The relations, by the Kentucky law, of a general assignee to an insolvent debtor, are very like those of an administrator to his decedent, in that it is the duty of both to collect, care for, and distribute, the estate of the insolvent in the one case and the personal estate of the decedent in the other. In the one case, if there is any of the estate left after the payment of the debts and the expenses of of the administration, it goes to the insolvent, and in the other case to the heirs and distributees of the decedent. By the provisions of the Kentucky statute, "personal representative" means executor or administrator or other person appointed to take charge of the estate of a deceased person, and "real representative" means the heir or devisee of real property of a deceased person. These definitions are in the Kentucky Code. The federal statute does not use the words "personal representative," but "legal representative." It seems to us, considering the rights and duties incumbent upon plaintiff as general assignee of Thomas & Son, it was, in making these several payments, the legal representatives of the assignors, who were the original borrowers.

It seems to be conceded by learned counsel that the plaintiff is entitled to recover because of the greater rate of interest paid by it upon the paper taken up by it; but, if we are correct in concluding that the plaintiff, in paying these debts, was the legal representative of Thomas & Son, then if these final payments are to be considered in law as the payment of the usury which had been taken in the previous renewals, the plaintiff is entitled to recover, because he is the person who paid the greater rate of interest than that permitted by the federal statute. This view, of course, does not assume that the deed of assignment transferred to the plaintiff the right to recover this double interest, which right had already

accrued to Thomas & Son; but merely that the deed of assignment gave to the plaintiff the right, and made it its duty, to pay these bank debts, under the circumstances; and in thus paying the debts the right to recover the double interest accrued and became perfect. The plaintiff is, therefore, not to be considered as merely a creditor or the representative of creditors of Thomas & Son, who is seeking to recover interest which had accrued to them, but the person who has paid the greater interest. But if we assume that the payments of the plaintiff, as assignee of Thomas & Son, of these debts, were the payments of Thomas & Son, and that thereby the right to recover accrued, still we think that the general assignee in Kentucky is a "legal representative" within the meaning of the federal statute, and entitled to recover. A brief review of several of the cases, we think, will sustain this view. It is impossible, in a brief opinion, to review all the cases referred to by learned counsel on this subject, but I will consider several that he refers to as decisive of this question. Thus the two cases decided by Judges Emmons and Swing, of *Barnett v. Bank* (decided in 1876), and reported in Fed. Cas. Nos. 1,026 and 1,034. The facts in these cases are not fully given, but the case No. 1,026 was taken to the supreme court, and was reported in 98 U. S. 555. It appears from that report that the usury which was sought to be recovered below was usury which had been paid by the insolvent debtors, Barnett & Whitesides, long before the assignment; and it is notable that, while the supreme court affirmed the case, they put it upon an entirely different ground from that of the trial judges, viz. that the usury could not be pleaded as a set-off to a suit, but that the recovery must be by a separate and distinct action, that being the only remedy given by the statute; and did not touch upon the question at all of whether or not the assignee could sue and recover. It appears from the statement of the case in the supreme court that the defendant assignee of Barnett & Whitesides set up that a bill which was sued upon contained illegal interest,—not only the bill itself, but the renewals thereof,—and claimed to have that usury applied to the payment of the bill sued on; and that plea was not demurred to, and was allowed by the trial court, and no error complained of therefor in the supreme court, showing that the assignee of the general assignment was allowed to so far represent the assignor. These cases, we think, are not in point in the present case, except that they show that the assignees could defend, under the statute against usury, when sued for the debt of the assignor. In the case of *Osborn v. Bank*, 175 Pa. St. 494, 34 Atl. 858, it was held that an assignee in the state of Pennsylvania was not entitled to sue for usury, and this was because of the local law, which defines "legal representative" as meaning executor or administrator, and it was held that under that law such an assignee was not a legal representative within the meaning of the federal statute. The court said (175 Pa. St. 498, 34 Atl. 859):

"It is true, if the subject-matter or the context shows that the words are used in a different sense. whether in statute or a contract, the courts will give them the meaning intended. Thus they may mean next of kin (*Ralston v.*

Wain, 44 Pa. St. 279), or, if land be the subject, they may be construed to refer to heirs, devisees, or alienees (*Duncan v. Walker*, 2 Dall. 205; *Ware v. Fisher*, 2 Yeates, 578; *Cochran v. Cochran*, 127 Pa. St. 486, 17 Atl. 981)."

The court said in another part of the opinion:

"This decision is not necessarily in conflict with *Bank v. Overholt*, 96 Pa. St. 327, as it was there held that the right of action passed to an assignee in bankruptcy. This officer, like the receiver, as already said, derives his power from the statute and the decrees appointing him, and stands on a different footing from a voluntary assignee for the benefit of creditors."

We have against this view the case of *Tiffany v. Bank*, 18 Wall. 409, in which Tiffany, trustee, was allowed to sue, or at least in which no objection was made, and the court disposed of the case thus brought upon its merits, thus assuming that he could legally bring it. In the case of *Wright v. Bank*, reported in Fed. Cas. No. 18,078, Judge Gresham sustained the right of an assignee in bankruptcy to sue for usury paid by the assignor. In the case of *In re Prescott*, 5 Biss. 523, Fed. Cas. No. 11,389, an assignee in bankruptcy was allowed to defend, and have the usury under this statute in a claim presented against the bankrupt stricken out. In the case of *Bank v. Alves*, 91 Ky. 146, 15 S. W. 132, the Kentucky court of appeals decided that an assignee under a deed of trust for the benefit of creditors was a "legal representative" within the meaning of the federal statute. In *Re Hoole*, 3 Fed. 496, Judge Choate allowed an assignee in bankruptcy to get the benefit of money paid by the bankrupt, and thus discharge a claim set up against the estate. *Danforth v. Bank*, 1 C. C. A. 62, 48 Fed. 271, decides that usury charged by a national bank destroys the interest bearing power of the note or bill. The reasoning of the court in *Timberlake v. Bank*, 43 Fed. 235, would rather tend to the conclusion that Thomas & Son could not sue for the usury paid by plaintiff, instead of proving plaintiff could not as claimed by counsel. But, whatever may be the rights of an assignee, either in bankruptcy, or a general assignee to recover usury under this statute, which had been paid (before the assignment or before the bankruptcy), and had been a concluded transaction, we think that there can be no serious doubt that plaintiff was the legal representative of Thomas & Son, and as such made the various payments of the debts under the circumstances detailed; and that fact, whether you consider the plaintiff as paying the usury, or whether you consider it merely as the legal representative of Thomas & Son, it seems to me gives it the right of action.

The next inquiry is whether or not several of the sums which are sought to be recovered are within two years from the time when the usurious transactions occurred. The case of *Brown v. Bank* (decided by the supreme court, Feb. 21, 1898) 18 Sup. Ct. 390, though not distinctly on this question, we think throws much light upon it. That case, as we understand, was a case which arose under the provisions of the law, where it was sought to have the entire interest on a note forfeited, because a greater rate of interest than allowed by law had been agreed to be paid thereon. The court of appeals of Kentucky held that only the interest on the last note

should be forfeited, and not the interest which had accrued upon notes for which the existing note had been a renewal. This was based upon the court's construction of the language of the act, which is, "Taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon." The case was returned to the trial court, and, although this construction of the statute had been subsequently reversed by the same court, still the trial court concluded that they were bound in that case by the court of appeals' decision, and the case went a second time to the court of appeals, and was there affirmed, and from there went to the supreme court of the United States. The opinion, delivered by Justice Harlan, is a brief one. The court says:

"If a bank which violates that section [5198] sues upon the note, bill, or other evidence of debt held by it, the debtor may insist that the entire interest, legal and usurious, included in his written obligation, and agreed to be paid, but which has not been actually paid, shall be either credited on the note or eliminated from it, and judgment given only for the original principal debt, with interest at the legal rate from the commencement of the suit. We say 'entire interest' because such are the words of the statute, based on the act of June 30, 1864, \* \* \* whereas the prior statute of February 25, 1863, \* \* \* declared that the knowingly taking, reserving, or charging a greater rate of interest than was allowed should be held and adjudged a forfeiture of the debtor's demand on which usurious interest was taken, reserved, or charged. The forfeiture declared by the statute is not waived or avoided by giving a separate note for the interest, or by giving a renewal note in which is included the usurious interest. No matter how many renewals may have been made, if the bank has charged a greater rate of interest than the law allows, it must, if the forfeiture clause of the statute be relied upon, and the matters thus brought to the attention of the court, lose the entire interest which the note carries, or which has been agreed to be paid. By no other construction of the statute can effect be given to the clause forfeiting the entire interest which the note or other evidence of debt carries, or which are agreed to be paid, but which has not been actually paid. It is said that within the meaning of the statute interest is 'paid' when included in a renewal note, and when suit is brought upon the last note calling for interest from its date only the interest accruing on the apparent principal of that note is subject to forfeiture. We think that the statute cannot be so construed. If, within the meaning of the statute, interest is paid simply by including it in a renewal note, it would follow that, as soon as usurious interest is included in a renewal note, the borrower or obligor could sue the lender or obligee, and 'recover back \* \* \* twice the amount of the interest thus paid,' when he had not in fact paid the debt, nor any part of the interest, as such. This cannot be a sound interpretation of the statute. The words 'in case the greater rate of interest has been paid,' in section 5198, refer to interest actually paid, as distinguished from interest included in the note, and only 'agreed to be paid.' If, for instance, one executes his note to a national bank for a named sum as evidence of a loan to him of that amount, to be paid in one year at ten per cent. interest, such a rate of interest being illegal, and if renewal notes were executed each year for five successive years without any money being in fact paid by the borrower, each renewal note including past interest, legal or usurious, the sum included in the last note in excess of the sum originally loaned would be interest which that note carried which was agreed to be paid, and not, as to any part of it, interest paid." And again: "If the note, when sued on, includes usurious interest agreed to be paid, the holder may in due time elect to remit such interest, and it cannot then be said that usurious interest was paid to him. *McBroom v. Investment Co.*, 153 U. S. 318, 323, 14 Sup. Ct. 852; *Stevens v. Lincoln*, 7 Metc. (Mass.) 525; *Saunders v. Lambert*, 7 Gray, 484, 486; *Stedman v. Bland*, 26 N. C. 296, 299."

The court also refers to the case of *Sydner v. Bank*, 94 Ky. 231, 21 S. W. 1050, and quotes from it approvingly the quotation used by the Kentucky court from the case of *Bank v. Hoagland*, 7 Fed. 159, in which it was held that a forfeiture was not waived by giving subsequent notes, though in respect to them the agreed rate of interest was a legal rate. The case of *McBroom v. Investment Co.*, 153 U. S. 318, 14 Sup. Ct. 852, is, we think, quite in point, and, taken with the reasoning of the court in the case of *Brown v. Bank*, is decisive of this question.

The remaining question which is argued by counsel is whether or not the recovery shall be double the amount of the interest paid or only double the amount of the usury paid. This question is not raised by the demurrer, and could not be raised, unless it would leave the amount less than the jurisdictional sum. Still, it has been argued by counsel very elaborately, and we should, perhaps, indicate our view upon it. We think the case of *Brown v. Bank*, read with the case of *McBroom*, is also decisive of this question, because it would be a most extraordinary construction of this statute to allow a forfeiture of all of the interest, not only of the remaining note, but all of the interest which accrued on previous renewals, when usury had not been paid, but only allow double the usury (double the amount of the excess of interest) to be recovered when the usury and the debt had actually been paid. It is quite evident from the entire section that the penalty is to be greater when the creditor has actually required the usury, and received it, than when it was merely agreed to be paid in the obligation, though not paid. The language of the section, fairly construed, we think makes it clear that the recovery should be double the amount of the interest, and not only the excess of the interest paid. We do not think it necessary to review the authorities upon this subject, but will refer to the following: *Hill v. Bank*, 15 Fed. 432; *Bank v. Davis*, 8 Biss. 100, Fed. Cas. No. 10,038; *Bank v. Moore*, 2 Bond, 175, Fed. Cas. No. 10,041; *Crocker v. Bank*, 4 Dill. 358, Fed. Cas. No. 3,397. The demurrer, therefore, should be overruled, and it is so ordered.

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SOUTHERN RY. CO. v. MYERS. SAME v. WHYTE. SAME v. REED.

(Circuit Court of Appeals, Fifth Circuit. April 12, 1898.)

No. 631.

1. RAILWAY—PASSENGERS—INJURY—BURDEN OF PROOF.

Where passengers on a railway train are injured without fault of their own, the presumption is, under the statutes of Georgia, that the railway company is liable, and the burden is upon it to rebut such presumption.

2. SAME—DAMAGES—ANTICIPATED PROFITS.

Where the members of a theatrical troupe take passage by a railway train to a place at which they expect to play, the mere fact that the agent of the railway company knows of such intention will not raise the presumption that he has in contemplation, as an element of the damage to result from a possible failure to arrive in time, the amount of profits which they expect

to realize. Damages for the loss of such profits are therefore too remote to be allowed, and it is error to admit evidence regarding them.

**8. SAME—ELEMENTS OF DAMAGE.**

Where the leader of a theatrical troupe is injured by the wreck of a train upon which the troupe is traveling, the elements of his damages are injury to his person, medical expenses, maintenance of himself and troupe while disabled by the accident, wages paid to members of the troupe during the same time, and the reasonable value of his own time lost.

In Error to the Circuit Court of the United States for the Southern District of Georgia.

J. F. De Lacy, J. Bishop, Jr., and W. A. Henderson, for plaintiff in error.

John T. Glenn, John M. Slaton, and Benj. Z. Phillips, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

McCORMICK, Circuit Judge. On March 8, 1895, Mrs. Mary Myers, Mrs. John G. Whyte, and Roland Reed were passengers on the railroad of the Southern Railway Company, going from Macon, Ga., to Jacksonville, Fla. They left Macon at 2 o'clock in the morning, and at Scotland, a station on the line, the train was derailed, and the sleeper in which the parties above named rode was overturned, and each of the parties was more or less injured. In September following, each of the persons named as having been thus injured began an action against the Southern Railway Company in the superior court of Telfair county, Ga. In each of these actions the defendant railway company presented its petition for removal of the case to the United States circuit court for the Southern district of Georgia. The order of removal was granted in each case, and the transcript in each duly filed in the circuit court. On May 17, 1897, the court entered an order which, after reciting the style of each of the three cases, proceeded thus:

"It appearing to the court that the above-stated cases are suits for damages against the same defendant, arising out of the same wreck, and involving to a large extent the same evidence, it is ordered that said cases be consolidated and tried together, the verdicts in each case to be rendered separately."

The cases thus consolidated proceeded to trial, and were tried together as a single case; and on May 25, 1897, the jury rendered its verdict in each case, finding in favor of Mrs. Mary Myers for \$4,000, and in favor of Mrs. John G. Whyte for \$1,000, and in favor of Roland Reed for \$2,000, on which verdicts, respectively, judgments were entered, to review which the defendant sued out a writ of error.

The assignment of errors covers 16 pages of the printed record. There is but one bill of exceptions. It covers 337 pages of the printed record. In justice to the distinguished counsel who tendered the bill, it is meet to remark that 317 of these printed pages are occupied by what is denominated "Exhibit A to Bill of Exceptions" and "Exhibit B to Bill of Exceptions," which exhibits appear to have been added to the bill of exceptions as originally tendered at

the instance, if not on the requirement, of the able and learned judge of the circuit court before whom the case was tried. At one place the judge certifies that:

"The foregoing brief of evidence, consisting of stenographic transcript of the oral testimony on the trial, and of the depositions taken in said case, is certified and approved as a part of the bill of exceptions. And it is further certified that the whole of said testimony is material to a clear understanding of the exceptions taken upon the trial of said cause."

And in another place he says:

"The foregoing bill of exceptions is certified and allowed, and it is ordered that, for the better understanding of the case, the entire charge of the court be hereto attached as Exhibit B, and made a part of the bill of exceptions."

Exhibit A purports to be, and doubtless is, all of the oral and documentary evidence offered on the trial. It embraces the original interrogatories and cross interrogatories propounded to witnesses whose testimony was taken as on commission. It also embraces the stenographer's report of questions propounded to witnesses on the stand, and their answers thereto, both in their direct, cross, and redirect examination. A part of this book of evidence of 290 closely-printed pages as mere literature is good reading. Much of it, however, is monotonous. Whether it is the one or the other, it is not our office, nor have we time, to luxuriate or labor on it. The facts in the case are few, and by no means novel. The substance of the testimony offered or what it tends to prove could have been stated on a very few pages, and would have shown to us as fully, and much more clearly, its bearing on the different rulings on the admission of evidence and the giving and refusing of charges to the jury. The manner in which the bill reserves exceptions to the refused requests and to the corresponding portions of the general charge does call for a different statement of the testimony from any that is made in the bill of exceptions as originally tendered, and it was proper for the judge of the circuit court to require the bill to be reconstructed, and give an adequate statement of what the proof tended to show applicable to these requests and these exceptions to the general charge. Moreover, these exceptions to refusal of requests, and to the portions of the charges given, are so numerous and comprehensive that, to secure a proper understanding of them by the court of appeals, it was necessary that that court should have before it the whole of the general charge.

After as careful and as extended an examination of the record as the state thereof calls on us to make, we find no error on account of which the judgment in favor of Mrs. Mary Myers and the judgment in favor of Mrs. John G. Whyte should be reversed. It is not questioned that they were passengers for whose carriage stipulated fares had been paid. They were injured without their fault by the operation of the road. The presumption of law, especially in Georgia, where they have a special statute to that effect, is that the railroad company was liable, and the burden of proof was put upon the carrier to show that it was not liable. Much testimony bearing on this issue was given to the jury. In reference to it the jury were well instructed. And on the evidence, under sound in-

structions, they found their verdict for these plaintiffs, on which the judgments in their favor were rendered by the circuit court. These judgments must be affirmed.

The judgment in favor of Roland Reed should be reversed. The 18th, 19th, 20th, 21st, and 22d specifications in the assignment of errors point out that the court erred in admitting the testimony of E. B. Jack, Charles W. Keogh, G. V. Burbridge, Roland Reed, and Sanford Cohen in reference to the anticipated profits of the Roland Reed troupe from its engagements at Jacksonville, Savannah, Charleston, and Augusta on the days immediately following the day of the injury, the admission of which testimony was objected to by the defendant on the ground that the profits testified about were speculative, and depended upon numerous uncertain and changing contingencies; that such profits were remote, and their loss not the direct and immediate result of the nonfulfillment of the contract; that there was no guaranty or express contract on the part of the defendant to transport the plaintiffs to Jacksonville, or that they would reach the other cities upon the date of their engagement; and that such profits were not in the contemplation of the parties; and that the engagement to pay the loss of such profits was not a part of the contract itself, nor to be implied from its nature and terms.

The 23d, 24th, and 26th specifications are as follows:

"(23) Because the court erred in refusing to charge the jury as requested by the defendant, as follows: 'In this case the only evidence before you as to the knowledge of the defendant in respect to the performance to be given by the Roland Reed Company is that the advance agent informed the defendant's agents of the fact that the company was to play at Jacksonville, and successively at Savannah, Charleston, and Augusta. It is not claimed or contended that the defendant was put on notice of the profits which the plaintiff's company expected to realize at these several points, and, in the absence of such proof, the court charges you that the plaintiff is not entitled to recover the same.'

"(24) Because the court erred in refusing to charge the jury as requested by the defendant as follows: 'In considering the claim for the recovery of such profits, the court instructs you that profits are not recoverable where—First, they are dependent upon numerous, uncertain, and changing contingencies, and thus fail to constitute a definite, trustworthy measure of actual damages; second, where such loss of profits is remote and not the direct and immediate result of the nonfulfillment of the contract; and, third, where the engagement to pay such loss of profits in case of default in the performance is not a part of the contract itself, nor to be implied from its nature and terms.'"

"(26) Because the court erred in charging the jury as follows: 'With regard to Mr. Reed, if you believe from the evidence that his agent made a contract with the defendant company by which he was to be transported to Jacksonville for the purpose of performing there, and that the company was also apprised that it was his purpose to play the successive nights and days at Savannah, Charleston, and Augusta, and if the company failed to transport him to Jacksonville in such manner as would enable him to perform there, he would be entitled to recover a sum equal to the loss which he sustained because of such failure, if the proof is sufficient to satisfy you what that loss was. And on this subject I charge you that the plaintiff is not held to absolute exactitude of proof in order to justify a recovery in such case because the very failure of the company, if at fault, would make exact proof impossible; but, if the evidence is sufficiently and reasonably certain to enable you to fairly approximate what Mr. Reed's profits would have been at Jacksonville, he will be, in case you find for him, entitled to recover that sum.'"

A very careful examination of all the proof touching the matters embraced in these assignments satisfies us that there was no evidence tending to prove that Mr. Reed's advance agent made any contract with the agent of the defendant which expressed or implied such a guaranty of the arrival of the train at Jacksonville at such time and in such condition as would enable the troupe to perform at Jacksonville at its appointed time. The proof appears to us to tend only to show that the advance agent of the plaintiff Reed contracted with the agent of the defendant for a reduced troupe rate, or perhaps a customary troupe rate, at prices below the rate for individual passengers. In this negotiation it naturally transpired that not only information as to the number of the troupe was given the agent of the defendant, but also notice and information as to their object in going to Jacksonville, and the time at which they were to play there. The running schedules of the different trains were considered, and the train most convenient for the troupe to take, which on its schedule time would make timely arrival in Jacksonville, was selected. The proof does not only not tend to show such a contract for carriage as naturally brought into the contemplation of the parties liability on the part of the carrier for damages for loss of profits the passenger might reasonably expect to make at Jacksonville, but it seems to us to affirmatively negative, not only the existence of such an express contract, but the making of any contract from which such an implied liability might spring. The advance agent, E. B. Jack, as a witness, testified as follows:

"Q. Was there any demand on your part or agreement on theirs for a guaranty as to what the schedule would be,—that they would arrive there at a certain time? A. No railroad company ever agrees to that. Q. Nothing of that sort asked or demanded? A. They agreed to get us into Jacksonville in time to play next day. Q. Did they bind themselves to do that, or did they merely show you the schedule? A. They accepted the proposition; that is, I stated we would leave at a certain hour, and was to play in Jacksonville. Q. And play in Jacksonville? A. Yes, sir; and they accepted the proposition. Q. They showed you a schedule? A. No; they told me that we would leave here at a certain hour, and arrive in Jacksonville at a certain hour. Q. Did they guaranty that would be done? A. They accepted the business."

In the absence of a definite contract for carriage to a given point by a given time, with such reasons for its making as would naturally lead the agent of the carrier to contemplate the profits the passenger expected to realize, it is clear that the damage claimed for the failure to realize such profits is too uncertain and remote, and that, until competent proof tending to show such contract was offered and admitted, it was error to admit any testimony in reference to the speculative profits which the passenger might have made if he had been safely carried through on schedule time. *Howard v. Manufacturing Co.*, 139 U. S. 199, 11 Sup. Ct. 500, and cases therein cited. On the case as it was made at the trial, on the competent proof admitted, Reed's recovery should have been limited to compensation for the injuries inflicted on his person, including therein the usual elements, and such actual reasonable expenses as the proof showed he was liable to pay for maintenance, medical treatment, and proper care of himself and the different

members of his troupe during the time he and they were disabled by the accident, including such wages, if any, which he was bound to pay to the other members of his troupe, and including also the reasonable value of his own time during the period that he was kept from work in his profession. It is ordered that the judgment in favor of Mrs. Mary Myers and the judgment in favor of Mrs. John G. Whyte be, and each is hereby, affirmed; that the judgment in favor of Roland Reed be reversed; and the cause as to him is remanded to the circuit court, with instructions to award the defendant therein a new trial.

**McFADDEN et al. v. MOUNTAIN VIEW MINING & MILLING CO.**

(Circuit Court, D. Washington. April 21, 1898.)

**1. MINERAL LANDS IN INDIAN RESERVATION—RESTORATION TO PUBLIC DOMAIN—WHEN OPEN TO LOCATION.**

Mineral lands within the limits of the tract described in act July 1, 1892, § 1, providing for opening a part of the Colville Indian reservation in the state of Washington were, by said act, restored to the public domain, and were thereafter, without any proclamation of the president so declaring, open to exploration and location under the general laws of the United States.

**2. SAME—POWER VESTED IN PRESIDENT—OPENING FOR SETTLEMENT.**

The provision of Act July 1, 1892, vesting in the president power to fix a date when that part of the Colville Indian reservation restored to the public domain should be open to settlement, was intended to give the Indians first choice of lands to be allotted to them, and had no application to mineral lands, which were not subject to such allotment.

This was an action by W. D. McFadden and others against the Mountain View Mining & Milling Company to determine an adverse claim to mining lands.

Stoll & McDonald, for plaintiffs.

W. B. Heyburn, for defendant.

**HANFORD, District Judge.** This action was commenced pursuant to section 2326, Rev. St., for the purpose of securing an adjudication of adverse claims to mining ground. A written stipulation, setting forth all the material facts, has been signed by all the parties and filed. By said stipulation, all questions which have been in dispute between the parties are settled or eliminated from the case, except the question as to the lawfulness of the original location of the vein or lode claim called the "Mountain View Lode," made on the 16th day of October, 1895, by Charles N. Collins, grantor of the defendant corporation; and the plaintiffs concede that the requirements of the law as to the manner of making a mineral location were in all respects observed by Collins, and he was in every respect qualified to locate and claim mineral lands under the laws of the United States; therefore said location was lawful, if said land was at the date of said location open to exploration by mining prospectors, and subject to location, under the general laws of the United States. The land is situated within the limits of the tract described in the first section of the act of congress, passed without approval by the president, July 1, 1892, entitled "An act to provide for the opening of a part of the Colville

reservation, in the state of Washington, and for other purposes." 27 Stat. 62. It is the defendant's contention that, although said tract was not by said statute placed on the market for sale, nor opened to settlement, it was restored to the public domain, and from the date of the act ceased to be a reservation, and was brought under the provisions of section 2319, Rev. St., relating to the mineral lands of the United States, which section expressly declares: "All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States, and those who have declared their intention to become such." The plaintiffs controvert this proposition, and they insist that a proclamation by the president, as provided in said act, is necessary to segregate the tract to be restored to the public domain from the reservation, and that no individual could lawfully initiate a right within the limits of said tract, under any of the general laws relating to the public lands of the United States, at any time prior to the act of congress approved February 20, 1896, entitled "An act to extend the mineral land laws of the United States to lands embraced in the north half of the Colville Indian reservation" (29 Stat. 9). In the decision of this court in the case of *Collins v. Bubb*, 73 Fed. 735, the provisions and the history of the act of 1892 are set forth, and an interpretation of the act is given which fully sustains the contention of the defendant in this case. The plaintiffs ask the court to consider the question again, and they argue that the interpretation of the act given in the case cited is contrary to the intention of congress, as shown by the words of the act and by subsequent legislation, and by the contemporaneous interpretation given by executive officers of the government.

I have considered the argument with due care and patience, but without discovering any basis for the contention that the words of the act show intention in the legislative mind to enact a law which should lie dormant until a time in the future when the president should put vitality and force into it by an executive proclamation. As I endeavored to show in the decision in the case of *Collins v. Bubb*, the first section provides for two things, viz.: Restoration to the body of the public domain of part of the land which by an executive order had been set apart for an Indian reservation; and, second, the opening to settlement of the part restored. The act itself, by positive words in the present tense free from ambiguity, accomplishes fully the first object of the law. It is true that the tract described is not restored unconditionally, but the restrictions and conditions are clearly defined, and by the rule, "*Expressio unius, est exclusio alterius*," there can be no additional implied restrictions or conditions. Congress intended to secure to the Indians the right of first choice of such parts of the tract as they are entitled by the provisions of the act to have allotted to them in severalty, and, to avoid all danger of conflicting claims and disputes between them and white settlers, power to fix a date in the future when the tract should be opened to settlement and entry was vested in the president. It was so provided in order to afford time for the Indian allotments to be made before the first white settlers

should be permitted to come upon the tract. There can be no such conflicting claims as to lands containing valuable deposits of mineral, for the reason that such lands are not subject to selection for allotment to Indians. The attorneys for the plaintiffs have cited an instructive opinion by Judge Sanborn in the case of *Hartman v. Warren*, 22 C. C. A. 30, 76 Fed. 157, in which words and phrases frequently used in the laws of the United States relating to the public lands are explained. According to my understanding of the opinion, the court held that the phrase "pre-emption entry" has a particular meaning in land-office practice, and when used in a statute relating to public land it is to be understood in a restricted sense, rather than comprehensively, as being applicable to all cases in which a particular person may have a right to be preferred to others in the purchase or acquisition of public lands. This agrees with my own views as to the true interpretation of the statutes, as expressed in the case of *Collins v. Bubb*.

In 1896, congress, by two special acts, extended the mineral-land laws so as to apply to the tract which was by the act of 1892 declared to be restored to the public domain, and granted a right of way across said tract to a railway company. The argument is that these enactments were unnecessary if the act of 1892 did of itself, eo instanti, take the tract out of the reservation, and restore it to the public domain; that congress would not do a vain thing; and therefore it must be presumed that the act of 1892, as construed and understood by congress, remains ineffective. This is not a necessary inference. The executive branch of the government having denied the rights of prospectors and miners and railroad builders, congress may well have considered that a sufficient reason for additional legislation. Certainly the acts do not show a disposition on the part of congress to acquiesce in the rulings of the interior department, but rather a continuity of purpose, to remove the barriers in the way of mining operations and the construction of highways, which purpose was first intimated by the act of August 19, 1890 (26 Stat. 355), providing for a commission to negotiate with the Colville Indians for relinquishment of part of their reservation, then plainly expressed in the report to the house of representatives by its committee on Indian affairs, which preceded the enactment of the law of 1892, and finally persisted in and made emphatic by these two enactments in 1896. It must be conceded that the construction of the act of 1892 by executive officers of the government is contrary to the opinion of this court. But, with all due deference, I must decide according to my own understanding of the law. The opinions of officers of the interior department "are entitled to careful consideration, and may well be permitted to lead the way to the proper construction of an ambiguous statute, but where the words of an act of congress are plain, and their meaning is clear, they must prevail. *Webster v. Luther*, 16 Sup. Ct. 963-967; *U. S. v. Tanner*, 147 U. S. 661-663, 13 Sup. Ct. 436; *Merritt v. Cameron*, 137 U. S. 542, 11 Sup. Ct. 174; *U. S. v. Graham*, 110 U. S. 219, 3 Sup. Ct. 582; *Swift Co. v. U. S.*, 105 U. S. 691." *Hartman v. Warren*, 22 C. C. A. 30, 76 Fed. 162. I am confirmed in the opinion given in *Collins v. Bubb*, and will follow it in this case.

Findings and a judgment may be prepared awarding to the defendant all of the ground included within the lines of the Mountain View lode claim, and to the plaintiffs only the land within the lines of their several claims, and not included within the defendant's lines. The defendant will also recover costs.

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MOHRENSTECHER et al. v. WESTERVELT.

(Circuit Court of Appeals, Eighth Circuit. March 21, 1898.)

No. 924.

**1. APPEAL AND ERROR—DECISIONS ON PRIOR APPEAL.**

When a case goes twice to an appellate court, questions decided upon the first occasion will not be considered upon the second.

**2. INSTRUCTIONS—CURING ERROR.**

Error in denying a motion to compel the plaintiff to elect between causes of action is cured by instructions eliminating all but one cause.

**3. SAME—BANK CASHIER—MISAPPLICATION OF FUNDS.**

It is error to give instructions authorizing the jury, in determining whether a transaction by which the cashier of a national bank obtained possession of some of its funds was a misapplication thereof, to consider the fact that his indebtedness to the bank exceeded 10 per cent. of its capital.

**4. SAME—TRIAL.**

Instructions that no devices for concealment, however elaborate, which a bank cashier may adopt to conceal a transaction amounting to a misappropriation of its funds, can protect him, are erroneous, when there is no evidence of any concealment whatever in respect to the transaction in question.

**5. NATIONAL BANKS—EXCESSIVE LOAN—CASHIER'S BOND.**

The making of a loan exceeding 10 per cent. of a national bank's capital, in the absence of fraud, is not a breach of the cashier's bond.

**6. SAME—MISAPPLICATION OF FUNDS—RENEWAL OF NOTES.**

To constitute a misapplication of the funds of a bank, it is necessary that some portion thereof shall be withdrawn from its possession or control, or that some conversion be made, so as to deprive the bank of the benefit thereof. Mere renewal of notes already in the bank's possession does not, of itself, constitute a misapplication of funds.

**7. SAME—ESTOPPEL.**

The cashier of a bank having made large purchases of real estate, one of the sureties on his bond made inquiries of several officers of the bank, actively engaged in its affairs, as to whether the cashier had borrowed money of the bank in order to make such purchases, and was informed that the purchases were for the benefit of the bank, that no liability accrued therefrom to the cashier to the bank, and that the cashier's total indebtedness to the bank was but a few hundred dollars. *Held*, that the bank was estopped subsequently to deny these statements, when the sureties had relied thereon, and the cashier had in the meantime become insolvent.

**8. APPEAL—HARMLESS ERROR.**

In a suit upon a bank cashier's bond, one of the sureties thereon was not allowed to testify to statements of bank officers in reference to the cashier's dealings with the bank, but the cashier himself was afterwards permitted to testify to practically the same effect as the testimony offered. *Held*, that the rejection was not harmless error, as the evidence could not be considered merely cumulative, in view of attacks made upon the cashier's credibility, and of his interest in misrepresenting his transactions, if illegal.

In Error to the Circuit Court of the United States for the District of Nebraska.

S. L. Geisthardt, C. C. Flansburg, and W. H. Thompson, for plaintiffs in error.

O. A. Abbott and John W. Blee, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and RINER, District Judge.

RINER, District Judge. This is a writ of error to review a judgment of the circuit court of the United States for the district of Nebraska, which was entered upon a verdict in favor of the defendant in error, for the sum of \$10,000, with interest from September 25, 1894. The action was brought by Edgar M. Westervelt, receiver of the Citizens' National Bank of Grand Island, Neb., against George A. Mohrenstecher, Otto A. Mohrenstecher, Mary Mohrenstecher, William Stull, and A. W. Ocobock, upon a bond given by George A. Mohrenstecher, the cashier of the bank, as principal, and the other defendants as sureties. The petition contained three causes of action. In the first cause of action it was alleged, in substance, that the plaintiff was the duly-appointed receiver of the Citizens' National Bank of Grand Island, Neb., and that the defendant George A. Mohrenstecher was the cashier of the bank from the 13th day of August, 1889, until the bank suspended payment, on the 4th day of December, 1893; that as such cashier he executed the bond upon which this suit was brought; that the bond provided that Mohrenstecher, as cashier of the bank, should execute the duties thereof with integrity and fidelity, and should faithfully perform and fulfill the trusts thereby in him reposed, and well and truly, at all times when thereto required, account for and render over to the bank all moneys, goods, chattels, and other things, the property of the bank, that came into his hands, possession, or control, so that no default, fraud, or failure should happen or be occasioned by any neglect or failure on his part to perform his duties as such cashier. It was then alleged that Mohrenstecher failed to perform his duties as cashier, and on or about the 29th day of December, 1891, appropriated to his own use \$10,365.82 of the moneys of the bank, in his custody and possession as cashier, and used and applied the same in payment of certain real estate before that time purchased in the joint names of himself and one Alexander H. Baker; that this money was appropriated by the cashier under the trick, device, and pretense of loaning various sums of money upon the joint and several notes of said cashier and one Alexander H. Baker and M. J. Baker. The second cause of action alleged that Mohrenstecher, disregarding his duties as cashier, loaned one Alexander H. Baker, on his own note, and jointly with others, a sum largely in excess of the sum of \$6,000, of the moneys of said bank in his custody as cashier, viz. the sum of \$18,522.95; that this indebtedness was evidenced by a note of Alexander H. Baker and M. J. Baker for the sum of \$8,157.13, and two joint notes of Alexander H. Baker and George A. Mohrenstecher (being the notes mentioned and described in the first cause of action), amounting to the sum of \$10,365.82. The third cause of action alleged that Mohrenstecher loaned to himself individually, and jointly with others, a sum greater than 10 per

cent. of the bank's capital stock, viz. the sum of \$17,321.82; that this amount was evidenced by two notes aggregating \$10,365.82, described in the first cause of action, and a note of George A. Mohrenstecher and Mary Mohrenstecher amounting to \$5,990, and several smaller notes executed by George A. Mohrenstecher aggregating \$966. The defendants filed separate answers. Each answer admitted the incorporation of the bank, its suspension of payment, the appointment of a receiver, the execution and delivery of the bond, and the signing and placing by Mohrenstecher, as cashier, among the bills receivable of the bank, of the two notes described in the first cause of action, aggregating \$10,365.82, and denied each and every allegation in the petition contained, except those thereinbefore specifically admitted. The answers of three of the sureties, after making the above admissions and denial, alleged, in substance, that the term for which George A. Mohrenstecher was appointed cashier, by the action of the board of directors of the bank, terminated on the 4th day of January, 1890; that when Mohrenstecher was appointed cashier, and when his bond was given, he was indebted to the bank in an amount exceeding 10 per cent. of its capital stock; that this fact was known to the officers and directors of the bank, but was concealed from the sureties on the bond, with intent to mislead and defraud them; that when George A. Mohrenstecher was reappointed cashier, on the 14th day of January, 1890, he was indebted to the bank in an amount exceeding 10 per cent. of its capital stock, which the officers and directors knew, but of which the sureties on the bond were ignorant; that such reappointment, under the circumstances, was a fraud on the sureties; that the two notes complained of, aggregating \$10,365.82, were in fact not a debt of the cashier, but represented a legitimate bank transaction, growing out of a purchase of certain real estate, known as the "Hurford Property," on January 25, 1890; that Mohrenstecher, as cashier, purchased the property on the date above mentioned for the benefit of the bank, for the purpose of realizing upon a claim which the bank held against Hurford; that the title was taken in his name and the name of Alexander H. Baker in trust for the bank; that the money used to pay for it was replaced by four promissory notes (one for \$6,000 executed by the vice president, William Hagge; one for \$6,000 executed by the teller, William Geddes; one for \$6,000 executed by Richard Koenig, son of the president of the bank; and one for \$4,250 executed by George A. Mohrenstecher and Alexander H. Baker); that a loan was afterward effected on the property, in the sum of \$12,000, and the proceeds thereof were turned in to the bank, and used to cancel the notes of Geddes and Koenig; that thereafter a further sum of \$5,000 was procured by Mohrenstecher and Baker for the benefit of the bank, and applied in partial satisfaction of the note of Hagge; that the notes for the remainder of the purchase price, evidenced by the notes still outstanding, were from time to time renewed, until, with the accumulation of interest and taxes, they amounted to the sum of \$10,365.82, which sum was evidenced by the two notes mentioned in the first cause of action; that the notes mentioned in the first cause of action were, for a valuable

consideration, extended by the officers of the bank without the knowledge or consent of the sureties; that, soon after the Hurford property was purchased by Mohrenstecher, William Stull, on behalf of himself and the other sureties on the bond, proceeded to Grand Island, and there made inquiry of the cashier himself, also of the president and vice president of the bank, in regard to the transaction and the cashier's relation to the bank, and was informed by each of them that the Hurford purchase was a bank transaction, and not a private speculation on the part of the cashier; that it involved the cashier in no liability to the bank; that he owed the bank nothing, beyond a small, nominal sum; that nothing whatever had been done which involved them in any liability upon the bond; that Stull and the other sureties relied upon that information, and took no action to indemnify themselves; that Mohrenstecher at that time had ample property to secure the sureties for any loss which they might have incurred by reason of their suretyship, but at the time when this suit was brought, and ever since, he was and has been wholly insolvent, and that the receiver is now estopped, by reason of these facts, from claiming any liability upon the bond against the sureties; that, when the bond was executed by Mary Mohrenstecher, she was a married woman, and the bond was not signed by her with reference to, or upon the faith of, her separate estate; that under the laws of Nebraska she was thereby exempt from liability on the bond. This same defense is also set out in her answer. The answer of George A. Mohrenstecher was substantially the same as the answer of the sureties, in relation to the purchase of the Hurford property, and the execution of the notes described in the first cause of action. Replies putting in issue the new matter set up in the answers were duly filed. There was a trial, and verdict and judgment in favor of the plaintiff for the sum of \$10,000 and interest. The case has been once before this court, on a writ of error sued out by the plaintiff in the circuit court to review a judgment rendered against him by that court upon the pleadings. 76 Fed. 118.

Numerous errors are assigned, but we shall not find it necessary to discuss them separately. Several of them raise the same questions presented to and decided by this court when the case was first before it. That these questions are not now open for re-examination is well settled. *Balch v. Haas*, 36 U. S. App. 693, 20 C. C. A. 151, and 73 Fed. 974; *Thatcher v. Gottlieb*, 19 U. S. App. 469, 8 C. C. A. 334, and 59 Fed. 872; *Supervisors v. Kennicott*, 94 U. S. 498; *Clark v. Keith*, 106 U. S. 464, 1 Sup. Ct. 568.

The court instructed the jury that the making of an excess loan, in the absence of fraud, would not of itself constitute a breach of the cashier's bond, that such fact was not material to the issues in the case, and that the jury should not give such fact any weight in arriving at a verdict; thereby eliminating from the controversy everything except the issues presented by the first cause of action. It becomes unnecessary, therefore, to consider the assignments of error by which it is sought to question the correctness of the ruling of the circuit court in denying the motion filed by the defendants to

require the receiver to elect upon which cause of action he would proceed. In view of the instructions given by the court to the jury at the trial, the defendants could in no way be prejudiced by the ruling upon the motion.

The following instruction given to the jury is assigned for error:

"But you are instructed that, under the law of the United States, national banks are prohibited from loaning to any person, company, corporation, or firm, or the several members thereof, a sum exceeding one-tenth part of the capital stock of such bank; and in this case, if you find from the evidence that the defendant George A. Mohrenstecher and one A. H. Baker got possession of the sum of \$10,365.82 of the funds of the bank at a time when each of said persons was indebted to such bank in the sum of \$6,000 or more, you may consider this fact, if proven, in connection with other facts and circumstances in evidence, in determining whether the transaction by which said Baker and Mohrenstecher got possession of \$10,365.82 of the funds of the bank, if you find from the evidence they did so get possession of such funds, was a misappropriation of such funds by said George A. Mohrenstecher, the cashier of said bank."

We think this instruction was erroneous, in that it authorized the jury to consider the fact of an excess loan in determining whether the transaction by which Baker and Mohrenstecher got possession of \$10,365.82 of the funds of the bank was a misappropriation of such funds by Mohrenstecher, the cashier, when such fact, if established, would not tend to show either deceit, fraud, or misappropriation.

It is also insisted that the court erred in refusing the request of the defendants to instruct the jury to return a verdict in their favor, and in giving the following instructions to the jury:

"And, when an officer converts money of a bank to his own use, he violates his duty; and no trick or device, however shrewd, will protect him in so doing, no matter how elaborate a system of notes and bookkeeping he may adopt. The law looks at the realities of the transaction, and will not allow a system adopted to hide the offense to protect the offender." "Therefore, no matter what acts were done by the cashier, Mohrenstecher, with reference to the notes in question, and disclosed by the evidence, if you find from the evidence, under these instructions, that such acts taken to conceal from the bank officials or the bank examiner the conversion by said George A. Mohrenstecher to his own use the money of the bank, if, under the evidence and these instructions, you find there was such conversion, you should disregard such acts, if any you find there were, designed to conceal, and find the fact of conversion to be fully proved."

The ground of objection to the two instructions just quoted is that they are misleading, and assume the existence of facts not proved. If the defendants are liable upon this bond, it is because Mohrenstecher, the cashier, misappropriated or misapplied \$10,365.82 of the bank's funds, as alleged in the first cause of action. To constitute a misappropriation, there would have to be a conversion of the funds of the bank, in some form, to the use of the cashier, or some person other than the bank, with the intent to injure and defraud the bank. If the notes described in the petition were merely renewals of other notes held by the bank, the fact that they were taken by the cashier in lieu of the old notes would not constitute a misappropriation or misapplication of the funds of the bank by him, for the reason that the funds of the bank were in no way withdrawn or diminished by his act. In *Dow v. U. S.*, 49 U. S. App.

605, 27 C. C. A. 140, 82 Fed. 904, Judge Shiras, in delivering the opinion of the court, said:

"To complete a misapplication of the funds of the bank, it was necessary that some portion thereof should be withdrawn from the possession or control of the bank, or that a conversion, in some form, should be made thereof, so that the bank would be deprived of the benefit thereof." "It is not necessary in all cases that the money should be actually withdrawn from the bank. Thus, if, by connivance between a bank official and a customer of the bank, the latter is allowed to draw checks on the bank when the drawer has not the funds to meet the checks, and the same are given by the drawer to third parties in payment of claims due them, and the third parties, instead of getting the cash on the checks, have them credited up to their accounts in the bank, this completes the misapplication of the funds of the bank, because the bank has become bound for the payment of the sums thus credited to the third parties; and the result is just the same as though the holders of the checks had obtained the money thereon, and had subsequently deposited it to their credit. In such cases the funds of the bank would be lessened, and thereby the criminal misapplication might be completed. If, however, the customer presents the checks himself, and has the same credited on his account, the crime of misapplication is not completed thereby, because the bank is not under legal obligation to pay out any of the amounts wrongfully credited to the customer, and may refuse to pay checks drawn against the inflated account, and may at any time charge back against the customer the amounts of the checks upon which nothing was in fact realized by the bank. To complete the criminal misapplication of the bank funds in the supposed case, some sum must be paid by the bank to the customer, or to third parties on his order, or must be credited to third parties, under such circumstances that the bank becomes bound for the payment thereof."

The case cited was a criminal case, but the principle announced applies in this case. The burden was upon the plaintiff to show that Mohrenstecher by means of these notes wrongfully obtained money from the bank. If, by executing the notes and delivering them to the bank, he was either paid or took money from the bank, that fact was capable of proof by showing the reduced amount of the cash on the day it was taken. The evidence in the case tended to show that the notes executed on the 29th day of December, 1891, were renewal notes; that the indebtedness represented thereby had its origin in the purchase of the real estate known as the "Hurford Property" on January 25, 1890; that this real estate was purchased by the cashier on the 25th day of January, 1890, for the sum of \$22,250; that the money used to pay for the property was represented by four notes (one for \$6,000 signed by the vice president of the bank, William Hagge; one for \$6,000 signed by the teller, William Geddes; one for \$6,000 signed by the president's son, Richard Koenig; and one for \$4,250 signed by Mohrenstecher and Baker); that subsequently a loan was made upon the property for the sum of \$12,000, and the proceeds thereof turned in to the bank, and used to cancel the notes of Geddes and Koenig; that thereafter a further sum of \$5,000 was obtained by Mohrenstecher and Baker, and applied as a part payment of the Hagge note; that the two notes, which aggregate the sum of \$10,365.82, represented the balance of the purchase price of this property, the accumulations of interest, and the taxes. While the record shows that on the 31st of December, 1891, the cashier's check for the amount of the two notes (\$10,365.82) passed through the bank, yet a careful examination of the record fails to show that the bank parted with any mon-

ey on that day. Upon the questions whether the two notes for \$10,365.82 were renewals, and whether this check represented a cash transaction, the following questions and answers in the testimony of Henry A. Koenig, president of the bank, throw some light:

"Q. You may state what those are. A. Bill discount and discount slip. Q. Of what bank and date? A. Citizens' National Bank, and made on the 31st of December, 1891. Q. Now, with those slips in your hand, and from an examination of them, can you tell what went to make up the consideration of the note for \$6,000 (No. 26,685), and the note for \$4,365.82 (No. 26,686), or either of them? A. These are renewals. Q. Of other notes? A. Of other notes of the same party. Q. As a matter of fact, did these not renew other notes aggregating \$9,452.70, and interest upon them of \$913.12? A. Yes, sir. Q. Do you know, of your own knowledge, whether this check was ever paid? A. I don't know. Q. Do you know, of your own knowledge, anything about the transaction testified to? A. I do not. Q. Do you know whether there was \$10,365.82 in cash paid out of the bank upon the check on that day? A. The books will show it. Q. Do you know? A. I don't know. Q. These discount slips that you have just testified to show that these were renewals,—Exhibits C and D were renewals of certain other notes? A. It looks like it, and the check shows that he has taken up old notes by it, because Mr. Mohrenstecher put it plain on the check himself. Q. As a matter of fact, this check says, 'Pay to the order of' certain other notes? A. Yes, sir. Q. And these are certain notes described in the discount slip and slip of bills discount? A. Yes, sir. Q. And these two notes were given in the place of those notes that were taken up? A. That I don't know. Q. That is what you infer from this transaction? A. Yes, sir. Q. I understand you to say that looking at these two notes, Exhibits C and D, and these discount tickets, you infer from the examination that these two notes took up the other notes mentioned here? A. Yes, sir."

The account of G. A. Mohrenstecher, agent, also shows that on December 31, 1891, a charge of \$10,365.82 was exactly counterbalanced by credit for the same amount. Mohrenstecher, in his deposition, also testified that these notes were given for the balance of principal and the interest and accumulation of interest and taxes accrued upon the purchase of the Hurford property. This record, we think, fails to show a misappropriation of the funds of the bank at the time alleged in the petition; and if the plaintiff desired to rest his case upon the transaction of December 29, 1891, the defendants were entitled to the instruction requested. There was no evidence tending to show that there was any trick or device employed by the cashier with the intent and for the purpose of covering up and concealing the transaction complained of. On the contrary, the evidence shows that the notes mentioned in the first cause of action at all times appeared upon the books of the bank, were kept in a note case in the usual place in the bank, and were frequently examined by the directors and officers of the bank authorized to examine them, including the discount committee. The two instructions above quoted are therefore open to the criticism made by counsel.

At the trial the defendants offered to prove by the defendant William Stull: That in a conversation had with Mr. Koenig, the president of the bank, soon after the purchase of the Hurford property, he demanded information as to whether Mohrenstecher, the cashier, had borrowed money from the bank for the purpose of purchasing the property, and whether the bank claimed any liability at that time upon the bond by reason of any act of Mohrenstecher's

in borrowing money. That he was then assured by Koenig that he need give himself no uneasiness about the bond; that there was no breach of it, and that George was not interested in the property more than any other stockholder in the bank; that it was simply a bank deal, and it was bought by George under instructions of the president and vice president, Koenig and Hagge, for bank purposes. The defendants further offered to prove by the same witness that, after having the conversation with the president of the bank, he went to Hagge, the vice president, and asked him for information concerning the transaction,—as to whether it was a private transaction on behalf of Mohrenstecher, or a bank deal,—and the vice president informed him that it was a deal on behalf of the bank, and a bank transaction; that the title was simply taken for convenience in the name of George A. Mohrenstecher, the cashier. He also stated to the witness that there was no violation of the bond, or any breach thereof,—no liability claimed,—and that the bank intended to erect a building upon this property. The defendants further offered to prove by this witness that a short time after his visit to Grand Island he had a conversation with Mr. Abbott, one of the directors of the bank, and chairman of the finance or discount committee; that he inquired concerning Mohrenstecher's indebtedness to the Citizens' National Bank; that Abbott, in reply to his question, stated that Mohrenstecher did not owe the bank more than four or five hundred dollars; that he (Abbott) was chairman of the finance or discount committee of the bank, and knew the facts. These offers were objected to, and the objections were sustained, to which the defendants excepted. We think this testimony should have been admitted. The conversations were had with the president, vice president, and a director of the bank, who was chairman of the finance or discount committee. There can be little doubt, from the record, that the two officers first named, together with the cashier, were engaged in the active management of the affairs of the bank. True, at one place in his testimony Mr. Koenig says that he did not devote personal attention to the business of the bank. He subsequently stated, however, that he did from time to time examine the bills discounted, and compared them with the books; and his testimony generally shows that he was very familiar with the business of the bank, and that he was consulted in relation to the purchase of this Hurford property, although his testimony and that of Mohrenstecher are not in harmony as to what was said upon that occasion. That Mr. Hagge, the vice president, was actively engaged in the management of the business of the bank from the time of its organization until its close is shown by the following question and answer in his testimony:

"Q. How much of that time were you actively engaged in the management of the bank's business? A. Well, I was there most of the time in the bank. Once in a while, of course, I had business outside."

In line with Mr. Hagge's testimony, the record of a meeting of the board of directors of the bank held on the 13th of October, 1891, after showing that all members of the board of directors were present, sets out at length a report made by the examining committee,

which was read and approved, in which the following statement appears:

"Your committee desire at this time to call the attention of the board to the fact that the assistant cashier and acting teller of the bank, the vice president and the president, who are engaged in the active management of the bank, have not given bonds in accordance with the by-laws and resolutions of the board."

If the statements contained in the offers by the defendants were made by the president, vice president, and the director, who was chairman of the finance or discount committee as therein stated, as against the sureties upon the cashier's bond, who, relying upon the information thus received from the officers of the bank, took no action to protect themselves against loss, the bank would be estopped to deny that the purchase of the Hurford property was a bank transaction, and that the title to the property was simply taken for convenience in the name of the cashier. In the case of *Illinois Trust & Sav. Bank v. City of Arkansas City*, 40 U. S. App. 257, 22 C. C. A. 171, and 76 Fed. 271, Judge Sanborn, delivering the opinion of the court, said:

"No principle is more universal in the jurisprudence of civilized nations, no principle is more equitable in itself, or more salutary in its effects, than that no one may, to the damage of another, deny the truth of statements and representations by which he has purposely or carelessly induced that other to change his situation." *Paxson v. Brown*, 27 U. S. App. 49, 10 C. C. A. 135, and 61 Fed. 874; *Dickerson v. Colgrove*, 100 U. S. 578; *Kirk v. Hamilton*, 102 U. S. 68.

That this principle applies to the transactions of corporations as well as to those of individuals is well settled. *Zabriskie v. Railroad Co.*, 23 How. 381; *Omaha Bridge Cases*, 10 U. S. App. 98, 188, 190, 2 C. C. A. 174, 239, 244, and 51 Fed. 309; *Butler v. Cockrill*, 36 U. S. App. 702, 20 C. C. A. 122, and 73 Fed. 945. There was testimony tending to show that Mohrenstecher was solvent at that time, and had property sufficient to satisfy any liability which might accrue upon the bond. Stull, the surety, was entitled to a truthful answer to his inquiry in reference to Mohrenstecher's indebtedness to the bank. It was a matter in which he was vitally interested. If Mohrenstecher was improperly using the bank's funds for the purpose of purchasing real estate, the sureties upon his bond had a right to know that fact. These officers knew that Stull was a surety upon Mohrenstecher's bond, and the purpose of the inquiry could not be misunderstood. True, the cashier was allowed to testify upon this point, and his testimony was, in substance, the same as the proof offered and rejected. We do not think, however, that it can be said that the testimony offered was merely cumulative, and therefore the error was error without prejudice. The credibility of this cashier had been seriously attacked before the jury, and his interest in withholding correct information in regard to his own transactions, if they were illegal, would render his declarations of little value. The sureties upon this bond had taken every precaution to save themselves and the bank from loss. They had made timely inquiry of the officers of the bank engaged in the active management of its affairs, with reference to a transaction which might affect their liability as sureties upon the cashier's

bond. The assurances of these officers that the transaction was a bank matter, in which the cashier was merely the representative of the bank, and that he had done nothing whatever to subject himself and his sureties to any liability on his bond, were statements upon which these sureties clearly had a right to rely; and they offered this testimony for the purpose of showing that they did rely upon them, and by reason thereof were lulled into inactivity at a time when prompt action might have averted loss. The judgment of the circuit court must be reversed, and the case remanded, with directions to grant a new trial.

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SCHIFFER et al. v. TRUSTEES OF COLUMBIA COLLEGE IN CITY OF NEW YORK.

(Circuit Court, S. D. New York. May 7, 1898.)

1. LIABILITY OF STOCKHOLDER—ENFORCEMENT—PLEADING.

In an action at law to enforce the individual liability of a stockholder in a Kansas corporation, an allegation in the answer that defendant "is not, and never was, a stockholder" in the corporation, is surplusage, as it is necessary to a recovery that plaintiff allege and prove defendant's ownership of the stock.

2. SAME—STATUTE OF LIMITATIONS—WHAT LAW GOVERNS.

The Kansas statute of limitations does not apply to an action brought in New York to enforce the individual liability of a stockholder in a Kansas corporation.

This was an action at law by Abe Schiffer and I. W. Schiffer, partners under the name of the Bank of Alamosa, against the trustees of Columbia College in the city of New York, to enforce the individual liability of the defendants as stockholders in a Kansas corporation. The case was heard on demurrer to two paragraphs of the answer.

Keatinge, Halradt & Miller, for complainants.  
John McL. Nash, for defendant.

LACOMBE, Circuit Judge. This is an action at law to enforce the individual liability of a stockholder in a corporation created under the statutes of the state of Kansas. The provisions of the constitution and the laws of that state creating such liability are set forth in full in *Whitman v. Bank*, 28 C. C. A. 404, 83 Fed. 288, where the court of appeals in this circuit held that the liability thus created was contractual, and could be enforced in this court against a resident of this district.

Plaintiffs demur to the eighth paragraph of the answer, which avers in defense that defendant "is not, and never was, a stockholder in the Kansas corporation." It is unnecessary to discuss the effect of such nonownership. The averment is not, in any logical sense, a defense to the claim set forth in the complaint. If it be essential to the plaintiffs' recovery to show that defendant is or was such stockholder, then, failing to aver and prove that fact, they will fail to make out any claim at all. The averment in the eighth paragraph is surplusage, and might have been stricken out on motion. To dis-

cuss the merits of the controversy upon a superfluous averment would seem to be itself superfluous.

Plaintiffs demur to the ninth paragraph of the answer, which sets up a statute of limitations of the state of Kansas touching demands against decedents' estates. The liability of the stockholder being contractual and transitory, the limitation of time within which such liability shall be enforced against a person sued thereon is a matter to be determined by the laws of the state in which the action is brought.

The demurrer to the ninth paragraph is sustained, and plaintiffs given leave to withdraw the demurrer to the eighth paragraph within five days. If not thus withdrawn, it will be overruled.

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SHEAHAN v. NATIONAL S. S. CO.

(Circuit Court of Appeals, Second Circuit. March 10, 1898.)

No. 87.

PRINCIPAL AND AGENT—DISCHARGE OF AGENT—NOTICE.

A contract of employment as agent, to sell on commission, may be terminated by the principal at any time without notice, in the absence of an express provision requiring it.

In Error to the Circuit Court of the United States for the Southern District of New York.

This was an action at law by Patrick Sheahan against the National Steamship Company to recover damages for breach of contract. The judgment below was for defendant, and plaintiff sued out this writ of error.

W. F. Randel, for plaintiff in error.

J. Parker Kirlin, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. This is an action to recover damages for breach of contract. The plaintiff was the sole witness, and the only contract with defendant which his testimony tended to establish was one made in 1867, whereby defendant employed him as its agent to sell tickets on commission, with no limitation as to time or provision requiring notice of termination. After he had continued in such employment about nine years, defendant abruptly terminated the contract. In the absence of any provision requiring notice as a condition precedent to termination, or of any clause fixing a term of employment, defendant was entitled to dismiss its agent at pleasure, without thereby giving plaintiff a cause of action for damages sustained by reason of such discharge. The judgment of the circuit court is affirmed.

**BURNHAM et al. v. NORTH CHICAGO ST. RY. CO.**

(Circuit Court of Appeals, Seventh Circuit. May 13, 1898.)

No. 470.

**1. WRIT OF ERROR—COPY IN TRANSCRIPT—JURISDICTION.**

Where a writ of error was duly issued and filed by the clerk of the circuit court, but no notation of its filing made, and by mistake a copy was attached to the transcript instead of the original, on production of the original, with the citation, and acknowledgment of service thereon, both certified by the clerk, they may be made or recognized as part of the record, or the want of a seal upon the copy may be supplied by an impression of the seal of the appellate court.

**2. SAME—WHEN JURISDICTION ATTACHES.**

The jurisdiction of the court of appeals attaches upon the filing of the writ of error in the office of the clerk of the circuit court, and is not defeated by irregularity in the transcript or in its certification.

**3. APPEAL AND ERROR—TRANSCRIPT—SUPPLYING OMISSION.**

Where a necessary part of the record has been omitted from the transcript, and is subsequently presented, duly certified, to the court of appeals, it may be made a part of the record by direct order, without writ of certiorari.

**4. SAME—IRRELEVANT PAPERS—PRÆCIPÉ.**

Irrelevant papers or proceedings need not be included in the transcript, and it is proper for the clerk to require of counsel for appellant or plaintiff in error a præcipe stating what the transcript shall contain, to attach a copy of such præcipe to the transcript, and certify that the transcript is full and correct according to the præcipe.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

John A. Rose, for plaintiffs in error.

A. D. Wheeler, for defendant in error.

Before WOODS and SHOWALTER, Circuit Judges, and BUNN, District Judge.

WOODS, Circuit Judge. The motion to dismiss is on the ground that this court is without jurisdiction—first, because the supposed writ of error issued herein has never been filed in the circuit court; second, because no return has been made by the clerk of the circuit court to the supposed writ of error; third, because the supposed writ of error did not issue under the seal of any court; fourth, because the clerk of the circuit court, to the judges of which the supposed writ was directed, has never made return to the writ by returning with the same to this court an authenticated transcript of the record of the cause; fifth, because there is no authenticated transcript of the record of the cause filed in this court, and nothing which purports to be such record or a transcript thereof. In support of the motion is offered a certified copy of docket entries, showing the taxation of costs in the case, including the filing of the petition for and the issuing, but not including the filing, of the writ of error. In answer to the motion it is satisfactorily shown that a writ of error in proper form was duly issued by the clerk of the circuit court under the seal of that court, and that the writ, with a copy thereof for the defendant in error,

was returned to the clerk for filing, and was by him placed on file in the case, but without any notation of the filing, and remained on file until by mistake it was delivered to the attorney for the defendant in error, the copy intended for that use being attached to the transcript and transmitted to this court. The original writ, which afterwards was returned to the clerk, and the citation, with an acknowledgment of service indorsed thereon, both certified by the clerk, the plaintiffs in error have produced here, and have moved that they be made or recognized as a part of the record; and have also moved, under section 1005 of the Revised Statutes of the United States, that the writ of error sent up with the transcript be sealed with the seal of this court.

The objections urged to the jurisdiction of this court are not essentially new, and in none of them is there tenable ground for the denial of jurisdiction. *Mussina v. Cavazos*, 6 Wall. 355; *Redfield v. Parks*, 130 U. S. 623, 9 Sup. Ct. 642; *Credit Co. v. Arkansas Cent. Ry. Co.*, 128 U. S. 258, 9 Sup. Ct. 107; *Texas & P. Ry. Co. v. Kirk*, 111 U. S. 486, 4 Sup. Ct. 500; *Cotter's Adm'r v. Railroad Co.*, 22 U. S. App. 372, 10 C. C. A. 35, and 61 Fed. 747. In *Mussina v. Cavazos* the writ of error had been destroyed before it reached the supreme court, but, "taking a copy of the writ found in the record to be a true copy," the court considered it "established that a writ of error was issued and served," and denied the motion to dismiss for want of jurisdiction. The original writ in this case has been produced, and is unobjectionable in form and substance; but, if that writ were wanting, and there were no proof of its existence or of its contents and form, the copy returned with the transcript might be regarded as the original, defective only in the lack of an impression of the seal of the court, and that defect, by force of section 1005 of the Revised Statutes, enacted since *Mussina v. Cavazos* was decided, may be cured by an impression of the seal of this court, from which theoretically the writ issued.

The objection that the transcript is not authenticated as a full and complete transcript, but only as "a true and correct transcript from the filing of the mandate" issued from this court on a former appeal, does not defeat the jurisdiction, which, as the cases cited show, attached upon the filing of the writ of error in the office of the clerk of the circuit court. In *Redfield v. Parks* there was a like objection to the authentication of the transcript, but, more than three years having elapsed before the motion to dismiss was entered, and the cause having been submitted on printed briefs on both sides on the merits, the court gave leave to the plaintiff in error to sue out a certiorari to bring up the papers omitted from the transcript. Jurisdiction cannot be conferred by agreement, and, if a proper authentication had been essential to jurisdiction in that case, it could not have been waived by filing briefs or otherwise. In this case the plaintiffs in error promptly after the filing of the transcript with the clerk of this court obtained a certiorari, in obedience to which the pleadings in the case were properly certified and transmitted, and, if there is now wanting anything relevant to the errors assigned, it is a single order, made be-

fore the first trial of the cause, showing the filing of a written waiver of the jury and a submission of the case for trial to the court. Of that order, in connection with other matters which are clearly irrelevant to the questions now presented, the plaintiffs in error have presented a properly certified copy, and ask that by direct order or by writ of certiorari it be made a part of the record. The formal writ under the circumstances is not necessary, and the clerk will cause the order as certified to be printed as a part of the record, and will also attach to the transcript the original writ of error.

While this disposes of the motion to dismiss and of the counter motions of the plaintiffs in error, we deem it proper here, besides calling attention to the remarks of the Chief Justice in *Railway Co. v. Stewart*, 95 U. S. 279, in respect to what should be contained in a transcript, to say that the words "all proceedings in the case," as used in the first clause of rule 14 of this court (21 C. C. A. cxv., and 78 Fed. cxv.), are to be interpreted with reference to the words "all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court," found in the third clause of the rule. It is not intended that irrelevant papers, proceedings, or orders shall be certified; and, that the clerk may not be left in doubt, he may well require of the counsel or attorney of the appellant or plaintiff in error in a cause a præcipe stating specifically what the transcript shall contain, and, attaching a copy of the præcipe to the transcript, certify that it is a true and correct transcript according to the præcipe. The motion to dismiss is overruled.

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### MISSOURI, K. & T. RY. CO. v. HALL.

(Circuit Court of Appeals, Eighth Circuit. April 18, 1898.)

No. 1,001.

#### 1. TRIAL—DIRECTION OF VERDICT.

Where the testimony would not compel every reasonable man, with fair and impartial judgment, who hears it, to come to the same conclusion in respect to a material fact in issue, it is not error to refuse to take the case from the jury.

#### 2. CARRIERS—ACTION FOR INJURY TO LIVE STOCK—DAMAGES—EVIDENCE.

Testimony of one accustomed to handling cattle, that certain cattle, after being in a railroad collision, failed to gain properly, by reason of which they were damaged in value a certain sum per head, is admissible in an action to recover damages resulting from the collision.

In Error to the Circuit Court of the United States for the District of Kansas.

T. N. Sedgwick, for plaintiff in error.

John C. Gage, Sanford B. Ladd, Charles E. Small, Mr. Lane, and Mr. Hicks, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge. While the Missouri, Kansas & Texas Railway Company, the plaintiff in error, was transporting a train load of cattle for John J. Hall, the defendant in error, it ran an engine into the rear of the train, and, as the defendant in error claims, knocked down and killed some of the cattle, and injured others. He sued the company for the loss which he alleged that he had sustained from this collision. The case was tried by a jury, which returned a verdict against the company.

It is assigned as error that the court refused to dismiss the case at the close of the evidence for the defendant in error, and that it refused to direct a verdict for the company at the close of all the evidence. But the collision was undisputed, and the only question was whether any damage to the cattle was caused thereby, and, if so, how much. Upon that question the testimony was conflicting. Some of the witnesses testified that the collision tore off one end of the caboose, and knocked down all, or nearly all, of the cattle; that from 30 to 41 of them were taken out dead 21 miles beyond the place of the accident; that many of them had ribs broken in, or horns torn off, or hips broken down; that within three days after the collision 97 of them died, and that those that lived were so injured that they would not thrive or take on flesh. On the other hand, witnesses testified, in effect, that all this loss was the result of the poor and weak condition of the cattle when they were shipped, and that the collision was so gentle and trivial that it did not injure them. The testimony to the injury to the cattle was, however, so positive and substantial that we are not satisfied that every reasonable man who heard it with fair and impartial judgment would be compelled to come to the conclusion that the cattle were not injured by the collision, and in this state of the case the court properly refused to withdraw the case from the jury. *Railway Co. v. Jarvi*, 10 U. S. App. 439, 451, 3 C. C. A. 433, 438, and 53 Fed. 65, 70; *Drake v. Stewart*, 40 U. S. App. 173, 178, 22 C. C. A. 104, 107, and 76 Fed. 140, 143. For the same reason there was no error in the refusal of the court to dismiss the case at the close of the evidence for the defendant in error, since the testimony to the injury to the cattle had then been introduced.

The defendant in error testified that he had been engaged in raising and in handling cattle for more than 20 years, that he saw these cattle on the day of the collision and frequently thereafter for four months, and that those that were not killed failed to thrive and take on flesh, so that they were lessened in value five dollars a head by the collision; and the court submitted this evidence to the jury under an instruction that, before they could allow any damages on this ground, they must be satisfied that the failure of the cattle to thrive was caused by the injuries they received in the collision, and not by their journey, and that they should exercise a great deal of care and consideration in coming to their conclusion upon this part of the case. An objection to this testimony was interposed that it was incompetent, irrelevant, and immaterial; that it called for a conclusion of the witness, and that he was not a competent witness; and it is insisted that the court erred in overruling this objection, and submitting this testimony to the jury. The contention cannot be sus-

tained. The questions it presents were carefully considered by this court in *Railway Co. v. Edwards*, 49 U. S. App. 52, 24 C. C. A. 300, and 78 Fed. 745, and for the reasons stated in the opinion in that case there was no error in the ruling of the court here.

A motion was made to strike out certain of the assignments of error in this case, but it is unnecessary to consider it, because we have arrived at the same result upon the merits that we should have reached if we had granted it. For this reason the motion is denied without a consideration of its merits. The judgment below is affirmed.

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GARDES v. UNITED STATES.<sup>1</sup>

GIRAULT v. SAME.

(Circuit Court of Appeals, Fifth Circuit. April 19, 1898.)

No. 646.

1 CRIMINAL PROCEDURE—INDICTMENT—SEVERAL COUNTS.

Where an indictment consists of numerous counts, the trial court may, in the exercise of sound judicial discretion, require the government to elect certain counts upon which it will ask conviction; but where the counts are all for transactions connected together, or of the same class, their joinder is proper, under Rev. St. § 1024, and the exercise of the court's discretion will not be disturbed, except in a clear case of improvidence or abuse.

2. SAME—MISTRIAL—FORMER JEOPARDY.

Where, during the trial, a juror becomes disqualified, and the court adjudges a mistrial, a plea of former jeopardy is not good on a second trial, even though all parties were willing to proceed with 11 jurors.

3. SAME—READING OF INDICTMENT.

Where defendants have been arraigned, and have waived reading of the indictment, they may not subsequently complain if the whole indictment is not read at the trial, but such parts of it are read, and such explanations made of the other parts, as may give the jury the clearest comprehension of it.

4. SAME—VERDICT—FORM.

Where the jury find accused guilty upon all counts of an indictment, "Guilty as charged," without specifying the counts, is a proper form of verdict.

5. SAME—COUNT TO SUSTAIN.

Where the verdict is sustained by one good count in the indictment, it must stand, even if all the other counts are bad.

6. SAME—INDICTMENT—AMENDMENT.

Where, after mistrial, and before a new trial, amendments are made to purely formal parts of certain counts of an indictment, and the defendants are not rearraigned, even if the irregularity is material it can affect only the counts so amended, and the error is cured by arrest of judgment on such counts.

7. SAME—SENTENCE—HARD LABOR.

Where the statute under which a prisoner is sentenced provides for imprisonment, but not at hard labor, the words "at hard labor" should not be inserted in the sentence, even if hard labor is a part of the discipline of the prison at which the sentence is to be served.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

J. R. Beckwith, for plaintiff in error Gardes.

Girault Farrar and A. D. Henriques, for plaintiff in error Girault.

J. Ward Gurley, for the United States.

<sup>1</sup> Rehearing denied May 24, 1898.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

**McCORMICK, Circuit Judge.** Henry Gardes was president, and Walter W. Girault was cashier, of the American National Bank of New Orleans, La. They and Thomas H. Underwood composed the firm of T. H. Underwood & Co., which firm was a customer of the bank. Gardes, Girault, and Underwood were indicted together, under section 5209 of the Revised Statutes. The first two were charged with embezzling, abstracting, and willfully misapplying the moneys, funds, and credits of the bank; and Thomas H. Underwood was charged with aiding and abetting them; and Walter W. Girault was charged with making false entries in the books of the bank; and Henry Gardes and Thomas H. Underwood, with aiding and abetting him in making the false entries. The indictment contained 136 counts. It charged 40 different offenses,—32 distinct acts of embezzlement, abstraction, and willful misapplication, and 8 separate false entries. Each one of the 32 distinct acts of embezzlement, abstraction, and willful misapplication is charged three times; that is, embezzlement, and aiding and abetting in the embezzlement, of a particular amount, upon a particular date, are charged in one count; the abstraction, and aiding and abetting in the abstraction, of the same amount, are charged in another count; and the willful misapplication of, and aiding and abetting therein, are charged in another count; so that the 32 distinct and separate acts, each being made the basis of 3 counts, are the subject of 96 counts in the indictment. Each of the 8 separate false entries is charged 5 times; that is, five counts for each entry,—a count for each of the intents and purposes stated in section 5209. Before the case was submitted to the jury the district attorney dismissed counts 79, 80, 81, 88, 89, 90, 91, 92, 93; and, after the verdict, judgment was arrested on counts 4, 7, 10, 13, 16, 19, 22, 25, 28, 31, 34, 37, 40, 43, 46, 49, 52, 55, 58, 61, 64, 67, 70, 73, 76, 79, 82, 85, 88, 91, 94. Gardes and Girault filed demurrers to the indictment on the ground that there are several distinct offenses charged against each defendant in the several counts, not for the same act and transaction, but for different acts and transactions, and crimes not of the same class of crimes or offenses. Gardes, in his demurrer, presented a further ground,—that he was charged in separate counts in different capacities; that is, in some he is charged as principal, and in other counts as aider and abettor: These demurrers were overruled, and the case went to trial March 29, 1897. The trial continued until April 14, 1897, when one of the jurors, I. W. Homan, became too ill to sit on the trial, and the case was continued until the next day. On the next day two physicians certified that the juror was permanently incapacitated, and thereupon a mistrial was entered. The case was again assigned for trial on the 17th day of May, 1897. On that day each of the defendants filed a plea of former jeopardy. Demurrers were filed to these pleas, and the demurrers were sustained, and the pleas dismissed, and a trial was again commenced May 18, 1897. It continued until June 12, 1897. Thomas H. Underwood was acquitted. Henry Gardes and Walter W. Girault were found guilty as charged. They bring this writ of error.

The errors assigned are numerous, but, in substance, they suggest that the circuit court erred (1) in refusing the motion made by the defendants to require the government to elect the counts in the indictment on which the district attorney will ask for conviction; (2) in sustaining the demurrers to the defendants' pleas of former jeopardy; (3) in dispensing with the reading in full of the indictment, and permitting, instead thereof, the reading only of certain counts, and a statement by the district attorney as to each of the other counts; (4) in admitting certain testimony offered by the government to prove the intent and purpose of the parties, and in explanation of certain entries made in the books of the bank by one of the witnesses; (5) in receiving from the jury a general verdict to the effect that they found Gardes and Girault "guilty as charged"; (6) in refusing to give certain charges requested by the defendant Girault.

The section of the statute under which these indictments are presented, so far as it bears upon them, and it is necessary to here quote, is in these words:

"Sec. 5209. Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or willfully misapplies any of the monies, funds, or credits of the association; \* \* \* or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor."

Section 1024 of the Revised Statutes provides:

"When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts. And if two or more indictments are found in such cases the court may order them to be consolidated."

It cannot reasonably be questioned that the transactions made the basis of the indictments in this case are connected together, and are of the same class of crimes and offenses. And, if the congress of the United States had the power to provide by statute as section 1024 was evidently intended to provide, it would seem that the language of the statute is a sufficient answer to any criticism of these indictments on the ground of misjoinder of the counts, or the excessive number thereof. Of the 32 offenses charged to have been committed, each is made the subject of three counts, manifestly because the language of the section applicable to the transaction denounced uses the three terms "embezzle, abstract or willfully misapplies." If it is suggested that 32 different transactions, each alike obnoxious under this penal statute, should not be accumulated upon the head of the offender at one time, it can be answered that the lawmaking power has taken a different view on that subject. It can, however, also be answered, both on reason and on authority, that it would manifestly be far more oppressive to the offender to torture him with 32 consecutive trials on 32 separate indictments than to combine them as the statute permits, and

subject him to only one trial. *U. S. v. Simmons*, 96 U. S. 360; *U. S. v. Britton*, 107 U. S. 655, 2 Sup. Ct. 512; *U. S. v. Northway*, 120 U. S. 330, 7 Sup. Ct. 580; *Claassen v. U. S.*, 142 U. S. 140, 12 Sup. Ct. 169; *Coffin v. U. S.*, 156 U. S. 432, 15 Sup. Ct. 394; *Id.*, 162 U. S. 664, 16 Sup. Ct. 943; *U. S. v. Harper*, 33 Fed. 471. In the case of *Coffin v. U. S.*, *supra*, the indictment contained 50 counts. Mr. Justice White, in opening his admirable summary and analysis of these counts, remarks that:

"The indictment is prolix and redundant, and it is difficult to analyze it so as to make a concise statement of its contents. It contains fifty counts, and alleges that the various offenses enumerated in them were committed on the different dates between January 1, 1891, and July 26, 1893. The counts embrace a number of acts made misdemeanors by the statute, and the charges are commingled in a very indefinite and confusing manner. All the counts, however, may be classed as follows."

He then proceeds with his classification and comments; but neither in his statement thereof, nor in the opinion of the court delivered by him, is it announced that the manner of counting in that indictment is not authorized by the statute, or that the government should have elected certain counts on which it would ask conviction, and enter a discontinuance as to the other counts. The case was reversed on the ground that the trial court erred in refusing certain requested charges, and in giving certain portions of its general charge to which the defendant reserved exceptions. The verdict in that case was a general verdict of "guilty as charged on all counts of the indictment." At the time the indictment was submitted to the jury to which their verdict related, it contained (as it did at the time the verdict was returned) 50 counts, as above stated. Afterwards, and before the writ of error was taken to the supreme court, the judgment was arrested on 20 of these counts. And on the second trial of the case only 17 out of the 50 counts originally contained in the indictment were submitted to the jury, and a verdict was returned finding one of the defendants guilty on 7 of the counts of the indictment; and against him judgment and sentence were pronounced, and he took his writ of error from that judgment to the supreme court. In disposing of this writ of error, Mr. Justice White delivered the opinion of the court. And while, in his statement of the case, he alludes to the fact that only 17 counts were submitted to the jury on the second trial, there is no word nor intimation that the manner and form of the counting, or the number or counts, in the original indictment, were not authorized by the statute. In *U. S. v. Harper*, *supra*, the indictment contained 57 counts, charging violations of section 5209. Judges Jackson and Sage presided at the trial. Judge Jackson (afterwards Mr. Justice Jackson) delivered the charge to the jury, and, in his direction as to the form of the verdict, said: "If your verdict is, 'Guilty on all counts,' you will say, by your foreman, 'We find the defendant guilty as charged in the indictment.'" It is manifest to us, from the language of section 1024, that the trial court has discretion to require the government, either before it has offered proof, or after it has closed its proof, to elect certain counts on which it will ask conviction, in all cases where the counts are

of such character, and so numerous, that in the judgment of the court the submitting of proof on each, and the submitting of issues to the jury on each, would or might lead to confusion, or unduly embarrass the accused in making his defense. And this discretion is doubtless a judicial discretion, and the subject of review in proper cases. The trial judge gets nearer to the case than judges of the appellate court can get. He is especially in a better position to judge of the sound exercise of this discretion than the appellate court can ordinarily reach. Therefore his exercise of this discretion should not be disturbed in cases where it is not clear that it was improvidently exercised. And while in this case it would have been as well, and might have been better, to have exercised a discretion in favor of the defendants' motion and have required the government to elect the limited number of counts on which the district attorney would ask the jury for a conviction, and withdraw the other counts from the consideration of the jury, either before the proof was entered upon, or after the government had closed its proof, we do not feel authorized by anything appearing in the record to hold that the judge's exercise of this discretion in this case was so far erroneous as to require the reversing of the judgment on that ground.

Was there error in sustaining the demurrer to the defendants' pleas of former jeopardy? The learning and genius of the counsel of plaintiffs in error addressed itself to this question with great force. In one of the bills of exceptions allowed by the trial judge, bearing upon this question, he makes this statement, as a part of the bill:

"With regard to the plea of former jeopardy, I state that the discharge of the jury on the first trial, on April 15, 1897, was a matter of imperative necessity, clearly and manifestly appearing at the time, and confirmed by the death of the juror Homan on Friday, April 17, 1897. I endeavored in every way to have the first trial go on. Notwithstanding the certificate of Drs. Holt and Martin, of date April 14, 1897, and hereto annexed, and made part of this bill of exceptions, I did not discharge the jury on that day, in the hope that the juror Homan might recover. On that day he was carried to his home, but instructed by me, through the marshal, that he was not discharged, and must hold no communication with any one concerning the case. The other eleven jurors were held confined. On the following day, April 15, 1897, Drs. Holt and Martin made the statement contained in their certificate of that date, which is hereto annexed, and made part of this bill of exceptions. Both certificates I read in open court prior to the discharge of the jury, in the presence of the defendants and their counsel, and stated that it was evident the trial could not go on. At no time did the defendants, or any of them, or any of their counsel, ask to interrogate the doctors, or either of them, or ask that they appear and make their statements orally in court. The statement made in defendants' pleas, that I took a recess on April 14, 1897, to enable the defendants to consider the proposition of the United States to proceed with the trial with eleven persons, is unwarranted. I ordered a recess without assigning any reason therefor; the main reason being to satisfy myself whether, even by consent, the trial could proceed with only eleven jurors. On the reconvening of the court on April 14, 1897, after recess, the defendants were silent as to any acceptance of the proposition of the United States attorney; and it was not until the next day, April 15, 1897, after I had stated that I had examined the question fully, and was satisfied that the trial could not legally be had with eleven jurors even by consent of parties, that the defendants stated that they had agreed to the offer of the United States attorney to proceed with eleven jurors, and that they would waive all irregularities, etc. It was clear to me, after a full review of the cases, that, under

any view of the matter, there could be no departure from the regular course of criminal procedure without consent of the court, which I did not give. I certify that neither of the defendants objected to the discharge of the jury, nor did they, or either of them, ask for or reserve any bill of exceptions to the discharge."

As the plea was disposed of on demurrer, the facts in the case as to the proceedings on the alleged former trial must be taken as stated in the plea. It therein appears that the juror "I. W. Homan was ill (affected by bodily sickness and ill health), and thereby unfitted to perform his duty as one of the jurors of said jury at that day's session of said court, to wit, the session of the said 12th day of April, 1897"; that Homan attempted to perform his duties with the jury on the following day, the 13th of April, 1897, and that on the next succeeding day, April 14, 1897, the presiding judge announced to the defendants that he had information that the juror I. W. Homan would be unable to attend the trial on that day. The proposition of the district attorney to proceed with only 11 jurors, and the insistence of the defendants that they fully accepted that proposition, show that all the parties clearly understood that the juror was totally and permanently disabled from further bearing his part in the trial, and that he was already discharged from the jury, by the condition of his health. We are of the opinion that, notwithstanding the urgent willingness of the defendants to proceed with the trial with only 11 jurors, the trial judge, in the exercise of the sound discretion necessarily vested in him, did not err in discharging the other jurors, and adjudging a mistrial in the case. The reasons and additional facts set forth by the judge in the bill of exceptions, as above quoted, only strengthen the case by removing all grounds for argument on the subject. We think the settled practice in this country supports the action of the trial judge in this matter. *Simmons v. U. S.*, 142 U. S. 148, 12 Sup. Ct. 171; *Logan v. U. S.*, 144 U. S. 297, 12 Sup. Ct. 617.

In regard to dispensing with the reading in full of the indictment, the bill of exceptions bearing upon that matter shows that, when the proper time arrived to present the indictment to the jury (the counsel for the government addressing himself to the court thereon), the following proceedings were had:

"Mr. Gurley: Now, if your honor please, I desire to state to the court that, instead of reading the entire indictment, every purpose will be answered, in my opinion, by reading certain of the counts of the indictment. The indictment consists of one hundred and thirty-six counts, one of which has been *nolle prosequi*; and each count charges embezzlement, abstraction or misapplication, and false entries. The defendants are charged with having embezzled, abstracted, and misapplied, in each instance, the same thing; that is to say, if it is a certain amount on a certain day, they are charged in separate counts,—in the one with having embezzled, in the other with having abstracted, and in the other with having misapplied that particular fund at that particular time. And therefore the reading of one of this character of counts will answer, in the opinion of the government, instead of reading each count just like it, which differs only in the amount and date; that explanation being made as the reading goes. Then, when it comes to the false entries, each false entry is charged in a number of different ways,—first, to deceive one officer, then to deceive another, for instance. Therefore the reading of one count concerning a false entry, and the explanation of what the difference is in the other counts, is, in the opinion of the government, sufficient; and I shall pursue that course, therefore, with

your honor's permission. The court allows the suggestion of the district attorney. Mr. Rouse: On behalf of Thomas H. Underwood, I desire to say that I cannot conceive of the possibility of the jury trying the issue under an indictment which is not read to them. I therefore except to the ruling of the court permitting the district attorney to read less than the whole indictment. The court rules as follows: As I understand it, the district attorney proposes to read the indictment in the manner which he has indicated. As I understand it, the defense objects, and insists that the whole indictment should be read. The defendants in a criminal case are entitled to know the nature of the accusation against them, and to have the indictment read to them. This right they can claim at a certain stage of the proceedings, namely, the arraignment. In this case the defendants have been arraigned, and have waived the reading of the indictment. Therefore they are charged with the full knowledge of what the indictment contains. In the opinion of the court,—the purpose for which the indictment would be read now being to inform the jury as to what the nature of the accusation is,—the court is satisfied the jury will have a much better and clearer understanding of the contents of this indictment if the course proposed to be followed by the district attorney is followed. The court repeats that it is satisfied that that course will result better, and more clearly inform the jury of the nature of this charge, than would the reading of this long indictment; consuming a considerable time, without a good result, in the opinion of the court. The court states that, if the defendants desire this indictment read in full, the right to do so is reserved and given to the defendants; and this indictment may be read, either by the defendants or through counsel, or any other course they may select."

Thereupon counts 1, 2, and 3 were read in full to the jury, when the counsel for the government, Mr. Gurley, said:

"I now explain to your honor and the jury that the three counts which have just been read in full are each in regard to the charge of the \$6,000 check paid to Mr. Henry Gardes and others on May 7, 1894."

And, continuing, he remarked:

"I now further explain to your honor and the jury that counts 4, 5, and 6 are exactly like counts 1, 2, and 3, respectively, except that the date in those counts is May 29, 1894, and the sum is \$5,000. I further explain to your honor and the jury that counts 7, 8, and 9 are exactly like the first three counts, respectively, except that the date in those counts is June 4, 1894, and the sum is \$5,000."

And thus he proceeded through all of the sets of counts,—three on each transaction,—through and to the ninety-sixth count; showing the date of the transaction, and the amount on which each separate set of three counts of this part of the indictment was based. Still proceeding, he said:

"I further explain to the court and the jury that with count 96 the charges relative to embezzlement, abstraction, and misapplication end, and that with count 97 begins the charge relative to false entries. Each false entry is alleged in five counts."

Counts 97, 98, 99, 100, and 101 were then read in full to the jury, when the counsel for the government, addressing the court, said:

"I now explain to your honor and the jury that the difference in each one of these counts is as follows: Each charges, as I have explained, and as you have heard read, the making of these particular false entries on that particular day. The first of those counts, namely, count 97, charges that this act was done to deceive the officers of the said banking association, and to deceive any agent then appointed, or who might thereafter be appointed, to examine the affairs of said banking association, and with the intent to injure and defraud said banking association and other companies, bodies politic and corporate, and the individual persons then doing, or who might thereafter do, business with the said banking association. The next count, namely, 98, charges that it was done to deceive any agent who might be thereafter appointed by the comptroller of the currency

to examine the affairs of said banking association, the name of said agent being to the grand jurors unknown. The next count, namely, 99, charges that this act was done to injure and defraud the said association, and certain persons to the grand jurors unknown. The next count, 100, charges that the act was done to deceive any agent appointed to examine the affairs of said banking association. The next count, viz. 101, charges that Mr. W. W. Girault did make, and caused to be made, instead of charging that Mr. Girault did it alone, and Mr. Gardes and Mr. Underwood aided and abetted. It charges that Mr. Girault did make, and caused to be made, by one Arthur Christy, then and there a clerk of said banking association, in a certain book, and so forth; that Mr. H. Gardes and Mr. Thomas H. Underwood aided and abetted in that; and that these acts were done, as charged in the first count, namely, 97, to deceive the officers of said banking association, and to deceive any agent appointed, or who might thereafter be appointed, to examine the affairs of said banking association, and with intent of injury, and to defraud any bodies politic and corporate, and individual persons, then doing, or who might thereafter do, business with the said banking association. I now explain to your honor and the jury that counts 102, 103, 104, and 105 are exactly like counts 97, 98, 99, and 100, which were, respectively, just read to the jury, with the exception that the date is September 20, 1895, the sum \$17,800, and the entry is charged to have been made on page 496 of note clerk's blotter No. 8, to the credit of Thos. H. Underwood & Co., N. Y., \$17,800."

This course, with differing details, but exhaustive in its analysis of the different counts, was continued through all the sets of five counts on the different charges of false entry. And, though there is much more bearing on the same subject, this will, we think, clearly show to any one versed in such proceedings exactly what was done in lieu of the reading in full of the indictment to the jury. The consolidated indictment covers 607 pages of the printed record. To have read it in full would probably have consumed the session hours of four days of the term. Except as to the dates and amounts, which in each case, with reference to each count, were carefully and accurately stated to the jury, the language of the counts not read is identical with the language of those counts that were read,—technical to a high degree, and difficult for the trained practitioner to detect, from the reading by an ordinary reader, any difference between the one and the other of the counts, if they had been successively read, from No. 1 to No. 136. It is manifest to the mind of any one at all conversant with such proceedings that the manner pursued by the court, or permitted by the court, was, beyond measure, the best suited to carry to the minds of the jury an accurate knowledge of the gravamen of the charge in each count of the indictment. It is shown by the bill of exceptions that the defendants had been duly arraigned; that on their arraignment they had waived the reading of the indictment. Each of the plaintiffs in error, in his plea of former jeopardy, duly verified by his own oath, recites that he, in his own proper person, "comes into court here, and, having heard the said indictment read," etc. So it clearly appears, as we reasonably would have known the fact to have been, that the defendants were fully advised as to the contents of the charges preferred against them by the grand jury. If the course taken was not regular, it was certainly one that did the defendants no legal harm. As it was difficult to give the jury a clear idea of the different charges, it may have tended to dispel the doubt and confusion that would

have settled on the minds of laymen during the protracted and weary reading of the great volume of technical verbiage in which the charges were imbedded, and thus, to a degree, at least, have prevented the generation of that generally miscalled "reasonable doubt," which is the "last ditch" in which the guilty so often succeed in eluding the sword of justice. But this did the defendants no legal injury. They were clothed with the presumption of innocence. This presumption given to the jury as evidence was sufficient of itself to secure the defendants' acquittal, unless the government, by competent proof, established their guilt beyond a reasonable doubt. The government should therefore have been allowed, and should be encouraged, to use all proper means to free the minds of the jury from the confusion which the reiterated language of many similar indictments consolidated for trial, or very numerous counts in one indictment, is calculated to produce. In *Agnew v. U. S.*, 165 U. S. 36, 17 Sup. Ct. 235, the chief justice, in discussing the question of irregularities presented in that case, after remarking thereon, and referring to authority in support of what he first advanced, added, "Another general rule is that for such irregularities as do not prejudice the defendant he has no cause of complaint, and can take no exception;" to support which the chief justice cites *U. S. v. Richardson*, 28 Fed. 61; *U. S. v. Reed*, 2 Blatchf. 435, 456, Fed. Cas. No. 16,134; *U. S. v. Tallman*, 10 Blatchf. 21, 28, Fed. Cas. No. 16,429; *State v. Mellor*, 13 R. I. 666; *Cox v. People*, 80 N. Y. 500; *People v. Petrea*, 92 N. Y. 128.

In reference to admitting certain testimony offered by the government to prove the intent and purpose of the parties, and in explanation of certain entries made in the books of the bank by the witness who was called to explain the same, we are satisfied from our inspection of the record that the trial judge did not err in overruling the objections made to the introduction of this testimony. It certainly is common knowledge that private entries made on the different folios of a system of books as extensive and complicated as the records of the transactions of a national banking association with a large capital must necessarily require that, for the proper understanding of the entries, the average juror is dependent upon the testimony of a witness conversant with that species of writing. Not only the average juror is dependent upon this testimony, but the most enlightened of the judges are thus dependent. And certainly one shown to have been employed and engaged in the making of the particular entries that were in controversy, and who made those about which he was examined, is at least a competent witness to testify on that subject, even though he may be not the best expert in existence. The testimony offered to show the intent and purpose of the parties was calculated, in connection with the other proof in the case, to aid the minds of the jurors in arriving at the truth. It was carefully limited strictly to the purpose to which it was applicable, and for which it was admitted. The jury were fully cautioned and charged, by appropriate instructions, repeated from time to time as occasion, during the tedious progress of the trial, seemed to require, as to the limits

of the application of this proof. The limitation of the use to be made of this proof was kept constantly before the jury, and carried forward into the court's final charge. It is clear to us that there was no error in the admission of this testimony.

In reference to the general verdict, its exact language is:

"We, the jury in the case of the United States vs. Walter W. Girault, Henry Gardes, and Thomas H. Underwood, find the following verdict: W. W. Girault, guilty as charged; Henry Gardes, guilty as charged; Thomas H. Underwood, not guilty.

Chas. H. Bailey, Foreman.

"New Orleans, June 12th, '97."

We have seen, in *U. S. v. Harper*, *supra*, that Judge Jackson instructed the jury in that case that, if they were satisfied that the defendant was guilty on all of the counts in the indictment, they should return their verdict, "We find the defendant guilty as charged in the indictment." The verdict in this case is not literally in that form, but it is substantially such a verdict as Judge Jackson directed the jury to find in case the guilt of the defendant on each count was, in their judgment, established. The verdict in this case has direct relation to the charges in the indictment which the jury were impaneled and sworn to examine into, and a true verdict render thereon. It would seem that if the proof did in fact establish the guilt of the defendant on each of the counts in the indictment, and the jury's purpose was to so find, that purpose can be as clearly shown by a general verdict, as by a particular verdict on each count, the sum of which would amount to a verdict of guilty on each and every of the counts. So that the objection, if that was all there was to it, would be a dispute about words. It, however, appears from the language of the assignments which we have summed up in this suggestion of error that the defendants thereby intended to attack the validity of all of the counts in the indictment, and of each count separately, and of the several associated groups of the different counts. Without being led by this suggestion into a detailed analysis of the different counts, it is sufficient to observe that, of the counts remaining after the action of the court below on the motion in arrest of judgment, there is at least one count on each transaction sought to be charged as an offense which does charge the offense in apt and adequate language. And when we consider that the sentence against the defendants on each of the counts left standing in the indictment condemned them to a period of imprisonment on each for the same length of time, namely, eight years, and provided that the sentences should run concurrently, making the sentence practically equivalent to a sentence on one count for the period named, it is manifest that the objection to the verdict cannot be sustained on the ground of its supposed relation to any count in the indictment that should be held to be bad. There being in the indictment counts of each class that are good, the verdict, and the sentence thereon, relate to these good counts, without regard to the number thereof. And the fact, if it be a fact (as to which we express no opinion), that among the counts as to which the circuit court overruled the motion in arrest of judgment there are some that should be held to be bad, does not vitiate the verdict, or the sentence

thereon. *Claassen v. U. S.*, 142 U. S. 140, 12 Sup. Ct. 169. In the case just cited Mr. Justice Gray says:

"In criminal cases, the general rule, as stated by Lord Mansfield before the Declaration of Independence, is that, if there is any one count to support the verdict, it shall stand good, notwithstanding all the rest are bad."

As to the refusal by the circuit court of certain charges requested by the defendant Girault, we do not deem it necessary to quote the language of these charges. So far as they were proper to have been given, they were fully embraced in the general charge, and in other special charges which were given by the trial judge to the jury, as shown in his memorandum made a part of the defendants' bill of exceptions No. 6.

We do not overlook the fact that the defendants, in their motion in arrest of judgment, rely strongly on the ground:

"That after the unlawful discharge of the said first jury impaneled in this cause, and before the unlawful impaneling of the second jury herein, rendering the verdict herein, at the instance of, or provoked by, the attorney representing the United States, the grand jury of this court, on its oath, made and presented to the court certain amendments of and to the indictment herein, whereby the same was, in some manner deemed by the United States attorney and said grand jury material, changed and amended in a material manner and in material averments; yet the said defendant was in no manner advised of said change in the indictment, nor called on or permitted to be newly arraigned under said newly-constituted and amended indictment, or to plead thereto; but, on the contrary, the government kept said change in said indictment in all things clandestine, and never notified this defendant of said amendments and change of and in said indictment; and, as appears by the record herein, said indictment, as so amended, stands without any lawful issue thereon, or any arraignment of this defendant under said indictment as so amended; it appearing from the record therein that there was and is no plea of this defendant to said amended indictment, and that no opportunity to so plead thereto was ever given to this defendant, as in justice and law should have been done."

It appears from the record that on April 24, 1897, the grand jury came—

"Into open court, and upon their oath, with leave of court, presented the following amendments to the indictment presented herein against Walter W. Girault, Henry Gardes, and Thomas H. Underwood on the 11th day of March, 1897, and filed in this court upon that date, viz.: At the commencement of counts 4, 7, 10, 13, 16, 19, 22, 25, 28, 31, 34, 37, 40, 43, 46, 49, 52, 55, 58, 61, 64, 67, 70, 73, 76, 79, 82, 85, 88, 91, and 94, and just before the word 'present,' insert the words, 'And the grand jurors aforesaid, upon their oath aforesaid, further'; the same having been inadvertently omitted from said respective counts in said indictment."

On the 17th of May, thereafter, the defendants presented their plea of former jeopardy, to which we have before alluded, which plea by each says that he—

"In his own proper person comes into court here, having heard the said indictment read, and now and at all times protesting that he is not guilty of the premises charged in said indictment, or charged in any count or counts contained in said indictment, saith," etc.

From the judgment of the court on the defendants' motion in arrest of judgment we excerpt the following:

"Whereupon, and on due consideration thereof, it is ordered by the court that the said motions in arrest of judgment be sustained as to all the counts in the indictment amended by the grand jury on April 24, 1897, said counts being

numbered [as above given], and that the said motions in arrest of judgment be overruled in all other respects."

The amendments made or attempted to be made to the certain counts in the indictment did not affect the body of either of each specified count. It made no change whatever in the charging words. The changes made or attempted to be made were in what is properly called the "caption" of the indictment or count; for in this sense, as in many others, each count is a separate indictment. If the defendants are not estopped, by their admission in their plea of former jeopardy, as above quoted, from thereafter urging that they had not been arraigned under the indictment to which they pleaded, and if the attempted amendment, being, not in the body or charging part of the indictment or count, but in what we think may properly be called the "caption" thereof, and strictly pro forma, can be held to be material, under the authority of *Ex parte Bain*, 121 U. S. 1, 7 Sup. Ct. 781 (which we think it cannot), it could only affect the counts attempted to be amended, on each one and on all of which counts, as we have seen, judgment was arrested.

We have thus considered, after our own order, the questions which appear to us to be involved in the assignments of error, and find not sufficient in any of them to warrant us in reversing the judgment of the court below. We find, however, on the face of the record, an error not assigned, so far as we are able to construe the assignments of error, which does not require the reversal of the judgment, but which seems to us to require a modification of the sentence. The section of the statute under which these indictments were found provides that persons convicted of the offenses therein named "shall be imprisoned not less than five years nor more than ten." The sentence in this case is that the defendants (naming them) shall "be conveyed to, and be imprisoned at hard labor in, the Ohio penitentiary, at Columbus, in the state of Ohio, for and during the term and period of eight years; the sentences to run concurrently." Section 5541, Rev. St., provides that, where any person convicted of an offense against the United States is sentenced to imprisonment for a period longer than one year, the court by which the sentence is passed may order the same to be executed in any state jail or penitentiary within the district of the state where such court is held, the use of which jail or penitentiary is allowed by the legislature of the state for that purpose. Section 5542 relates specially to persons convicted and sentenced to imprisonment and confinement at hard labor, and has the same provision in reference to such persons being sentenced to the penitentiary. The language of the two sections, except in describing the punishment, is substantially identical. In reference to both classes of persons it is provided that, when the offender is imprisoned in a jail or penitentiary of any state or territory, such offender shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the state or territory in which such jail or penitentiary is situated, and, while so confined therein, shall be under the exclusive control of the officers

having charge of the same under the laws of such state or territory. Section 5546 provides for selecting a suitable jail or penitentiary in a state other than that in which the court is held, when the use of no suitable jail or penitentiary can be procured in the latter state, in which case the prison to be used shall be designated by the attorney general; and the prevalent practice under these provisions has obtained, in accordance with which the attorney general notifies the different courts, through the district attorney, of the designation that he has made for the different districts from time to time, and procures to be entered upon the minutes of the courts in each district an order showing the designation which is in force. These provisions of the statute are fully discussed by the chief justice in *Ex parte Karstendick*, 93 U. S. 396, and are construed to widen the range of punishment in all cases where any person may be sentenced to imprisonment for a longer period than one year, and to authorize the court, at its discretion, to order execution of its sentence at a place where labor is exacted as a part of the discipline and treatment of prisoners held in the institution. At the time of the passage of the acts from which these sections of the Revised Statutes were drawn, it was the law in most, if not in all, of the states, that persons convicted of offenses, and sentenced to imprisonment in the penitentiary, were sentenced to imprisonment at hard labor. Such labor, therefore, was a part of the uniform discipline and treatment of all convicts therein held; and the statute requiring the subjection of the United States prisoners to the same discipline and treatment, and to the exclusive control of the officers having charge of the prisoners, would involve, necessarily, the doing of hard labor by the convict during the term of his imprisonment in such a penitentiary. The circuit court doubtless had knowledge that the discipline and treatment of prisoners in the Ohio penitentiary enjoined their being held at hard labor, and that persons sentenced to a period of eight years' confinement in that prison would be required to submit to that discipline and treatment. We think, however, that there is a substantial difference between having to submit to hard labor as a part of the discipline and treatment in the state penitentiary to which by statute the courts are authorized to sentence convicted offenders, and the having pronounced against them a sentence to hard labor, as a brand or mark of the grade of their punishment for the offense. The statutes of the United States require in some cases that the sentence shall be to confinement at hard labor. They provide in other cases that the punishment may be imprisonment for more than a year, without adding the words "at hard labor." It may be difficult to perceive, and more difficult to accurately express, the distinction which we suggest; but we believe there is a material distinction in the public thought between a sentence to confinement at hard labor, and a sentence to confinement in a designated state penitentiary, where hard labor will be required of the person sentenced, as a part of the discipline of the prison. "At the present day, imprisonment in a state prison or penitentiary, with or without hard labor, is an infamous pun-

ishment"; and, "by the express provisions of acts of congress, either a sentence 'to imprisonment for a period longer than one year,' or a sentence 'to imprisonment and confinement to hard labor,' may be ordered to be executed in a state prison or penitentiary" (*Mackin v. U. S.*, 117 U. S. 348, 6 Sup. Ct. 777), and thus in either case stamp the convict with the stigma of subjection to an infamous punishment. Still we think that the embodying in the sentence the words "at hard labor" gives the stigma an emphasis which the statute does not require in this case. We conclude, from a careful consideration of the subject, that the sentence should not go beyond the language of the statute in describing the character of the confinement, and we modify the sentence in this case by striking out the words "at hard labor." And as thus modified the judgment appealed from is in all things affirmed.

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HOEFFNER v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. May 9, 1898.)

No. 985.

UNITED STATES COMMISSIONERS—POWER TO TAKE BAIL.

United States commissioners, under Rev. St. §§ 1014, 1015, have the same power to take bail upon an arrest made after an indictment as they have in cases of arrest before indictment.

In Error to the District Court of the United States for the Eastern District of Missouri.

Thomas B. Harvey, for plaintiff in error.

Edward A. Rozier, U. S. Atty., and Walter D. Coles, Asst. U. S. Atty.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

SHIRAS, District Judge. From the record in this case, it appears that on the 8th day of August, 1896, the plaintiff in error entered into a recognizance, in the sum of \$3,000, conditioned that one Charles F. Knowlton, who had been indicted in the United States district court for the Eastern district of Missouri for a criminal violation of section 5480 of the Revised Statutes of the United States, should personally appear before said court on the first day of the November term, 1896, and continue in attendance until discharged according to law; this recognizance being entered into before a United States commissioner in and for the Eastern district of Missouri.

It further appears that on the 15th day of December, 1896 (that being one of the regular days of the November term, 1896, of the United States district court for the Eastern district of Missouri), the named Charles F. Knowlton was duly called, and, failing to appear, default was entered against him; and the plaintiff in error, as surety upon the recognizance, was likewise called, and, failing to appear, a forfeiture of the recognizance was entered against both the parties;

and thereupon the present proceedings by scire facias were instituted to recover the penalty named in the recognizance; to which the plaintiff in error appeared, and on the 5th day of May, 1897, filed an answer, wherein he denied each and every allegation made in the writ of scire facias. On the 20th day of May, 1897, the matter came up for hearing, and a default was entered against Knowlton, the principal in the bond, for want of appearance, and a jury trial was had on the issues presented by the answer of the surety; the verdict being in favor of the government, assessing the damages at \$3,000, for which amount judgment was entered in favor of the United States against both defendants. To reverse this judgment the present writ of error has been sued out by the surety on the bond, three errors being assigned as grounds for reversal; the first being that it was error to submit the issues to a jury, it being claimed that the party was "entitled to have a finding of fact by the court." The transcript does not contain a statement of the evidence submitted in the case, and this court is not informed what issue or issues of fact were submitted to the jury. It does not appear that the plaintiff in error asked a finding of fact from the trial court, or objected to submitting the issues to a jury, nor is it made to appear in any form what the issue of fact was that the plaintiff in error now claims should have been passed upon by the court. As already stated, the answer filed is simply a general denial, and the transcript recites that after hearing the evidence introduced, and receiving the instructions of the court, the jury returned a verdict in favor of plaintiff; but, as the transcript does not contain a word of the evidence or of the instructions, it is impossible to know, either from the pleadings, or the recitals of the transcript, what issue of fact was presented for determination. Before this court can be called upon to determine the question whether the trial court erred in submitting an issue of fact to the determination of a jury, the nature of the issue thus submitted ought to be made plain; and, as that has not been done in this case, this court is not required to further consider this assignment of error.

The second point relied upon in the brief of plaintiff in error, to wit, that the record does not show that a forfeiture of the recognizance had been entered before the institution of the present proceedings, has been obviated by the fact that the clerk of the trial court, in obedience to the certiorari issued by this court, has sent up the portion of the record which shows that the forfeiture had been duly entered, but which, from some oversight, had been omitted from the transcript originally filed.

The third ground of error assigned is that the United States commissioner, before whom the recognizance was taken, was without jurisdiction to let to bail a defendant who had been already indicted, and therefore the recognizance was void. The record shows that Knowlton was indicted in the district court; that a warrant of arrest was ordered by the court, and the amount of the bail to be given was fixed by the court at the sum of \$3,000. The only question presented by the record is whether, under such circumstances, a commissioner can approve a bail bond or recognizance, and release the

party indicted, or whether such action can be had only in the court in which the indictment is pending. There can be no question that, under the provisions of section 1014 of the Revised Statutes, commissioners have the power to cause the arrest of all persons charged with having violated the criminal statutes of the United States, and to order them to be held for trial; and by section 1015 it is provided that "bail shall be admitted upon all arrests in criminal cases where the offense is not punishable by death; and in such cases it may be taken by any of the persons authorized by the preceding section to arrest and imprison offenders." The latter section includes all arrests in criminal cases, whether made before or after an indictment is found; and, under its provisions, commissioners have the same power to take bail upon an arrest made after an indictment, as they have in cases of arrest before indictment. The proceedings taken in this case were in accordance with the common practice obtaining in the district courts when an indictment is found against a person who has not been previously arrested.

Upon the filing of the indictment, a warrant of arrest is ordered by the court, and the amount of the bail is fixed. When the arrest is made, if the defendant wishes to give bail in the sum fixed by the court, he is taken before the nearest commissioner for that purpose; and, upon the approval of the recognizance by the commissioner, the party arrested is released, and the officer makes due return of the proceedings to the court from which the warrant of arrest was issued. If the rule should be adopted that in such cases the party arrested, and his sureties, must appear before the court in which the indictment is pending before he can be released on bail, it would work a very great hardship upon the defendant, and might in many cases defeat the beneficent purposes of the statute, as the expense caused thereby might be beyond the ability of the defendant, if the place of his arrest was at a distance from the place of holding court. Finding no merit in the errors assigned, the same are overruled, and the judgment of the court below is affirmed.

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JOHNSTON v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. April 26, 1898.)

No. 688.

1. CRIMINAL LAW—INFORMATION—AFFIDAVIT OF FACTS.

An affidavit which states simply that the offense of obstructing the due administration of justice in a district court of the United States for a certain district has been committed, and that there is probable cause to believe that it was committed by a person named, but which neither sets out any act done nor avers any knowledge of the facts by affiant, is insufficient as the basis of an information.

2. INFORMATION FOR OBSTRUCTING JUSTICE—SUFFICIENCY.

An information for attempting to obstruct the due administration of justice in a district court, by furnishing to one charged with a criminal offense a false certificate to enable him to obtain a continuance, is bad where it charges the making of such certificate by inference only, and fails to charge that it was furnished by defendant with a corrupt intent.

In Error to the District Court of the United States for the Middle District of Alabama.

S. L. Fuller, for plaintiff in error.

Warren S. Reese, for the United States.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

PARDEE, Circuit Judge. Preston T. Johnston, who prosecutes this writ of error, was tried, convicted, and sentenced for the violation of section 5399, Rev. St. U. S., on an information as follows:

"The United States versus P. T. Johnston.

"No. 2,953. Information. District of the United States for the Middle District of Alabama. For the November Term, A. D. 1896.

"Before the Hon. John Bruce, District Judge.

"Be it remembered that George F. Moore, as district attorney of the United States for the Middle district of Alabama, who for the said United States, in this behalf, prosecutes in his proper person, comes here unto the district court of the United States for the said Middle district of Alabama, on the tenth day of December, A. D. 1896, in this same term, and gives the court here to understand and be informed that heretofore, on the fourth day of December, A. D. 1896, before the filing of this information, in the county of Montgomery, within said Middle district of Alabama, and within the jurisdiction of said court, P. T. Johnston, whose name to the district attorney is otherwise unknown, did unlawfully and corruptly endeavor to obstruct the due administration of justice in the district court of the United States for the Middle district of Alabama, in this: That during the present term of said district court there was and still is pending on the docket of said court an indictment charging one J. E. Bailey, alias Ed. Bailey, with a violation of the internal revenue laws of the United States for unlawfully and knowingly removing, to wit, 500 gallons of distilled spirits, on which the tax due the United States had not been paid, from a warehouse for distilled spirits authorized by law, without first paying the tax thereon, and with removing said spirits in a manner otherwise than provided by law, to wit, by stealth and without proper notice being given to the officers of the United States; and the said Bailey was then and there under bond to appear for trial on the fourth day of December, 1896, under the indictment charging him with said offense; and, the said case having been duly called for trial in said court, the said Bailey, through his counsel, sought to have the said criminal case against him continued until the next term of the said district court, and, in support of his said application, filed the following certificate, to wit:

"State of Alabama, Franklin County. I hereby certify that Mr. J. E. Bailey, who is now suffering with a simple fracture of the tibia, will be for some time unable to travel, or to perform any kind of physical labor where it would be necessary to be upon his feet.

"In witness whereof, I hereunto set my hand and seal, this November 29th, 1896.

P. T. Johnston, M. D.

"Personally appearing, Dr. P. T. Johnston made oath that the foregoing statement by him subscribed is in all respects correct and true.

"Jas. S. McCluskey, [Seal.] Notary Public.

"Filed Dec. 4, 1896. J. W. Dimmick, Clerk."

"And the said district attorney gives the court to understand and be informed that the said Johnston knew, when he made the said certificate, and furnished the same to the said Bailey, that the said certificate was false, and he, the said Johnston, furnished the said certificate to the said Bailey for the purpose of obstructing the due administration of justice in said district court of the United States for the Middle district of Alabama, by and in causing the said case against the said Bailey to be continued for the term of said court without any legal or just cause therefor, and then and there and thereby obstructing the

due administration of justice in the said court of the United States. Whereupon the said district attorney of the United States for the said United States prays the consideration of the court in the premises, and that due process of law may be moved against the said P. T. Johnston in this behalf to make him answer the United States concerning the premises aforesaid.

"Geo. T. Moore, United States Attorney."

Accompanying this information, and as the basis thereof, appears the following affidavit:

"United States of America, Middle District of Alabama—ss.: Before me, John Bruce, Judge of the district court of the United States for the Middle district of Alabama, personally appeared J. A. Dudley, who, being by me first duly sworn, deposes and says that the offense of obstructing the due administration of justice in the district court of the United States, for the Middle district of Alabama, has been committed, and that there is probable cause to believe that the said offense has been committed by P. T. Johnston. J. A. Dudley.

"Sworn to and subscribed before me this, the tenth day of —, A. D. 1896.  
"John Bruce, Judge."

The record shows that the plaintiff in error first demurred to the indictment, on the ground that the information was not based upon an affidavit showing facts within the personal knowledge of the affiant. This demurrer being overruled, Johnston filed a plea in abatement, the grounds of which do not appear in the record. Following the plea in abatement, Johnston appears to have demurred generally to the information. The bill of exceptions found in the record purports to give all the testimony adduced on the trial of the case. The affidavit on which the information was based was wholly insufficient to warrant the arrest and trial of the plaintiff in error, and is altogether too general in terms as to the offense against the United States said to have been committed; and it shows no knowledge, information, nor even belief on the part of the affiant as to the guilt of the party charged, beyond the bare statement that "there is probable cause to believe that the said offense has been committed by P. T. Johnston." However false the affidavit may be, it would be next to impossible to assign and prove perjury upon it.

In *U. S. v. Tureaud*, 20 Fed. 621, the law with regard to the sufficiency of an affidavit upon which an information can be lawfully based is fully considered and discussed on principle and authority, and therein it is held that "the probable cause supported by oath or the affirmation prescribed by the fundamental law of the United States, sufficient to base an information upon, is the oath or the affidavits of those persons who of their own knowledge depose to the facts which constitute the offense." In *U. S. v. Polite*, 35 Fed. 59, it is held that "informations must be based on affidavits which show probable cause arising from the facts within the knowledge of the parties making them, and that mere belief is not sufficient." Tested by these authorities, the affidavit in the present case was fatally defective.

The demurrer to the information should have been sustained. The information first charges that Johnston "did unlawfully and corruptly endeavor to obstruct the due administration of justice in the district court of the United States for the Middle district of Alabama in this: [Then reciting matters and things done by one

J. E. Bailey, but nothing whatever that was done or charged to have been done by Johnston.]” Following this, and apparently as a second count in the information, Johnston is charged with furnishing a certain certificate to the said Bailey for the purpose of obstructing the due administration of justice in said district court of the United States for the Middle district of Alabama, which he knew when he made and furnished the same was false. Only incidentally or inferentially is it charged that Johnston made the said certificate, and nowhere is it specifically charged that he made it and furnished it with any corrupt intent. There was no evidence in the case to show that Johnston made or furnished the specific certificate set forth in the information. It is true, there was evidence tending to show that he made and furnished to the said Bailey a certificate similar to a part of the certificate set forth in the information; but there is a fatal variance between the certificate proved to have been made and furnished by Johnston and the one charged in the information to have been furnished by him. For these reasons, the judgment of the district court is reversed, and the case is remanded, with instructions to set aside the verdict and sentence, and quash the information.

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DINGELSTEDT et al. v. UNITED STATES.

REISINGER et al. v. SAME.

(Circuit Court, S. D. New York. December 9, 1897.)

**CUSTOMS DUTIES—CLASSIFICATION—ELECTRIC LIGHT CARBONS.**

Electric light carbons, of which lampblack is the chief component, were dutiable under section 3 of the act of 1894, at 20 per cent., as “articles manufactured in whole or in part, not provided for,” and not as “articles composed of earthen or mineral substances,” under paragraph 86, or preparations or products of coal tar, under paragraph 443.

These were appeals by Dingelstedt & Co., and by H. Reisinger & Co. from decisions of the board of general appraisers affirming decisions of the collector of the port of New York in regard to the classification for duty, under the act of August 28, 1894, of certain electric light carbons.

Everit Brown, for plaintiffs Dingelstedt & Co.

W. Wickham Smith, for plaintiffs H. Reisinger & Co.

Henry D. Sedgwick, Jr., Asst. U. S. Atty.

WHEELER, District Judge. These electric light carbons, of which lampblack is the chief component, do not seem to be “composed of earthen or mineral substances,” within paragraph 86 of the tariff act of 1894; nor “preparations” or “products of coal tar,” within paragraph 443. They rather seem to be “articles manufactured in whole or in part, not provided for,” under section 3, dutiable at 20 per cent. Decision reversed.

## McCREERY et al. v. UNITED STATES.

(Circuit Court, S. D. New York. December 9, 1897.)

No. 2,246.

## CUSTOMS DUTIES.

Fabrics composed in chief value of silk woven 22 inches wide, and used for making waists or skirts for women's and children's dresses, and also for sleeves and trimming of dresses, and which were known commercially as silks, *held* to be dutiable under paragraph 302 of the act of August 28, 1894, as manufactures of silk, "or of which silk is the component material of chief value," and not under paragraph 283.

This was an application to review a decision of the board of general appraisers affirming a decision of the collector of the port of New York in regard to the classification for duties under the act of August 28, 1894, of certain fabrics. The general appraisers found that they were composed of silk and worsted, silk being the component material of chief value in all, but wool predominating in quantity in all but one.

Edwin B. Smith, for plaintiffs.

James T. Van Rensselaer, Asst. U. S. Atty.

WHEELER, District Judge. The board of general appraisers reports:

"These fabrics are woven twenty-two inches wide, and they are used for making waists or skirts for women's and children's dresses, and also, in combination costumes, for sleeves and the trimming of dresses. They are commercially known as women's and children's dress goods, or are goods of similar description and character."

They classify the goods as women's and children's dress goods, under paragraph 283, Act Aug. 28, 1894, against a protest that they should be classified under paragraph 302, which covers "all manufactures of silk, or of which silk is the component material of chief value, including those having India rubber as a component material, not specially provided for in this act." The evidence in this court shows that the goods were not commercially known as dress goods, but as silks. If they are not such dress goods, they come exactly under the description in paragraph 302, as goods "of which silk is the component material of chief value." The board did not find the goods were such dress goods, but that they were such, "or are goods of similar description and character." Paragraph 283 does not provide for such goods, or for those of similar description and character, but for such dress goods. They are such goods or not, and they appear to be not. Decision reversed.

## RICHARD et al. v. UNITED STATES.

(Circuit Court, S. D. New York. December 9, 1897.)

## CUSTOMS DUTIES—CLASSIFICATION—ROSE PLANTS, ETC.

Rose plants and azaleas mollis were dutiable, under paragraph 234½ of the act of August 27, 1894, as plants used for forcing under glass for cut flowers or decorative purposes, and were not entitled to free entry, under paragraph 587, as nursery stock.

This was an application to review a decision of the board of general appraisers affirming, as to the items mentioned in the opinion of the court, a decision of the collector of the port of New York in regard to the classification for duties under the act of August 27, 1894, of certain merchandise.

Albert Comstock, for plaintiffs.

Henry C. Platt, Asst. U. S. Atty.

WHEELER, District Judge. These are roses and azaleas mollis. They were assessed under paragraph 234½ of the tariff act of 1894, which provides for "orchids, lily of the valley, azaleas, palms, and other plants used for forcing under glass for cut flowers, or decorative purposes," against a protest that they should come in free under paragraph 587, which provides for free entry of "plants, trees, shrubs, and vines for all kinds commonly known as nursery stock." These do not appear to be nursery stock, within that description. Decision affirmed.

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## SHEVILL et al. v. UNITED STATES.

(Circuit Court, S. D. New York. December 9, 1897.)

## CUSTOMS DUTIES—CLASSIFICATION—TOYS.

Hollow glass spheres, three-fourths of an inch in diameter (and too large to be described as beads), covered with tinsel and strung for hanging on Christmas trees, etc., were dutiable as toys, under paragraph 321 of the act of August 28, 1894, and not under paragraph 99, as "glass beads" strung.

This was an application to review a decision of the board of general appraisers affirming a decision of the collector of the port of New York, in regard to the classification for duties under the act of August 28, 1894, of certain hollow glass spheres about three-fourths of one inch in diameter, as "toys," under paragraph 321.

Everit Brown, for plaintiffs.

Henry C. Platt, Asst. U. S. Atty.

WHEELER, District Judge. These articles are hollow glass spheres covered with tinsel, and strung, for hanging on Christmas trees, etc., and were assessed as toys, against a protest that they came under paragraph 99, as "glass beads, loose, strung, or carded." They may not be toys, strictly; but the protest cannot be sustained unless they are "beads," which are defined to be little perforated

balls, to be strung on a thread and worn for an ornament. These are too large to come within that definition, and are not to be worn. They do not appear to be beads. Decision affirmed.

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## LEVI et al. v. UNITED STATES.

(Circuit Court, S. D. New York. December 9, 1897.)

## CUSTOMS DUTIES—CLASSIFICATION—LACES.

Laces of which wool or worsted is a component material were dutiable under paragraph 398 of the act of October 1, 1890, and did not come under paragraph 413, even though silk is the component material of chief value.

This was an application to review a decision of the board of general appraisers affirming a decision of the collector of the port of New York, in regard to the classification for duties, under the act of October 1, 1890, of certain fabrics. The board found that they were laces composed of silk and mohair, the latter being a product of wool or worsted, and that the mohair was more than 12 per cent. of their entire value.

W. Wickham Smith, for plaintiffs.

James T. Van Rensselaer, Asst. U. S. Atty.

WHEELER, District Judge. These fabrics are silk laces, of which silk is the component material of chief value, and would be dutiable, according to the protest, under paragraph 413 of the act of 1890, but for that this paragraph does not include articles otherwise provided for. They are otherwise provided for in paragraph 398, which contains no such classifying provision as to such articles as are expressly included in it. Decision affirmed.

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## GOLDMAN v. UNITED STATES.

(Circuit Court, S. D. New York. March 1, 1898.)

## CUSTOMS DUTIES—CLASSIFICATION—WOOD FLOUR.

Wood ground into a powder by a dry process, and known in trade both as "wood flour" and "wood pulp," was not dutiable as wood pulp, under paragraph 303 of the act of August 28, 1894, as claimed by the protest; and the collector's decision classifying it as a "manufacture of wood not specially provided for," under paragraph 181, must stand.

This was an application to review a decision of the board of general appraisers affirming a decision of the collector of the port of New York in regard to the classification for duties under the act of August 28, 1894, of certain wood powder, classifying it as a "manufacture of wood not specially provided for," under paragraph 181. The importer claimed that it should be classified, under paragraph 303, as "wood pulp."

Howard H. Williams, for petitioner.

J. T. Van Rensselaer, for the United States.

TOWNSEND, District Judge (orally). The article in question is wood ground into a dry powder. It was known in the trade both as "wood flour" and "wood pulp," and under various other names. Wood macerated with water against stones revolving vertically, until it is converted into a soft coherent mass, is commercially known as "wood pulp." This wood flour is ground dry, like other flours, between millstones, and is never "pulp" in fact, in the common meaning of the word. Although some persons deal in it under the name of "wood pulp," it is not uniformly or generally known as "wood pulp" in trade and commerce. The finding of the board, on the evidence before it, that the article is not wood pulp, is not overcome by the conflicting testimony in this court. Inasmuch as the importer has failed to show that this article is wood pulp, the decision of the board of general appraisers sustaining the collector is affirmed.

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UNITED STATES v. ISELIN et al. SAME v. HIRSCH et al. SAME v. DYER et al.

(Circuit Court, S. D. New York. March 11, 1898.)

Nos. 2638, 2640.

**CUSTOMS DUTIES—TIME OF TAKING EFFECT OF DINGLEY LAW.**

The tariff act of 1897 took effect only from the moment of its approval by the president, which was 6 minutes past 4 o'clock p. m., Washington time, on July 24, 1897, and goods imported and entered for consumption on that day, but prior to such approval, were dutiable under the law of 1894.

These are appeals by the United States from decisions of the board of general appraisers at New York sustaining protests of importers; the question involved being a determination of the time at which the tariff act of 1897, known as the "Dingley Law," became operative. The board, in deciding the question, rendered an opinion as follows:

The question involved in these protests relates to the precise time when the tariff act entitled "An act to provide revenue for the government and to encourage the industries of the United States," approved July 24, 1897, went into effect. The government seeks to maintain the proposition that it became operative from the earliest moment of the day on which it was signed by the president, i. e. at 12 o'clock midnight of July 23, 1897. The importers' claim that it became operative only from 4:06 o'clock p. m. (Washington time) of July 24, 1897, the hour at which the president is known to have approved the bill as it came from the conference committee of the senate and house. On the decision of this issue depends the question as to whether the goods under consideration are liable to assessment for duty under the tariff act of 1897, as assessed by the collector, or the act of 1894, under which they are claimed in the protests to be subject to classification by the importers.

The material facts of the case we find to be as follows: (1) The importations in question consist of a quantity of wool, which arrived at the port of Boston on the forenoon of July 24, 1897. (2) The goods were entered for consumption before 12 o'clock noon of that day, and permits of delivery from the collector and naval officer were at once placed in the hands of the importers, stamped "Free," under the provisions of paragraph 685 of the tariff act of 1894, which placed in the free list all imported wool. (3) The entries were afterwards liquidated by the collector, so as to classify and assess the wool for duty under paragraph 357, Schedule K, of the tariff act of July 24, 1897, which levied a duty of 11 cents

per pound on imported wool of class 1. (4) We find, further, that the tariff act of July 24, 1897, entitled "An act to provide revenue for the government and to encourage the industries of the United States," was approved by the president of the United States at six minutes after 4 o'clock p. m. (Washington time) on the day of its date. Under this state of facts, the importers claim in their protests that the wool was free of duty under paragraph 685 of the tariff act of 1894, and that the collector erred in assessing duty on it under the act of 1897.

The above findings of fact are based in part on the following admission in writing, made without prejudice by the authorized counsel of the treasury department acting for the government, which is offered in evidence by the importers:

"The government admits that the act entitled 'An act to provide revenue for the government and to encourage the industries of the United States' was signed by the president at six minutes after 4 o'clock in the afternoon of the 24th day of July, 1897 (Washington time). This admission is made without prejudice to the government, and subject to objections as to its materiality and relevancy.

"October 5, 1897.

W. J. Gibson,

"Counsel for the Treasury Department in Cases Before the Boards of U. S. General Appraisers."

The government, by its counsel, contends that the evidence offered as to the hour of the day the act was approved is irrelevant and immaterial, because it legally became operative by relation from the first moment of the day of its date, and no reasons exist for excepting this case from the general rule of law which does not permit fractions of a day to be considered. This presents the pivotal point of the whole case under consideration. The adjudged cases are conflicting in both the federal and state courts as to how far the law will recognize fractions of a day in cases of this kind. The question of import duties, being one which may be reviewed by the federal courts, should, in our judgment, be governed by the decisions of those courts, rather than by authorities based on state decisions. The first section of the tariff act of July 24, 1897, provides as follows: "That on and after the passage of this act, unless otherwise specially provided for in this act, there shall be levied, collected, and paid upon all articles imported from foreign countries, and mentioned in the schedules herein contained, the rates of duty which are, by the schedules and paragraphs, respectively prescribed, namely: [Here follow the various schedules.]" Section 2 of said act, relating to the "Free List," is as follows: "Sec. 2. That on and after the passage of this act, unless otherwise specially provided for in this act, the following articles when imported shall be exempt from duty." Section 33 reads as follows: "Sec. 33. That on and after the day when this act shall go into effect, all goods, wares, and merchandise previously imported, for which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to the duties imposed by this act and to no other duty, upon the entry or the withdrawal thereof." Section 34 repeals sections 1 to 24, both inclusive, of the tariff act of August 28, 1894, and "all acts and parts of acts" inconsistent with the provisions of the present act of July 24, 1897, "said repeal to take effect on and after the passage of this [latter] act." It is further provided by said section 34: "\* \* \* But the repeal of existing laws or modifications thereof embraced in this act shall not affect any act done, or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause before the said repeal or modifications; but all rights and liabilities under said laws shall continue and may be enforced in the same manner as if said repeal or modifications had not been made. Any offenses committed and all penalties or forfeitures or liabilities incurred prior to the passage of this act under any statute embraced in or changed, modified, or repealed by this act may be prosecuted or punished in the same manner and with the same effect as if this act had not been passed. All acts of limitation, whether applicable to civil causes and proceedings or to the prosecution of offenses or for the recovery of penalties or forfeitures embraced in or modified, changed, or repealed by this act shall not be affected thereby; and all suits, proceedings, or prosecutions, whether civil or criminal, for causes arising or acts done or committed prior to the passage of this act may be commenced and prosecuted within the same time and with the same effect as if this act had not been passed. \* \* \*

There is no controversy, and certainly there can be no reasonable contention, at least under the federal decisions, as to the day this act took effect. The phrases "on and after the passage of this act," as used in sections 1 and 2, and, "on and after the day when this act shall go into effect," appearing in section 33, unquestionably embrace at least a portion of the day of its approval by the president, which was July 24, 1897. That the law took effect on the date of approval is clear from the following authorities: *Arnold v. U. S.*, 9 Cranch, 104; *Suth. St. Const.* § 112, and cases cited; *Louisville Tp. v. Savings Bank*, 104 U. S. 469, 475; 1 Kent, Comm. 457. The question at issue has been argued by counsel on both sides with much ability and research, both orally and in briefs, and in a manner to greatly lighten the labor of investigation by the board. The general rule may be conceded to be, as contended by the government counsel, that, when no special circumstances exist, a statute will ordinarily be construed to take effect from the earliest moment of the day of its approval, unless some other time is named. It was so held in *Arnold v. U. S.*, 9 Cranch, 104, decided by the supreme court in February, 1815, the opinion being delivered by Mr. Justice Story. This case involved a question of import duties arising under a tariff act approved July 1, 1812, the importation under consideration having been made on the same day the act was approved. It did not appear, however, what was the precise hour of the day the president approved the act, or at what hour the cargo arrived. That act imposed an additional duty of 100 per cent. upon all merchandise "which shall, from and after the passing of this act, be imported into the United States from any foreign port or place." It was held that a cargo of goods arriving in port on July 1, 1812, was subject to this additional duty, the court observing: "The statute was to take effect from its passage; and it is a general rule that, when the computation is to be made from an act done, the day on which the act is done is to be included." Following this general rule, and on the authority of this case, the attorney general advised the secretary of the treasury on March 10, 1875, that duties imposed by section 1 of the act of February 8, 1875 (chapter 36), accrued on importations made on the day the act was approved, no question being directly presented as to fractions of a day. 14 Ops. Attys. Gen. U. S. 542.

There are some decisions also which have applied the same general principle to proclamations of the president, holding that they take effect as of the beginning of the day of their date. *U. S. v. Norton*, 97 U. S. 104, reaffirming *Lapeyre v. U. S.*, 17 Wall. 191. As said by Mr. Justice Harlan, in *Louisville Tp. v. Savings Bank*, 104 U. S. 469, 475, after referring to these cases and to the *Arnold Case*, supra: "But to these general rules there are established exceptions, as an examination of adjudged cases and elementary treatises will show." After reviewing the adjudged cases, English and American, including all reported federal decisions, speaking for the supreme court, he asserts that "it cannot be doubted that the court may, when substantial justice requires it, ascertain the precise hour when the statute took effect by the approval of the executive." It was accordingly decided by the court that the constitution of Illinois, which was adopted and went into effect on July 2, 1870, would not be construed retrospectively to invalidate certain township bonds issued in aid of a railroad, in the forenoon of the same day, under a pre-existing statute, which lawfully authorized their issue, although the new constitution prohibited them. The clearly announced doctrine of this case of *Louisville Tp. v. Savings Bank*, 104 U. S. 469, which is the latest deliverance of the supreme court on this particular subject, may be stated to be that, when it is necessary to determine conflicting rights, courts of justice will take cognizance of the fractions of a day. This case repudiates the ancient doctrine that the law would in no case recognize fractions of a day, and that all statutes are to be construed to take effect from the first moment of the day of their approval by the executive. The court there approved the rule declared in *Grosvenor v. Magill*, 37 Ill. 239, as being "consistent with sound reason and public policy," and as being "in line with the settled course of decisions in other courts." This language is quoted from the Illinois decision: "It is true that for many purposes the law knows no divisions of a day, but whenever it becomes important to the ends of justice, or in order to decide upon conflicting interests, the law will look into fractions of a day as readily as into the fractions of any other unit of time." 2 Bl. Comm. 140, notes. The rule is purely one of convenience, which must give way whenever the rights of parties require it.

There is no indivisible unity about a day which forbids us, in legal proceedings, to consider its component hours, any more than about a month which restrains us from regarding its constituent days. The law is not made of such unreasonable and arbitrary rules." So, in *Bank v. Burkhardt*, 100 U. S. 686, 689, it was said: "For most purposes, the law regards the entire day as an indivisible unit. But when the priority of one legal right over another, depending on the order of events occurring on the same day, is involved, this rule is necessarily departed from." The principle is thus stated in 23 Am. & Eng. Enc. Law, p. 215, citing the above case and many other authorities: "The view which seems to be supported by the weight of authority is that a bill becomes operative only from the time of its approval; that the doctrine that there is no fraction of a day is a legal fiction, which may be overthrown by the fact, when necessary, in order to accomplish substantial justice. Accordingly, whenever a question arises as to the time when a statute took effect, the court may resort to any source of information which, in its nature, is capable of conveying to the judicial mind a clear and satisfactory answer to the question, the best and most satisfactory evidence in all cases being required." A like view is taken in *Suth. St. Const.* § 110: "The weight of American authority," concludes the author, "is that a statute which is to go into effect immediately is operative from the instant of its passage." So in *Potter's Dwar. St. p.* 101: "Common sense and common justice equally sustain the proposition of allowing fractions of a day whenever it will promote the purposes of substantial justice. The time of the approval of an act is a question of fact. The constitution declares that to be the time when the law takes effect. This act of approval cannot look backward, and by relation or fiction make that a law at any antecedent period of the same day which was not so before the approval. The constitution cannot be abrogated by construction. The law prescribes a rule for the future, not for the past; and this, in a republican government, is a doctrine of vital importance to the security and protection of the citizen."

It is provided by the constitution of the United States (article 1, § 7) that "every bill shall take effect as a law from the time of its approval by the president." In the case of *In re Richardson*, 2 Story, 571, Fed. Cas. No. 11,777, where this clause of the constitution was construed by Judge Story, it was held by the United States circuit court that the act of March 3, 1843 (repealing the bankruptcy act of 1841), which repealing act was passed by congress and approved by the president late in the afternoon of said date, did not affect jurisdiction of a petition filed about noon on the same day. In referring to the above clause of the constitution, the learned judge said: "Now, it seems to me clear from this language that in every case of a bill which is approved by the president it takes effect only by such approval, and from the time of such approval. It is the act of approval which makes it a law, and until that act is done it is not a law. The approval cannot look backward, and by relation make that a law at any antecedent period of the same day which was not so before approval, for the general rule is, 'Lex prospicit, non respicit.' The law prescribes a rule for the future, not for the past." Judge Story observed further that the oft-repeated doctrine that in law there is no fraction of a day is true only in a limited sense "when it will promote the right and justice of the case." "It is," he said, "a mere legal fiction, and, therefore like all other legal fictions, is never allowed to operate against the right and justice of the case." This decision was made about 30 years after that in the *Arnold Case*, supra, the opinion being in each case by the same judge. They can be readily harmonized in principle. *Louisville Tp. v. Savings Bank*, 104 U. S. 475; *Salmon v. Burgess*, 1 Hughes, 356, Fed. Cas. No. 12,262. We shall not consume time in reviewing the numerous adjudications which support the above conclusion. The cases are admitted to be in conflict, but the weight of reason and authority, in our judgment, supports the views above announced. *Louisville Tp. v. Savings Bank*, 104 U. S. 469; *Burgess v. Salmon*, 97 U. S. 381; *In re Richardson*, 2 Story, 571, Fed. Cas. No. 11,777; *In re Wynne, Chase* (Johnson's Rep. 251) 227, Fed. Cas. No. 18,117; *Bank v. Burkhardt*, 100 U. S. 686, 689; *Grosvenor v. Magill*, 37 Ill. 239; *Croveno v. Railroad Co.*, 150 N. Y. 225, 230, 44 N. E. 968; *People v. Clark*, 1 Cal. 406; *Salmon v. Burgess*, 1 Hughes, 356, Fed. Cas. No. 12,262; *Combe v. Pitt*, 3 Burrows, 1433; *In re Ankrim*, 3 McLean, 285, Fed. Cas. No. 395; *Kennedy v. Palmer*, 6 Gray, 316; *Bemis v.*

Lecnard, 118 Mass. 502; 1 Kent, Comm. 457; *Arrowsmith v. Hamering*, 39 Ohio St. 573; *Strauss v. Heiss*, 48 Md. 292; *Brainard v. Bushnell*, 11 Conn. 16.

The counsel for the government makes the further contention that, while the law often takes cognizance of the fractions of a day to determine conflicting priorities of private rights, the rule has no application to a public statute involving a contest between the citizen and the government in a case of this kind. As much, it is true, was said by Judge Prentiss in *Re Welman*, 20 Vt. 654, but the case of *Burgess v. Salmon*, 97 U. S. 381, is an authority clearly to the contrary. That was a contention between a citizen and the government, involving the validity of an internal revenue tax on certain tobacco. In the forenoon of March 3, 1875, the owners of a quantity of tobacco stamped, sold, and removed it for consumption from the place of manufacture, it being subject, under section 3368 of the United States Revised Statutes, to a tax of only 20 cents per pound. On the afternoon of the same day, the president approved the act of March 3, 1875 (18 Stat. 339), increasing the tax to 24 cents per pound, but providing that such increase should "not apply to tobacco on which the tax under existing laws shall have been paid when this act takes effect." It was agreed, as a matter of fact, that the duty of 20 cents had been paid, and the tobacco had been removed, before the act in question had been approved by the president. It was said by the court, after citing the seventh section of article 1 of the federal constitution, above quoted by us: "In the present case the president approved the bill, and the time of such approval points out the earliest possible moment at which it could become a law, or, in the words of the act of March 3, 1875, at which it could take effect." This case clearly decides that the law would, under the facts stated, regard the fractions of a day so far as to hold that a statute imposing an additional tax on goods would not be construed to be retrospective for a single moment, so as to affect the rights of the citizen already accrued under a previous statute imposing a lower rate of duty on the like merchandise. The act was held, in other words, not to take effect at the earliest hour of the day of approval, but only in futuro from the moment of such approval. The agreement made in that case as to the exact time of the approval of the bill, as observed by Mr. Justice Harlan, in *Louisville Tp. v. Savings Bank*, 104 U. S. 469, 477, "could not have authorized an inquiry into the fractions of a day, unless such inquiry were permissible by the established rules of law." The case of *Lapeyre v. U. S.*, 17 Wall, 191, where a dictum to the contrary appears, was held to contain nothing to make it an authority on the question under consideration. The *Lapeyre* Case, decided by a divided court, it is true, was reaffirmed in *U. S. v. Norton*, 97 U. S. 164, where a proclamation of the president, dated June 13, 1865 (13 Stat. 763), annulling certain trade restrictions in the Southern States, was held to have taken effect as of the beginning of the day it was issued. But in that case no proof was offered or made as to fractions of the day, and hence the court held that they could not be taken into account. In other words, the general rule was applied, which is often one of convenience or necessity.

We can see no difference in the principle in its application to import duties and internal revenue taxes. The one case, as much as the other, involves a question of substantial justice in the matter of taxation, and of conflicting rights of the government on the one hand and the citizen on the other, arising under a new tariff law which repeals an old one. To such cases, as we have seen, the fiction of retrospective relation of statutes has no proper application, and the fractions of a day will be considered, in order to determine the precise moment, or *punctum temporis*, when the new law repealing the old one was made effective by the approval of the executive. This view is rendered more forcible by the fact that section 34 of said act above cited provides expressly that the repeal or modification of the tariff act of August 28, 1894, "shall not affect any act done, or any right accruing or accrued \* \* \* before the said repeal or modification; but all rights and liabilities under said laws shall continue and may be enforced in the same manner as if said repeal or modification had not been made." This provision is identical in language with the repealing section (72) of the tariff act of August 28, 1894 (28 Stat. 509, c. 349), which was construed by the supreme court in *U. S. v. Burr*, 159 U. S. 78, 15 Sup. Ct. 1002. It was said by Chief Justice Fuller that this repealing section "kept in force every right and liability of the government or any other person which

had been incurred or accrued prior to the passage of the act, and thereby every such right or liability was excepted out of the effect sought to be given to the first section." The court observed that the legislative intention was apparent that "the act of October, 1890, should remain in full force and effect until the passage of the new act on August 28th, and that all acts done, rights accrued, and liabilities incurred under the earlier act, prior to the repeal, should be saved from the effect thereof as to all parties interested, the United States included." It was held that the rights of the government to duties under the tariff act of October 1, 1890, which was in force between August 1 and August 28, 1894, was a right accruing prior to the passage of the latter act; that is, "the date when the bill became a law." The section, we may add, as is manifest, equally preserves the accrued rights of the citizen as well as those of the government. This express language of the statute, moreover, entirely harmonizes with the common-law rule that "the repeal of a statute has no effect on those rights and interests which have accrued under it, and which are passed and closed." 23 Am. & Eng. Enc. Law, 501. The court, furthermore, in the Burr Case, reiterated the well-settled general rule, often before announced, that "words in a statute ought not to have a retrospective application, unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied." It was observed that section 1 of the act in question (which used the same phraseology as section 1 of the present act) provided that there "shall" be levied certain specified duties. "In our judgment," said the chief justice, "the word 'shall' spoke for the future, and was not intended to apply to transactions completed when the act became a law."

There is another reason why it would seem that congress never intended that this act should be construed to be retrospective in its operations. Section 32 materially amends section 7 of the act of June 10, 1890 (26 Stat. 131). Prior to amendment, said section 7 imposed certain additional or penal duties on imported merchandise only in case "the appraised value" should "exceed by more than ten per centum the value declared in the entry." Section 32 of the new act of July 24, 1897, while it reduces the per cent. of these additional duties, entirely abrogates this 10 per cent. limitation, and imposes "an additional duty of one per centum of the total appraised value" of any imported merchandise "for each one per centum that the appraised value exceeds the value declared in the entry." These additional duties, which, as said in *Bartlett v. Kane*, 16 How. 274, "were enacted as discouragements to fraud, and to prevent efforts by importers to escape the legal rates of duty," have been construed to be "penalties," within the meaning of sections 5292, 5293, of the United States Revised Statutes, and were held to be subject to remission as such under the authority conferred on the secretary of the treasury to remit fines, forfeitures, and penalties. Attorney General Olney so advised the treasury department in an elaborate opinion, dated September 9, 1893 (Synopsis, 15,946), and the practice has since then obtained of their remission by the secretary within his lawful discretion. "On principle," said the attorney general, "it is clear that the so-called 'additional duty' is a penalty. It is not provided for the purpose of revenue. It is no less a penalty because proof of fraud or other willful misconduct is not a necessary preliminary to its infliction. It is, in its essence, a fine inflicted to promote honesty. Nor is it less a penalty because it is called something else. The law looks at facts, not names." Many court decisions were cited by the attorney general in support of his views, including *Greely v. Thompson*, 10 How. 225; *Maxwell v. Griswold*, Id. 242; *Bartlett v. Kane*, 16 How. 263, 274; *Passavant v. U. S.*, 148 U. S. 214, 13 Sup. Ct. 572. It is true that said section 32 provides that "such additional duties shall not be construed to be penal, and shall not be remitted, nor the payment thereof avoided," except in certain cases specified. We construe this to mean that such duties shall not be interpreted to be penal, so as to be subject to remission as penalties under the sections of the Revised Statutes construed by the attorney general. It cannot be supposed that congress intended to declare that they shall not be judicially construed as penal, so far as they partake of the nature of an *ex post facto* law. *Burgess v. Salmon*, 97 U. S. 381, 384; *Cummings v. Missouri*, 4 Wall. 277. The authorities are uniform in holding that the fiction of the relation of statutes does not apply to penal statutes. If the above section be penal, it cannot be construed to be retro-

active for a single moment of the day on which the bill was approved by the president. As said by Judge Hughes in *Salmon v. Burgess*, 1 Hughes, 356, Fed. Cas. No. 12,262, which involved the precise question under consideration, it would be absurd to construe the penal sections of a law to be operative at one hour of the day and its other parts as in force at another time of the same day. "The law," he said, "is an entirety. If, as to its penal features, it cannot be held to have gone into effect until 9 p. m. of the day of its enactment, neither can it be held to have gone into effect before that hour as to its other provisions." These views are in harmony with the opinion of the supreme court in the same or a similar case on appeal. *Burgess v. Salmon*, supra. And a like course of reasoning was adopted in *U. S. v. Burr*, 159 U. S. 78, 15 Sup. Ct. 1002, involving the date on which the tariff act of 1894 went into effect. The question is one of legislative intention, rather than of mere construction. But, admitting the question to be one of doubt, as often announced, it must be resolved in favor of the importers, "as duties are never imposed on the citizen upon vague or doubtful interpretations." *Hartranft v. Wiegmann*, 121 U. S. 609, 7 Sup. Ct. 1240.

There is nothing in section 33 which, in our judgment, can properly be construed to antagonize the conclusions above reached. The phrase there used is, "on and after the day when this act shall go into effect," etc., special provision being made as to goods "previously imported, for which no entry has been made," and goods "previously entered without payment of duty, and under bond for warehouse, transportation, or any other purpose." In *Pugh v. Duke of Leeds*, Cowp. 714, the phrases, "from the day of the date" and "from the date" were decided to mean the same thing, and this view was affirmed by the supreme judicial court of Massachusetts in *Bigelow v. Willson*, 1 Pick. 485. We accordingly construe the words, "on and after the day when this act shall go into effect," used in section 33, to mean simply on and after the time the act shall become operative as a law by the approval of the president. Any other view would create an embarrassing hiatus as to the status of all goods imported prior to the 24th day of July, 1897, and entered for consumption between 12 o'clock of the night of the 23d of July and six minutes after 4 p. m. of the 24th of July, when the bill received the president's signature. It is accordingly our judgment that the evidence offered as to the precise time when the act in question was approved by the president is relevant and admissible, and we so hold; and that this is a case where the fractions of a day must necessarily be considered so as to determine the conflicting rights of the government and the citizen arising under two tariff acts, each of which was operative during parts of the same day; otherwise there would seem to be a failure of substantial justice resulting from the retroactive application of a new law to transactions completed and rights accrued at the hour of its enactment. Our conclusion is: (1) That the tariff act of July 24, 1897, did not become operative as a law until six minutes after 4 o'clock p. m. of said day when it was approved by the president; (2) that it was not operative by relation on any previous hour of the day, but that the tariff act of August 28, 1894, remained unrepealed and in force until the precise moment when said act of July 24, 1897, was approved; (3) that goods imported and entered for consumption in the forenoon of said July 24, 1897 (or at any hour prior to the time of approval of said act), would be governed as to classification and rates of duty by the tariff act of 1894, and not by said act of 1897. The protests are sustained in harmony with the foregoing views, and the collector's decision in each case is reversed, with instructions to reliquidate the entries accordingly.

Max J. Kohler, Asst. U. S. Atty.

W. Wickham Smith, for defendants Iselin & Co.

Stephen G. Clarke, for defendants Hirsch & Co.

TOWNSEND, District Judge (orally). These cases raise the question whether the tariff act of July 24, 1897, commonly known as the "Dingley Act," became effective at the precise time in the day on which it was signed by the president or at the beginning of said day. The various questions involved have been exhaustively pre-

sented in the arguments and briefs of counsel, and have been carefully considered and examined. The opinion of the board of general appraisers reversing the action of the collector contains a full statement of the facts and an admirable discussion of the questions of law, and the decision of said board is hereby affirmed.

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UNITED STATES v. WOLFF et al.

(Circuit Court, S. D. New York. March 1, 1898.)

CUSTOMS DUTIES—CLASSIFICATION—SHEET STEEL.

Sheet steel in strips, cold rolled, valued at less than four cents a pound, was dutiable under paragraph 122 of the act of August 27, 1894, according to par value per pound, and not under paragraph 124.

This was an application to review a decision of the board of general appraisers reversing a decision of the collector of the port of New York in regard to the classification for duties under the act of August 27, 1894, of certain merchandise. The board found that it was "sheet steel in strips, cold rolled, valued at less than 4 cents per pound," and dutiable under paragraph 122, according to value per pound.

J. T. Van Rensselaer, for the United States.

W. Wickham Smith, for importers.

TOWNSEND, District Judge (orally). The decision of the board of general appraisers sustaining the protest of the importers is affirmed. The contention of the counsel for the United States that in paragraph 124 of the act of 1894 the words "and all the foregoing manufactures of iron or steel of whatever shape or form valued above four cents per pound" shall be interpreted as though printed in brackets, and thereby so limited as not to apply to any of the foregoing articles except round iron or steel wire, would violate the settled rules of statutory construction.

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SCHROEDER et al. v. UNITED STATES.

(Circuit Court, S. D. New York. March 8, 1898.)

No. 2,586.

CUSTOMS DUTIES—TOBACCO SCRAPS.

Leaf tobacco scraps, broken from the leaves in handling and stripping, are dutiable as "waste," and not as manufactured tobacco.

This was an appeal from the decision of the board of general appraisers of New York fixing the duty to be imposed on certain tobacco.

Stephen G. Clarke, for importers.

Henry C. Platt, Asst. U. S. Atty.

TOWNSEND, District Judge. The article in question consists of those portions of the leaf tobacco which break off in handling the tobacco before it is stemmed or in the process of stripping. It falls

on the floor, and is swept up, and is used for the same purposes as original leaf tobacco. It is used as filler tobacco, and is known as "scrap filler." It is unnecessary to consider all the questions presented by the elaborate briefs and arguments of counsel. Upon the argument of this case, I was inclined to affirm the decision of the board of general appraisers in conformity with the opinion of the court of appeals in *Sheldon v. U. S.*, 5 C. C. A. 282, 55 Fed. 818. But I have been unable to distinguish the material issues herein from those involved in *Seeberger v. Castro*, 153 U. S. 32, 14 Sup. Ct. 766, where the supreme court of the United States decided that tobacco sweepings such as those in question herein were "waste." I think that opinion is controlling upon the issues herein, and for that reason the decision of the board of general appraisers is reversed.

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EIMER et al. v. UNITED STATES.

(Circuit Court, S. D. New York. March 3, 1898.)

CUSTOMS DUTIES—FREE ENTRY OF SCIENTIFIC INSTRUMENTS—COMPLIANCE WITH REGULATIONS.

To entitle an importer to the benefit of paragraph 585 of the tariff act of 1894, authorizing the free entry of "philosophical and scientific instruments imported for the use of a society incorporated for scientific purposes," the affidavit required by the regulations prescribed by the secretary of the treasury in such cases must be filed before the arrival of the articles, showing that they were imported by order of such institution, and not for sale or distribution; otherwise, the collector is justified in requiring payment of the prescribed duty.

This was an appeal by Eimer & Amend, importers, from the decision of the board of general appraisers sustaining the action of the collector of New York in assessing duty upon certain instruments imported.

H. T. Walden, for importers.

H. I. Sedgwick, for the United States.

TOWNSEND, District Judge. The goods in question were assessed as optical instruments at 40 per cent. ad valorem, under the provisions of paragraph 98 of the act of 1894, and are claimed as free under paragraph 585 of said act, as "philosophical and scientific instruments imported for the use of a society incorporated for scientific purposes." The apparatus was imported for the use of the state board of health of Minnesota. It is doubtful whether this board of health is an institution established for scientific purposes, within the benefit of the act. *Robertson v. Oelschlaeger*, 137 U. S. 436, 11 Sup. Ct. 148. But, without determining this question, I think the decision of the board sustaining the action of the collector should be affirmed, upon the admitted fact that the custom-house regulations were not complied with. Under the authority of Rev. St. § 251, giving the secretary of the treasury power to make regulations, he made a regulation not inconsistent with law providing that, for the free entry of such merchandise, an affidavit must be made within seven days before their arrival that such

articles were imported by the order of such institution, and not for sale or distribution. This regulation seems to be a reasonable one. It does not appear that its reasonableness has ever been called in question. The decision of the board of general appraisers is affirmed.

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FISH BROS. WAGON CO. v. FISH BROS. MFG. CO.

(Circuit Court, N. D. Iowa. April 20, 1898.)

1. USE OF TRADE-MARK AND TRADE-NAME BY TWO—ASSIGNABILITY OF RIGHT.

In a suit between the originator of a manufacturing business and the purchaser thereof, it was decided that the right to the trade-mark and trade-name used in connection therewith was not exclusive in either party, but that each had a right to the limited use thereof. *Held*, that such right was assignable.

2. SAME—CLAIMS OF GENUINENESS—RIGHTS FIXED BY COURT.

Where the court has decided that each of the parties to a suit is entitled to manufacture an article, and use the same name and trade-mark to designate it, it is not open to either to give out or claim that he manufactures the only genuine article of that name; but neither can be restrained from using the trade-mark or trade-name, at the suit of the other.

This was a suit in equity brought by the Fish Bros. Wagon Company, of Racine, Wis., against the Fish Bros. Manufacturing Company, of Clinton, Iowa, to restrain defendant from the use of the trade-mark and trade-name claimed by complainant.

Quarles, Spence & Quarles and Preston & Moffitt, for complainant.  
W. J. Turner and Chase & Seaman, for defendant.

SHIRAS, District Judge. From the evidence submitted in this case, it appears that in 1863 Fish & Bull began the manufacture of wagons at Racine, Wis.; and about a year later Bull retired from the firm, and Abner C. Fish became interested in the business with his brother Titus G., the firm name being changed to Fish Bros. In 1868 John C. Huggins and E. B. Fish were admitted as partners, and the firm name was changed to Fish Bros. & Co. Shortly after this time the firm became embarrassed financially, and an arrangement was made with Jerome I. Case, under which the latter advanced a large amount of money in aid of the business, and received as security a transfer of the assets of the firm; the business being conducted in the name of Fish Bros. & Co., Agents. In 1880 Jerome I. Case brought a suit against the firm to settle the respective rights of the parties under the agreement above named. During the pendency of this suit, and in the year 1882, Abner C. Fish ceased to be a member of the firm, and D. J. Morey and S. S. Lyon were admitted thereto, without change in the firm name. On the 2d day of October, 1882, a declaration for a trade-mark was duly registered in the United States patent office in the name of Fish Bros. & Co.; it being stated that the firm was composed of T. G. Fish, E. B. Fish, D. J. Morey, and S. S. Lyon, and that the trade-mark had been used by the Fish Bros. since 1873 in connection with the manufacture of wagons. On October 16, 1883, J. I. Case was appointed receiver, in the suit

brought by him against the firm; and he took possession of the wagon plant, to the exclusion of the firm of Fish Bros. & Co. Thereupon T. G. Fish and E. B. Fish made an arrangement with the Olds Wagon Company, of Ft. Wayne, Ind., for the manufacture of wagons which were marked "Fish Bros. Wagon." In September, 1885, Case ceased to act as receiver of the business at Racine, one A. O. Hall being appointed to succeed him; and thereupon Titus G. Fish resumed his connection with the Racine plant, the business of which was advertised as being conducted by "Fish Bros. & Co.,—A. O. Hall, receiver; T. G. Fish, superintendent." In December, 1886, one O. R. Johnson bought the claims of Jerome I. Case, and the assets of the firm in the hands of the receiver; and in January, 1887, a corporation was formed, under the name of the Fish Bros. Wagon Company, in which Titus G. Fish, Edwin B. Fish, O. R. Johnson, Deane, and Booth were the stockholders; Johnson being elected president; Titus G. Fish, vice president and manager; Edwin B. Fish, superintendent; and Deane, treasurer; and the property, real and personal, composing the plant at Racine, was conveyed by Johnson to the corporation. In March, 1889, Titus G. Fish ceased his connection with the corporate business; and in June, 1890, Edwin B. Fish left the employ of the corporation; and thereupon Titus G. Fish, Edwin B. Fish, and Fred B. Fish, a son of Titus G. Fish, entered into a co-partnership agreement for the manufacture of and dealing in wagons under the firm name of Fish Bros. & Co.; and an arrangement was entered into with the La Belle Wagon Works for the manufacture of wagons by that company at Superior, Wis., under the supervision of Fish Bros. & Co. Thereupon the Fish Bros. Wagon Company brought a suit in equity in the circuit court of Douglas county, Wis., against the La Belle Wagon Works and Titus G. Fish and Edwin B. Fish, to restrain the named defendants from using the trade-mark adopted by Fish Bros. and Fish Bros. & Co., on the ground that the same was owned by the Fish Bros. Wagon Company, having passed to that corporation with the transfer of the assets and good will as hereinbefore stated. The case was carried before the supreme court of the state of Wisconsin, and an opinion rendered which defined the rights of the parties, it being therein held that a trade-mark was assignable; that under the transfer made of the assets of the company, and the continued use of the trade-mark by the complainant with the assent of Fish Bros., it must be held that the right to use the trade-mark had passed to the complainant; that the fact that Titus G. and Edwin B. Fish subsequently withdrew from all connection with the corporation did not deprive the complainant corporation of the right to continue the use of the trade-mark as a means of indicating that the corporation was continuing the manufacture of the Fish wagons at Racine, Wis.; that this right to the use of the trade-mark was not exclusive; that the Fish Bros. had not by contract debarred themselves from manufacturing wagons of the same style at South Superior, Wis., or at any other place; that they had the right to attach to a place upon the wagons the words "Fish Bros.," or "Fish Bros. & Co.," together with the picture of a fish, or, in other words, to use the trade-mark in question, provided it was so done as not to induce persons to believe that

the wagons built by defendants were in fact the product of complainant's works at Racine. Fish Bros. Wagon Co. v. La Belle Wagon Works, 82 Wis. 546, 52 N. W. 595. The case being remanded for final trial to the circuit court of Douglas county, it was thence transferred to the circuit court of Milwaukee county; and in April, 1894, a final decree was therein entered, embodying in substance the rulings found in the opinion of the supreme court. The La Belle Wagon Works, becoming insolvent, ceased to manufacture wagons under the agreement with Fish Bros.; and thereupon Titus G. Fish and Edwin B. Fish, acting in concert with a number of the citizens of Clinton, Iowa, organized a corporation under the name of the Fish Bros. Manufacturing Company, for the purpose of engaging in the manufacture and sale of wagons, the plant being located at Clinton, Iowa; and Titus G. and Edwin B. Fish assigned to this corporation the trade-marks in question; and thereupon the manufacture and sale of wagons were entered upon by this corporation at Clinton, Iowa; Titus G. Fish being the president, and Edwin B. Fish the superintendent, of the company. On May 3, 1897, the present suit was begun, it being claimed in the bill exhibited on behalf of the Fish Bros. Wagon Company, of Racine, Wis., that the defendant corporation, the Fish Bros. Manufacturing Company, of Clinton, Iowa, was engaged in the manufacture and sale of wagons of the style, make, and appearance of the Fish wagon made at Racine; that Titus G. Fish and Edwin B. Fish could not convey or assign a right to the use of the trade-mark to a third party; that the use thereof by the defendant was a violation of the rights of complainant, as secured to it by the decree entered in the circuit court of Milwaukee county, Wis., the proceedings had in that case being set forth at length in the bill; that the trade-mark was of value, and the use thereof by the defendant was in fraud of the rights of the plaintiff; and that the defendant company, in the catalogues, folders, and advertisements of its business, which it was using in the trade, was exceeding the rights secured to Titus G. Fish and Edwin B. Fish in the decree entered in the Wisconsin case, and was trespassing upon the rights therein decreed to the complainant.

It is clear that the rights of the parties in this case are based upon the construction to be given to the decision in the case decided in Wisconsin. That suit was brought by the complainant herein for the express purpose of having adjudicated the extent of the rights it had acquired, as against Titus G. Fish and Edwin B. Fish and their assigns, to the business built up at Racine, and in the trade-marks and trade-names connected therewith; and the conclusions therein reached must be held to be the measure of the rights of the parties to the present suit. As already stated, the complainant herein recites in the bill the bringing of the suit in the circuit court in Wisconsin, and the proceedings had therein; and the defendant, in the answer, sets forth the same at length, and avers that the rights it claims as the assignee of Titus G. Fish and Edwin B. Fish are those adjudged in that case; and hence the first question for consideration is the construction to be placed on the adjudication had in that suit. In the opinion of the supreme court of Wisconsin it is,

in effect, held that by the transfer to the complainant of the assets and good will of the plant and business which had been created at Racine, Wis., under the several names of Fish Bros., Fish Bros. & Co., and Fish Bros. & Co., Agents, that company had secured the right to continue the manufacture of the so-called "Fish Wagon" at Racine, as the successor to the preceding firms, but that such right to manufacture the Fish wagon was not exclusive in complainant, and that Titus G. and Edwin B. Fish, as the originators of that style of wagon, had the like right to manufacture wagons of the style and make known as the "Fish Wagon," and that both parties had the right to use the trade-marks and trade-names associated with the Fish wagon, as the means of indicating the style and kind of wagon they dealt in, but that the defendants Titus G. and Edwin B. Fish must not represent that they were the successors to the Racine business, or that their wagons were in fact the product of the Racine factory. Practically, the court proceeded on the theory that the trade mark and names might subserve two distinct purposes,—the complainant having the right to use the same to indicate that it, as the successor to the parties who had built up the business at Racine, was continuing in the manufacture of the Fish wagon in the plant or factory where it originated, at Racine, and the defendants Titus G. and Edwin B. Fish having the right to use the trade mark and names to indicate that they were engaged in the business of manufacturing the Fish wagon; they being the persons who had previously been engaged in the manufacture thereof, and from whom it derived its name. It appearing that the assets and good will of the business at Racine, together with the right to a limited use of the trade-mark, had been conveyed to complainant, the court further held that the Fish Bros. could not rightfully represent that they were the successors to the Racine business, or that the wagons by them made were the product of the Racine factory. In brief, it was held in that case that the complainant and the defendants therein had an equal right to continue and engage in the business of manufacturing the Fish wagon, and each party had a right to a limited use of the trade-names and trade-mark associated with that known style of wagon.

The rights of the parties having been thus adjudicated, the next question presented is whether the present defendant can rightfully claim to be a successor to the rights adjudged to be held by Titus G. and Edwin B. Fish; it being claimed on behalf of complainant that the rights reserved to them in the decision of the Wisconsin court are personal only, and not transferable. The ruling that sustained the validity of the transfer to the complainant of its rights in the premises sustains the transfer from Fish Bros. to the defendant corporation, it being settled that trade marks and names are assignable. *Richmond Nervine Co. v. Richmond*, 159 U. S. 293, 16 Sup. Ct. 30.

It thus appears that the defendant company has the right to make the Fish wagon; has the right to advertise that its business is conducted under the supervision of Titus G. and Edwin B. Fish, who were the originators of the Fish wagon; has the right, for these purposes, to use the trade-mark and trade-names heretofore associated

with the Fish wagon, but, in the exercise of these rights, must see to it that it is not represented that the Fish wagons by it made are the Fish wagons made by complainant at Racine. Thus we are brought to a consideration of the question whether the evidence shows that the defendant has overstepped the limits defined in the decree entered in the Wisconsin court, in advertising the business by it conducted at Clinton, Iowa, and in the sale of its products. It is strongly urged in argument on behalf of complainant that if the defendant company is permitted to advertise and mark the wagons of its manufacture with the name "Fish Wagon," or the equivalent, it will inevitably result in confusion, and that many farmers and other purchasers of wagons will be misled, through the general association of that name with the wagons built in the Racine factory. There is foundation for this belief, but the only remedy suggested by counsel for the complainant is that the defendant company be wholly restrained from using the trade-mark and trade-names in connection with the wagons manufactured by it, which would be, in effect, to hold that the complainant had secured the right to the exclusive use of the trade-mark and trade-names, whereas it has already been adjudicated that complainant does not own such exclusive right either in the trade mark and names, or in the manufacturing of wagons of the style and make known as the "Fish Wagon." The liability to confusion suggested by counsel grows out of the fact that the Fish Bros. and the defendant company have as full right to make and vend the Fish wagon as is possessed by complainant, and the injury to the business of the latter, which is so largely dwelt upon in argument, is mainly due to the fact that the defendant is a lawful competitor in the business of making the Fish wagon. The evidence shows that, in the catalogues and folders issued by the defendant company, it is plainly stated that its factory is situated at Clinton, Iowa, and the wagons sent out for sale are so marked; and the effort rather seems to be in the line of claiming that the wagons made at Clinton are superior to the product of the factory at Racine. In the decree entered in the circuit court of Milwaukee county, based upon the decision of the supreme court of Wisconsin, it, inter alia, decreed that the defendants are enjoined from giving out or claiming that they are manufacturing the genuine Fish wagon, or that the complainant is not manufacturing the genuine Fish wagon. This portion of the decree evidently proceeds on the assumption that, as it had been decided that both parties had the right to make the so-called "Fish Wagon," it could not be permitted to the defendants to assert that the genuine Fish wagon was made by them, or that it was not made by the complainant, for, in effect, that would be an assertion that the complainant was not making the Fish wagon; and hence the defendants in that case were enjoined from asserting that the Fish wagon by them made was the genuine Fish wagon, because, under the ruling of the supreme court of Wisconsin, the wagons made by complainant at Racine, and by the defendants at Superior or elsewhere, are alike genuine Fish wagons, if made in the style and manner covered by that name, and therefore the defendants could not rightfully assert that their wagons were the

genuine Fish wagons, because that assertion would imply that none other were genuine. Under this view of this decision, it is not rightfully open to either the complainant or the defendants in that case to assert that the wagons by them made are the only genuine Fish wagons. It is open to the complainant to assert that, as the successor to the business built up at Racine by the pre-existing firms, it is continuing the business of making the Fish wagons in the original factory at Racine; and it is open to the defendant company to assert that it is engaged in the manufacturing of the Fish wagon at Clinton, Iowa, under the supervision of Titus G. Fish, the founder, and of Edwin B. Fish, who, with his brother Titus G. Fish, were the originators of the Fish wagon; but it is not open to either of the parties to assert that the product of their factory is the only genuine Fish wagon. In some of the advertisements, put out by persons engaged in selling the product of the Clinton factory, it is asserted that these wagons are the only genuine Fish wagons. Such advertisements are clearly in violation of the provisions of the decree entered in the Wisconsin case. In some of the circulars and other advertising material sent out by the defendant, it is said, in effect, that the Clinton wagon is the only Fish wagon made by the genuine Fish Bros. Thus, on the picture of a fish, used as a sticker by the defendant company, it is said, "The Only Fish Bros. Wagon, made by the Original & Genuine Fish Bros., comes from Fish Bros. Mfg. Co., Clinton, Iowa." This use of the word "genuine" violates the spirit of the decree in the Wisconsin case, as it suggests that there are genuine and non-genuine Fish wagons in the market, although it does so only indirectly. This use of the word "genuine" should be discontinued, as it gives occasion for the claim that it is intended thereby to assert that the genuine Fish wagon can only be had at the factory of defendant.

Under the facts of the case, and the adjudication of the rights of the parties in the case in Wisconsin, it must be held that the complainant is not entitled to a decree and injunction as prayed for, restraining the defendant company from using the trade-marks and trade-names connected with the Fish wagon, or from advertising that it is engaged in the manufacture of the Fish wagon under the superintendence of the Fish Bros., who were the originators of that style of wagon. The utmost complainant can ask is a decree reciting that the defendant company, in its use of the trade marks and names associated with the Fish wagon, is subject to the limitations found in the decree entered in the circuit court of Milwaukee county, Wis., and enjoining the further use of the word "genuine" in the ways in which it appears to have been used in the stickers sent out by the defendant, and in some of the advertisements used by the agents of the defendant company.

## WALTER BAKER &amp; CO., Limited, v. BAKER (two cases).

(Circuit Court, S. D. New York. May 13, 1898.)

Nos. 6,439 and 6,440.

## 1. TRADE-NAMES—UNFAIR COMPETITION—USE OF ONE'S OWN NAME.

One entering a particular trade may not use his own name in a way calculated to cause confusion between his own goods and those of an old established manufacturer, having the same name.<sup>1</sup>

## 2. SAME—POPULAR DESIGNATION OF GOODS.

When a manufacturer's goods have become known to the trade and to commerce as "Baker's Chocolate," "Baker's Cocoa," and "Baker's Breakfast Cocoa," another also bearing the name "Baker," subsequently entering the trade, may not use, to designate his goods, those combinations of words, with or without the addition of other words or names.

These were suits in equity by Walter Baker & Co., Limited, against William P. Baker, to restrain unfair competition by use of trade-names.

Wm. Lowell Putnam and Rowland Cox, for complainant.  
John Vincent, for defendant.

SHIPMAN, Circuit Judge. These are bills in equity brought by Walter Baker & Company, Limited, a corporation under the laws of the state of Massachusetts, and a citizen of that state, and located in Dorchester therein, against William P. Baker, of the city and state of New York, to restrain that use of trade names and trade designations upon his packages of unsweetened chocolate and his packages and cans of powdered cocoa, which decoys the purchaser into the belief that he is purchasing the article manufactured by the complainant, and which was devised for that fraudulent purpose. The questions in respect to the unfair use of the complainant's name by persons who also bear the name of "Baker," and who seek, by the use of their own name in a way which simulates the manner and form in which the complainant and its predecessors have long used the name, to gain artificially the reputation which the complainant's goods have acquired, have been before the courts of the United States in the Western district of Virginia, and in this circuit. *Walter Baker & Co. v. Sanders*, 26 C. C. A. 220, 80 Fed. 889.

The important facts in the cases now before this court can be compactly stated: The complainant is the successor of James Baker in the manufacture of bitter chocolate, who is alleged in the complaint to have commenced such manufacture in Dorchester about the year 1780. It is proved that since 1845 and the death of Walter Baker, who, in his lifetime, was the owner of the business, the manufacture has been carried on under substantially the name of the present corporation, and that the complainant is the owner of the good will of the business, and has the exclusive use of the stamps, brands, and

<sup>1</sup> For elaborate notes on the "Right to Use One's Own Name," see note to *R. W. Rogers Co. v. Wm. Rogers Mfg. Co.*, 17 C. C. A. 579, and supplementary note to *Kathreiner's Malzkaffee Fabriken Mit Beschränkter Haftung v. Pastor Kneipp Medicine Co.*, 27 C. C. A. 351.

names "W. Baker," "W. Baker & Co.," "Walter Baker," and "Walter Baker & Co.," in the manufacture and sale of chocolate and powdered cocoa. The complainant and its predecessors have been the leading manufacturers in this country of chocolate and cocoa articles for domestic use. Their products are the most popularly and widely known and sold, and are generally spoken of by the trade and by consumers as "Baker's Chocolate" and "Baker's Cocoa." The chocolate cakes have been uniformly, for the last 40 years, presented to the public in rectangular form, inclosed in a blue wrapper, which had a yellow label, bearing upon it, conspicuously, the words "Baker's Chocolate." Upon the bottom of the label the words "W. Baker & Co., Dorchester, Mass.," were formerly used. At present the label has the words "Made by Walter Baker & Co., Limited." The defendant's testimony was taken in April, 1897. He had then been a wholesale grocer in the city of New York for about seven or eight years. Before that time he was a dealer in tea and coffee. In September, 1896, he commenced to buy chocolate from the Brewster Company, of Newark, in 10-pound cakes, and has since continued to buy such cakes from that company, and from Crane & Martin. He remolded these cakes into rectangular half-pound cakes of the customary size and shape, wrapped each cake in a blue wrapper, put upon the wrapper a buff or salmon colored label, having upon it conspicuously, in script, the words "W. P. Baker's," followed by "No. 1 Extra Chocolate." At the bottom of the label were the words, "W. P. Baker, New York, U. S. A." This article has been freely sold, and has come into the stock of retail dealers. It has been delivered by them to purchasers as "Baker's Chocolate," and has been sold in response to requests for "Baker's Chocolate," and in one instance it was offered to a retail dealer by a traveling salesman as Baker's goods. The manner in which the defendant buys and remolds, wraps, and labels the goods which he purchases, shows that he adopted his label for the purpose of gaining surreptitiously the reputation which Baker's chocolate or Baker's goods possess, and for the purpose of deceiving the consumer into the belief that his order for an article of known value was being complied with. It is said that he has not been shown to have deceived any one, or to have instigated a deception, but that he has testified that he uniformly asks his customers if they want his goods as distinguished from those of the complainant. The reply to these suggestions and to this testimony is that he intentionally uses his name as a manufacturer of chocolate in the same way that the complainant and its predecessors have long been accustomed to use their name as manufacturers of the same article, and that he has thus intentionally presented his article to the public under a form of words which would naturally lead the purchaser to believe that it was the complainant's manufacture. The well-known short name by which the public styles the article of the complainant is "Baker's Chocolate," and thus the public regards what is presented under that name as the complainant's article, and associates the name with a particular factory of long existence and permanence. The defendant has a right to manufacture chocolate, and to acquire his own reputation under his own

name, but not to use the name so as to deceive the purchaser. When he presents his article as W. P. Baker's Chocolate, he not only improperly works mischief to the pre-existing manufacturer, but he wrongs the public, because he does not accompany his name "with such indications that the thing manufactured is the work of the one making it as will unmistakably inform the public of that fact." *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002. While, therefore, he can clearly inform purchasers that the package contains chocolate which William P. Baker, of New York, made, the words "W. P. Baker's Chocolate" are inadmissible, because that style of presentation has become identified in the mind of the public with the manufacture of the complainant. "So long as the title contains the words which in trade and among consumers have come to be the every-day designation of complainant's goods, the chocolate so labeled will naturally be assumed to be complainant's, unless special care be taken to indicate that it is not." *Walter Baker & Co. v. Sanders*, *supra*.

Let there be a decree for an injunction, with costs against the defendant and his agents and servants, in the following form: (1) From using in connection with the business of making or selling chocolate, on labels, wrappers, cans, boxes, cakes, molds, signs, letter heads, bill heads, or advertisements, or in any other manner whatsoever, the word "Baker," "Baker's," or "Bakers," alone, or the word "Baker," "Baker's," or "Bakers" (whether the same be or be not coupled with other names or initials) in such a collocation with the word "Chocolate" (whether the same be or be not coupled with some further descriptive word or words) as to indicate that the chocolate so made or sold is a variety of "Baker's Chocolate." But defendant may indicate thereon, in appropriate language, that the chocolate is made or prepared for or sold by "William P. Baker, of New York." (2) From using, as aforesaid, the initial "W.," in combination with the name "Baker"; but the defendant may use his full name, "William Phillips Baker," or "William P. Baker," in conformity with this decree; and also for an accounting. The second clause of the form of injunction order is in addition to that contained in the *Sanders Case*, where the defendant was permitted to use his initials. There was testimony in the *Virginia* case in regard to the long use by the defendant of his initials, and the fact that he had become known by the initials of his Christian name, which does not exist in this case, and I do not perceive any good reason why a newcomer in the chocolate business, who desires to use his own name of "Baker," should use it in the form which most closely resembles the well-known name of another manufacturer. Under the name of "William P. Baker," the defendant can gain his own reputation, and enjoy the benefit of his own name.

The bill in equity No. 6,439, by the same complainant against the same defendant, was to restrain unfair competition in the use of the complainant's name and distinctive dress or insignia upon tin cans of powdered cocoa, which the complainant has styled

"Breakfast Cocoa" for 15 years, and which it and its predecessors have manufactured and presented to the public under their own name for 25 years. It is a newer preparation of cocoa than chocolate, and the precise date when the Dorchester factory commenced to make it does not appear. The complainant's can is made with slightly rounded corners, and has upon one of its broadest sides the words, "Walter Baker & Co. L't'd. Breakfast Cocoa;" and the same words are employed upon the top of its can. The defendant has upon the corresponding side of his can the words, "W. P. Baker's Breakfast Cocoa;" and the same words are embossed upon the top of his can. He buys his cocoa roasted, reduced to powder, and packed loosely in barrels, from the Brewster Cocoa Manufacturing Company; and he repacks the article thus received, in half-pounds cans, applies the labels, and places the cans upon the market. The facts which have been already stated in the chocolate case are true and are applicable to this case. The intent of the defendant, his acts and the result of his acts, are the same. The complainant has no exclusive right to the word "Breakfast" disconnected from its name. The testimony in this case does not lead me to think that the use of the mere shape of the complainant's can, provided the labels are so distinctive as not to create unfair competition, should be enjoined. The practical difficulty in this class of cases is to compel the newcomer into the chocolate or cocoa market to swing clear of the complainant, and to use his name in such a way as unmistakably and intentionally to show that he is not the well-known manufacturer; in other words, to carry to a successful result "a bona fide effort to accentuate the differences" with respect to the origin of the two products, and thus to acquire a reputation for his own genuine work. In this case, the label, and not the mere shape of the half-pound can, is the important thing for the relief of the complainant.

Let there be a decree for an injunction, with costs, against the defendant, his agents and servants, in the following form: (1) From using in connection with the business of making or selling cocoa, on labels, wrappers, cans, boxes, signs, letter heads, bill heads, or advertisements, or in any other manner whatsoever, the word "Baker," "Baker's," or "Bakers" alone, or the word "Baker," "Baker's," or "Bakers" (whether the same be or be not coupled with other names or initials) in such a collocation with the word "Cocoa" (whether the same be or be not coupled with some further descriptive word or words) as to indicate that the cocoa so made or sold is a variety of "Baker's Cocoa." But defendant may indicate thereon in appropriate language that the cocoa is made or prepared for or sold by "William P. Baker, of New York." (2) From using as aforesaid the initial "W." in combination with the name "Baker"; but defendant may use his full name, "William Phillips Baker," or "William P. Baker," in conformity with this decree. (3) From using on or in connection with the sale of powdered cocoa the words "Baker's Cocoa," "W. P. Baker's Cocoa," "William P. Baker's Cocoa," or any like description of his cocoa; and from using cans of the same shape as those of the complainant in com-

bination with the name "Baker" or "W. P. Baker" or "William P. Baker's" as applied to the cocoa contained therein; and from applying to such powdered cocoa on cans or labels, or in circulars, price lists, advertisements, or in any manner whatsoever, the connected name "Breakfast Cocoa" in connection with the name "Baker," or any name of which the word "Baker" forms a part; and also for an accounting.

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LILLARD et al. v. SUN PRINTING & PUBLISHING ASS'N.

(Circuit Court, S. D. New York. May 7, 1898.)

1. ACTION FOR INFRINGEMENT OF COPYRIGHT—AVERMENT OF PROPRIETORSHIP.

An averment that complainants were, prior to the time of securing copyright, proprietors of a certain book or periodical, is a sufficient averment of proprietorship of an article and engraving alleged to have been pirated therefrom.

2. SAME—EXHIBIT WITH BILL—COPYRIGHTED BOOK—ARTICLE PIRATED.

Where complainants' copyrighted book and defendant's article complained of are filed with and referred to in, the bill, they need not be copied therein.

3. SAME—ENGRAVING OF EXTINGUISHED ANIMAL—IMPROBABILITY OF ORIGINAL PRODUCTION.

A bill will not be dismissed on demurrer where the cut or engraving pirated from complainants' copyrighted book is a close reproduction of complainants', even though it appears highly probable that the final proof will show that the engraving was not an original production of complainants.

This is a suit in equity by Benjamin Lillard and another against the Sun Printing & Publishing Association, seeking an injunction and accounting for alleged violation of complainants' copyrighted production. It comes up on demurrer to the bill.

D. J. M. O'Collaghan, for complainants.

Franklin Bartlett, for defendant.

LACOMBE, Circuit Judge. It is difficult to see why complainants have sought relief in equity for the alleged violation of their copyrighted production. Assuming that the defendant still has in its possession some copies of its issue of Sunday, January 10, 1897, it is highly improbable that it will ever sell them. Still more improbable is it that the woodcut, and the text descriptive thereof, will be reproduced in some future issue of the defendant's paper. Injunction, therefore, should complainants make out a case entitling them to it, would be of no practical benefit. Upon an accounting, assuming that accounting were decreed at the same time as the injunction, it would seem to be impossible for the complainants to show any damages resulting from the defendant's publication. It is inconceivable that the sale of the Sunday Sun, with the illustration and description contained in it, interfered with or prevented the sale of a single copy of complainants' monthly publication. So, too, it is difficult to see how complainants can show upon the accounting that any profit inured to the defendant by reason of the publication in question. Reference was made upon the argument to the case of Callaghan v. Myers, 128 U. S.

617, 9 Sup. Ct. 177, but the facts in that case were very different from those in the one at bar. The defendant had printed a series of law reports,—the opinions of the court therein contained being, of course, free to the world,—and had pirated the syllabi from the reports of the complainant. Of course, the parts which were copied could not be separated from those not protected by the copyright without destroying the use and value of the whole; and therefore defendant, who had blended the lawful with the unlawful, was held to respond for all the profits received. The case here is very different. The illustration and the entire description which it is claimed that defendant has pirated might be eliminated from the paper without at all affecting what was left, and it will probably appear in the end that not a single additional copy of the paper was sold by reason of its containing the article and illustration complained of. Nevertheless, the suit is here, and must be disposed of under the recognized principles of equity jurisprudence and practice.

The first ground of demurrer is that the bill contains no averment that complainants are the authors, inventors, designers, or proprietors of the engraving, cut, or print, and of the article in reference to the same. It is, however, averred that they were, prior to the time of securing copyright, the proprietors of the book or periodical entitled "Popular Science, January, 1897." If they were proprietors of the whole book, they were, of course, proprietors of every part of it, including the engraving and the article in reference thereto contained in such book. Averment of proprietorship is sufficient, under the authorities. When the proofs are taken, complainants will no doubt have to show who was the author or designer of the article and of the illustration, and how such article and illustration came into their possession as proprietors, but it is not necessary in the bill to set forth the chain of title. Inasmuch as the complainants' copyrighted book and the defendant's article complained of have been filed with the bill, and are referred to in it, there was no necessity of rehearsing both *ipsissimis verbis* in the bill.

The article, while containing much which appears in complainants' article, is nevertheless within what is recognized as a fair use of the copyrighted description, especially in view of the fact that such description was presumably not original with the complainants, or with the individual from whom they obtained it. It is the description of an extinct animal, the "brontosaurus,"—an animal which no human being ever saw, and the details of whose anatomy have presumably been worked out by different geologists, and are now contained in many different publications, both here and abroad, of which it will probably appear that complainants' article is a mere compilation. The cut or engraving, however, is a close reproduction of complainants', and will hardly fall within the classification of a "fair use." The bill, therefore, should not be dismissed, as to the cut or engraving, upon demurrer, although it is highly probable that when the proofs are taken it will appear that the illustration of the brontosaurus was not an original production,

either of complainants, or of any one employed by them. The demurrer is sustained as to the article, and overruled as to the cut or engraving.

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WHIPPANY MFG. CO. et al. v. UNITED INDURATED FIBRE CO. OF NEW JERSEY et al.

(Circuit Court of Appeals, Third Circuit. March 28, 1898.)

No. 11.

1. PATENTS—PRELIMINARY INJUNCTIONS—PRIOR DECISION.

A prior adjudication sustaining a patent is good ground for issuing a preliminary injunction only when the proof of infringement is clear and convincing; and the injunction should be denied when it does not appear that the construction then given to the patent was the same as that claimed in the case at bar, or broad enough to cover the respondent's process.

2. SAME.

An order granting a preliminary injunction against the infringement of reissue No. 10,282 (original No. 267,492), for a process for rendering paper or pulp articles hard, tough, and impervious, and the Keyes patent, No. 342,609, for a pail or other similar article made of wood pulp or similar fibrous material, reversed on appeal because the proof of infringement was not sufficiently clear. 83 Fed. 485, reversed.

Appeal from the Circuit Court of the United States for the District of New Jersey.

This was a suit in equity by the United Indurated Fibre Company of New Jersey and others against the Whippany Manufacturing Company and others for alleged infringement of letters patent No. 267,492 (reissue No. 10,282) for a process of rendering paper or paper pulp articles hard, tough, and impervious; and also letters patent No. 342,609, to Martin L. Keyes, for a pail or other similar article formed of wood pulp or other similar fibrous material. The circuit court made an order granting a preliminary injunction (83 Fed. 485), and the defendants have appealed.

M. H. Phelps and M. B. Philipn. for appellants.

Charles Neave and Frederick P. Fish, for appellees.

Before ACHESON, Circuit Judge, and BUTLER and BRADFORD, District Judges.

BUTLER, District Judge. This is an appeal from a decree for preliminary injunction. The facts are well stated in the opinion filed below, and need not be repeated here. The learned judge discussed the exhibits and affidavits intelligently and carefully, apparently as if the case was up for final hearing. Were we required to determine the rights of the parties finally, on this evidence we might possibly adopt his conclusions. We are not however. That determination must await a future hearing, when the exhibits may be considered in the light of what witnesses say on examination and cross-examination in presence of the parties. The only question now presented is whether the complainants' rights as claimed, are so entirely clear as to justify the preliminary writ awarded. The rule governing such cases

is well settled. While the remedy is a valuable one, it is also a dangerous one; and when applied improvidently may work irreparable mischief. It should never be applied when the complainant's case is doubtful—except indeed where the object is merely to preserve the status quo, as when alleged rights are menaced. As the court said in *Brush Electric Co. v. Electric Storage Battery Co.*, 64 Fed. 775:

"While it is well settled that a preliminary injunction will issue almost as matter of course in any given case where the defendants are shown to be guilty of infringement, after an adjudication establishing the validity of the letters patent involved in the litigation, yet it is equally well settled that to warrant and justify the exercise of this extraordinary power, the proof of the alleged infringement must be clear and decisive. Equity peremptorily insists that such action, so drastic in its effects, shall be taken only in those cases wherein a clear undoubted equitable right to the interference of the court is shown. \* \* \* It must be apparent that affidavits ex parte as they are, can only be productive of doubt. \* \* \* The existence of such doubt must control the action of the court."

In *Machine Co. v. Adams*, Fed. Cas. No. 752, Judge McKennan said:

"A motion for a provisional injunction is always an appeal to the discretion of the court, but, in the class of cases to which the present one belongs, such discretion ought to be exercised only when 'the complainant's title, and the defendant's infringement, are admitted, or are so clear and palpable that the court can entertain no doubt on the subject.' The court are not bound, at this stage of the cause to decide doubtful and difficult questions of law, or disputed questions of fact, nor exercise this high and dangerous power (if exercised rashly) in doubtful cases, before the alleged offender shall have an opportunity of a full and fair hearing."

In *Standard Elevator Co. v. Crane Elevator Co.*, 6 C. C. A. 100, 56 Fed. 718, the court of appeals for the Seventh circuit said:

"Without passing any opinion upon the complainant's right or the defendant's infringement, it suffices to say that, upon the proofs in the record, we cannot declare that the right or the infringement is so clear from doubt as to warrant the issuance of a preliminary injunction. The evidence as to construction of claims and infringement, upon which the court below was called to pass, was largely and necessarily ex parte. There was no opportunity of probing the witnesses. Scientific expert evidence is not wholly reliable when not subjected to the searchlight of intelligent cross-examination. It would, we think, be most unsafe to determine this controversy without full and orderly proof. It would be most unwise to imperil, and presumably wholly ruin, the large capital and interests involved in the business of the appellants by arresting the enterprise in advance of a final decree when the damages which the appellee may sustain can be compensated in money."

Here the complainants' case is not clear. It is not so when judged by the exhibits alone, and when the respondents' affidavits are considered the doubt is increased. These affidavits are met by counter affidavits; but this simply raises an additional question, which can only be decided on final hearing. No description of evidence is so unreliable as ex parte affidavits, and disputed questions can never be safely decided upon it.

The complainants' patent was sustained by the circuit court of New Jersey in a suit against the New York Wood Fibre Company; but it does not appear that the construction there given it was such as is now claimed, and broad enough to cover the respondents' process, and thus subject them to the charge of infringement.

A further discussion of the subject is unnecessary at this time, and might lead to embarrassment hereafter.

For these reasons the decree must be reversed.

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SCHREI et al. v. MORRIS et al.

(Circuit Court, N. D. Illinois. April 12, 1898.)

No. 24,328.

PATENTS—INVENTION—REFRIGERATOR CRATES.

The Schrei patent, No. 547,185, for a refrigerator crate for use in shipping perishable articles, construed, and held void for want of novelty and invention.

This was a suit in equity by William A. Schrei and Hiram Mills, doing business as Schrei & Mills, against Nelson Morris, Frank E. Vogel, Edward Morris, and Herbert N. Morris, co-partners as Nelson, Morris & Co., for alleged infringement of letters patent No. 547,185, issued October 1, 1895, to William A. Schrei. The invention is thus described in the specifications:

"This invention relates to certain new and useful improvements in refrigerator crates which are designed for use in shipping perishable products, the aim of the invention being to produce a shipping box or crate, for the purpose described, which will be simple in construction, which may be used in one shipment of perishable goods, and then at its destination be destroyed, to save the expense of its return to the shipper. A further object of the invention consists in the provision of a water-tight cold-conducting separator between the perishable products contained in the box or crate and the ice receptacle above, the edges of the separator overlapping the edges of the box, to prevent the water from the melting ice entering the receptacle containing the products being transported. To these ends, and to such others as the invention may pertain, the same consists, further, in the novel construction, combination, and adaptation of the parts, as will be hereinafter more fully defined in the appended claim. I clearly illustrate my invention in the accompanying drawings, which, with the letters of reference marked thereon, form a part of this specification, and in which drawings similar letters of reference indicate like parts throughout the several views, in which Fig. 1 is a perspective view of the crate closed in shape for shipment, with overlapping frame for ice receptacle. Fig. 2 is a perspective view of the crate closed in shape for shipment, with cleats for fastening ice receptacle to box. Fig. 3 is a vertical longitudinal section through the crate, with overlapping frame for ice receptacle. Fig. 4 is a vertical longitudinal section through the crate, with cleats for fastening ice receptacle to box. Reference now being had to the details of the drawings by letter, A designates the box or receptacle designed to hold the perishable products to be transported, and on its under side is provided with the cleats, B. D is a framework which is provided to retain the ice, and is adapted to rest on the cleats, C, at each end of the box, A, the ice resting on the sheet-iron or metallic cover, E, which has its ends bent down over the ends of the box, so as to allow the water melting from the ice to be conveyed off, and not allowed to enter the box containing the perishable products. F is a cover for the framework, D, and is designed to be nailed or otherwise secured thereto. From the above it will be seen that the whole purpose of the invention is to provide a simple, inexpensive refrigerator shipping crate, which can be constructed so cheaply that it would not pay to return the crate for a second shipping. The ice-retaining frames may be securely held to the sides of the box or fastened by means of cleats, G, which are perpendicularly secured at their upper ends to the outer corners of the ice-retaining frame, the free ends of said cleats extending down over the meeting edges of the frame, metallic cover, and box, and adapted to be secured to the said box by any suitable means, and the ice contained within its inclosing sides and on

the metallic separator will cause the contents of the box to be kept cool by the natural tendency of atmosphere to settle. In Figs. 1 and 3 of the drawings I have shown a slight modification in the form of the crate. In this modified form the vertical cleats, G, at the corners of the crate, are dispensed with, and the upper portion of the crate is fitted down over the upper edges of the lower portion, resting upon the horizontal strips, C, as shown in the drawings.

"Having thus described my invention, what I claim to be new, and desire to secure by letters patent, is: As an improved article of manufacture, a refrigerator shipping crate, having in combination with the box, A, a metallic plate, E, with its edges bent over the upper edges of said box, an inclosing frame, D, adapted to rest on said metallic plate, the cleats, G, secured at each corner of said frame, and their free ends extended down over the meeting edges of said frame, plate, and box, and of a cover, F, all substantially as shown and described."

Fig. 1.

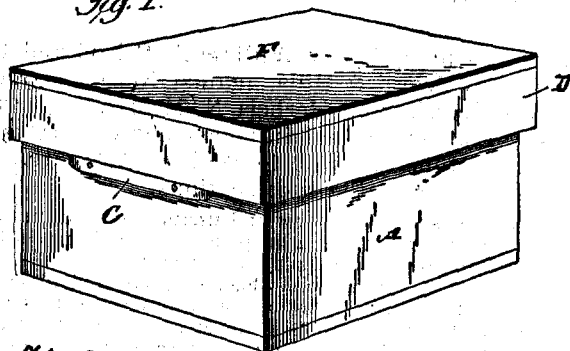


Fig. 2.

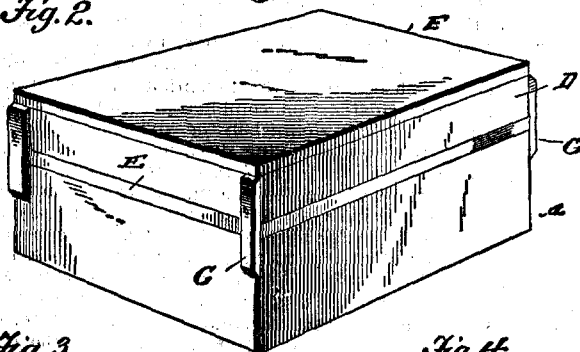


Fig. 3.

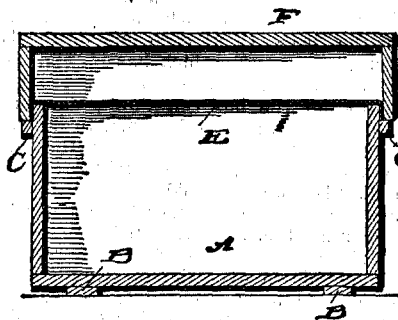
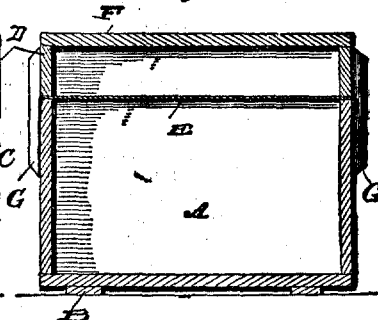


Fig. 4.



Carter & Graves, for complainants.

Bond, Adams, Pickard & Jackson, for defendants.

SHOWALTER, Circuit Judge. I was under the impression at the hearing of this case that the absorption of the water from the melted ice by the wooden sides of the box, A, of the device, and the process of evaporation therefrom, might distinguish the combination in suit as something novel; but, on reading the expert testimony, specification, and the claims, I am unable satisfactorily to sustain the patent on this ground. The sides of the cover, E, are bent over, according to the showing of the specification, merely to run the water off. It is not a feature of the claim that the sides of the box, A, are made of wood, nor in the specification does it appear as part of the invention that the water must run down the sides. The expert, moreover, who testified on complainants' behalf, seems to say that the measure of invention would be the same regardless of the material made use of in the construction of the box, A, whether of wood or of metal. In their printed argument counsel for complainants have made a "summary of evidence" in 11 paragraphs. In no one of these is the evaporation from the wooden sides of the box, A, put forward as a clear and distinctive quality of the patentee's combination,—a something which would and does in fact distinguish the same in mode of operation and result from prior devices. This feature, if it be really a feature at all, is not even mentioned or suggested in the said summary of evidence. It was, as I understand, a common practice in the art of refrigeration to make a structure with a metal-lined compartment above to hold the ice, and having drains to run off the water, and a compartment below for the articles to be preserved. At all events,—and if the evaporation at the sides is so far fanciful or theoretical as to amount to nothing in the way of distinguishing the complainants' device,—such structures as that of Douglas or Colton, for instance, seem to preclude the novelty of the combination in suit. The combination in suit specifies a metallic cover, E. Aside from this requirement, two equivalent methods of structure are shown in the specification. In one the cover, F, telescopes, as an ordinary box cover would, over the sides of the box, A, and rests on cleats. This cover is nailed or otherwise secured to the box, A. The function of the metallic cover, E, is to hold the ice and run the water off at the sides. How far it shall extend over the sides, provided it keeps the water from the interior of the box, A, seems to be a matter of no consequence. If the claim be construed with reference to the method of construction last above referred to, as put forth in the specification, then all the elements are found in the Douglas device. This, upon the assumption that the shape of the structure, whether rectangular or cylindrical, and the material, other than that of the metallic cover, E, out of which it is made, are not essential to the invention. I think the bill must be dismissed for want of equity.

HOE et al. v. SCOTT.<sup>1</sup>

(Circuit Court, D. New Jersey. March 19, 1898.)

**1. MASTERS IN CHANCERY—DUTIES AND POWERS—REVIEW BY COURT.**

When a cause is referred to a master to take an account of profits or damages, it is his duty to pass upon all the questions of procedure arising before him. His action is subject to review only when he has completed his labors, and filed his report; and the court will not, in the meantime, on the application of a party, give him directions not to take evidence in relation to a particular matter.

**2. PATENT SUITS—PROFITS AND DAMAGES—MASTER'S REPORT.**

Profits and damages should be computed by the master as nearly as may be to the time of filing his report. If defendant has changed his machine so as to differ from that decreed by the court to infringe, the master must, in the first instance, determine whether the new form is also an infringement; but he is bound by the terms of the decree, and is, therefore, limited to the inquiry whether the new machines are substantially similar to the ones adjudged to infringe.

B. F. Lee and Wm. H. L. Lee, for the motion.

H. M. Phelps, opposed.

KIRKPATRICK, District Judge. Upon a final hearing in this cause the defendant was adjudged to have infringed the complainants' patent, and an interlocutory decree was entered referring it to a master to ascertain and take and settle the account of the gains and profits, and to assess the damages, and to report thereon. See 65 Fed. 606, and 17 C. C. A. 410, 70 Fed. 781. The complainants are undertaking to prove the number of infringing machines made and sold by the defendant, and the amount of profits realized by defendant by the use of infringing devices. In the progress of the investigation the inquiry is sought to be extended to the manufacture of machines containing, as the complainants insist, their patented devices which have been adjudicated to be valid, and infringed by the defendant, but which the defendant claims are not within the decision of the court. The application now is that the court shall give its directions to the master to refuse to take evidence concerning any machines which the defendant may claim to be noninfringing machines until the court has had the opportunity to determine the question whether they be infringers or not. This does not seem to me to be in accordance with precedent or proper practice. The court appoints the master with special reference to his fitness to perform the duties imposed upon him. He is the court's representative, and it is his duty to pass upon all the questions of procedure as they come before him. His action is subject to review of the court, but it must be only when he has concluded his labors, and the court has before it all the data upon which his conclusions are founded. The duty of the master is to hear the parties fully, "directing the mode in which the matters requiring evidence shall be proved before him," as provided for in the seventy-seventh rule in equity. It is necessary that he should be given the power to avoid delays and confusion, and to relieve the court of the necessity of passing upon the materiality of every disputed question as it may arise in the progress of the hearing. Errors made by the

<sup>1</sup> For copy of order entered May 20, 1898, see 87 Fed. 1007.

master can be corrected upon the coming in of his report upon exceptions properly taken.

There cannot be any question that the beginning of the suit should not be the limit of time within which damages may be recovered for the use of the patented device. They should be computed to the time, as nearly as may be, of the coming in of the master's report; and the account should embrace not only the damages sustained by infringing machines made before the institution of the suit, but also those made afterwards, though the construction be different. *Rubber Co. v. Goodyear*, 9 Wall. 788; *Edison Electric Light Co. v. Westinghouse Electric & Manufacturing Co.*, 54 Fed. 504. Whether the particular machines of the defendant in this case embody any of the claims of the complainants' patent adjudged to be infringed by defendant is properly a question to be determined in the first instance by the master. As to the defendant's responsibility to answer in damages for the use of machines covered by or substantially like those adjudicated upon, the master is bound by the decree, and is not at liberty to take testimony or exercise his judgment; but, "if there is something claimed to be an infringement, which had not been passed upon by the decree, then the question concerning that would be open before the master to be passed upon by him." *Wooster v. Thornton*, 26 Fed. 274. He cannot review the decree, and inquire into the prior state of the art. The master in this case is limited in his inquiry as to whether the defendant's machines are substantially similar to those adjudged by the court to be an infringement of the complainants' patent. Upon this question of fact he should hear both the parties fully, and report his findings to the court. Upon the coming in of the report the parties can file their exceptions founded upon previous objections, and have the court pass upon their validity. It would be productive of interminable delay and much vexation if all the disputed questions upon a hearing before the master should, as they arise, be brought before the court for revision and approval. "The court may, but rarely will, interfere with the master's rulings before his report is brought before it for review." *Fost. Fed. Prac.* § 313. Reference to the court as each question arises is improper. *Rob. Pat.* § 1157; *Sugar Refinery v. Mathiesson*, 24 Fed. Cas. 682. The motion to strike out the testimony will not be allowed, and all matters pertaining to the merits will be deferred until the coming in of the master's report.

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## WELSBACH LIGHT CO. v. SUNLIGHT INCANDESCENT GAS LAMP CO.

(Circuit Court, S. D. New York. March 25, 1898.)

### 1. PATENTS—SPECIFICATIONS—EQUIVALENTS.

A patentee is not obliged to state all the known equivalents of the materials used by him.

### 2. SAME—INFRINGEMENT.

In a patent for the production of an incandescent mantle for lights, the patentee's claim was, "paraffin, or other suitable material, substantially as set forth." In his specifications he stated that "other materials may be

employed, as long as they set hard at ordinary temperatures, and burn away without mechanical destruction to the mantle." *Held*, that the patent was infringed by using for the same purpose collodion and castor oil.

**3. SAME—INCANDESCENT MANTLES.**

The Rawson patent, No. 407,963, for "production of incandescent mantles," was not anticipated, but covers an invention of pioneer rank, and is entitled to be so construed as to cover a broad range of equivalents.

This was a suit in equity by the Welsbach Light Company against the Sunlight Incandescent Gas Lamp Company for alleged infringement of a patent.

Wm. Findlay Brown and John R. Bennett, for complainant.  
Charles G. Coe, for defendant.

TOWNSEND, District Judge. The questions herein presented at final hearing on bill and answer relate to the first claim of patent No. 407,963, granted July 30, 1889, to Frederick Lawrence Rawson and William Stepney Rawson for "production of incandescent mantles," and assigned to complainant. Prior to the discussion of the issues directly involved, it will be necessary to briefly describe the Welsbach light: In 1885, Dr. Carl Auer von Welsbach discovered or invented the mantle of the incandescent light which bears his name. Prior to that date it was known that certain rare earths, when heated to incandescence, were possessed of great luminosity. Dr. Auer von Welsbach (or, as he will hereafter be called, Welsbach) was the first to discover that by immersing a textile fabric in a solution of the salts of said rare earths, and afterwards applying heat and consuming the fabric, the earthy salts would be left in a coherent condition, exactly reproducing the fabric consumed, and capable of emitting the intense, white Welsbach incandescent light. Great as was this scientific discovery, it was commercially valueless. The resultant product was so light and fragile that although, as stated by the inventor, "it would remain effective as an illuminant for hundreds of hours," it would crumble to ashes if handled, or even touched by a hard body. In their specification, the patentees, after speaking of the difficulty previously found in transporting these mantles without breakage, say:

"This difficulty our invention is designed to overcome, by dipping the mantles, after they have been given their proper shape, into a liquid which will thoroughly penetrate the pores of the material, and will afterwards set to such a degree of hardness as to protect the material from danger of breakage in packing or handling, and which can afterwards be removed without mechanical injury to the mantles, or without leaving any objectionable residue."

The claim in suit is as follows:

"(1) The herein-described improvement in strengthening incandescent mantles, consisting in coating the completed mantle with paraffin, or other suitable material, substantially as set forth."

The defenses are invalidity for lack of invention, and denial of infringement.

Bright's British patent No. 12,305, granted in 1848, for "improvements in lamps, wicks, and covers for vessels for holding oil and other fluids," *inter alia*, describes a method of "manufacturing hollow, cylindrical wicks in a stiffened state," to permit of their easy insertion into

the lamp burner, "by inserting into them paper cases, \* \* \* or by dipping them (not partially but wholly) in wax, or in any other suitable stiffening matter." It has not the same purpose nor mode of operation as the patent in suit, and does not anticipate it. Gwynne's patent, No. 52,788, issued in 1866, for an "improved process for saturating wood, cloth, paper, etc., with paraffin," and Toppan's patent, No. 89,095, for "improved water-repellant material," may be considered together. The patentee, Gwynne, says that, "when the paraffin is thus combined with the substances they seem together to form a new substance, inasmuch as it cannot be again expelled," and that substances thus saturated acquire "greatly increased tenacity, toughness, power of endurance and of resistance to the action of the elements." Toppan describes a similar treatment with a solution of paraffin. Each of these patents describes a process for making wood, paper, and cloth waterproof, by permanently combining them with paraffin. Neither of them attempts to effect the object of the Rawson patent. But defendant relies chiefly upon patent No. 261,529, issued July 25, 1882, to Charles Clamond, for "means and apparatus for producing intense white light." Fig. 9 of the drawings shows a burner composed of magnesium threads. These threads are made by forcing a wet, plastic material through dies. While thus wet they are shaped into the form of a cone, which is then dried and baked. The resultant product is a fragile, porcelain-like shell or basket of refractory material, capable of use with a gas burner to produce an incandescent light. In connection with this basket, the patentee used small rods formed of the same material. It was not claimed that there was anything novel in Clamond's magnesium light which is relevant herein. But defendant contends that "this patent shows that the strengthening of such fragile refractory cones, to protect them against breakage in transport and handling, was not new." This contention is founded upon the following statement in Clamond's specification: "The basket may be cased over with paper or other combustible material, so as to strengthen it for transport and handling; this casing being burned away when the jet is ignited." In this chief reliance of defendant I find nothing to detract from the merit of the patented invention. There was no strengthening treatment of a refractory material having the form of a textile fabric, no combination with another substance by saturation in a protecting solution, and no process of hardening the protecting solution. In short, Clamond merely proposed to wrap up his porcelain cone in a piece of paper, which would burn off when the cone was placed over a lighted flame. He protected his shell by an ordinary external wrapper, which could be removed in the ordinary way, leaving the shell as before. By the Rawson process, the solution so penetrated the interstices of the Welsbach fabric that it became an integral part thereof. But the expert and counsel for defendant claim that:

"All the Rawsons have done is to apply the old Gwynne process of dipping porous articles into hot, melted paraffin, or the Toppan process of dipping porous articles in paraffin solutions with a volatile hydrocarbon, such as benzine or naphtha, without any difference in their mode of application, or the result obtained therefrom, to the old purpose of protecting fragile mineral cones in transport and handling set forth by Clamond."

I cannot assent to this proposition. The Clamond protecting wrapper is not even remotely allied to the Rawson strengthening process. The result of the latter is new, distinct, and strikingly unexpected. To introduce these processes in this new art, and to work out and apply the undeveloped possibilities of this use of paraffin in solution in connection with these earths, so as to place this light within the reach of the general public, was a most meritorious invention.

Defendant says it does not infringe, because it does not coat its mantles with paraffin, or any of the equivalents mentioned in complainant's patent, and relies upon certain limitations claimed to be disclosed by the file wrapper. After describing the use of paraffin in the specification, it is there set forth that:

"Other materials may be employed, as long as they set hard at ordinary temperatures, and burn away without mechanical destruction to the mantle, and without leaving any residue which would injure the light-giving properties of the mantle."

The examiner required the patentee to insert a specific statement as to what other materials are used, and the following was thereupon added:

"The materials referred to as being capable of use in lieu of paraffin may be any solid hydrocarbon of a high boiling point, and many resins and gums soluble in spirit, such as alcohol, etc. Shellac will serve the same purpose, but not quite as advantageously."

The defendant insists that the patent cannot be infringed by the use of any materials other than those thus specified. It is admitted:

"That the defendant corporation herein has \* \* \* and still is coating completed incandescent mantles or hoods, for the purpose of strengthening them for purposes of transport and handling, by dipping or immersing them in a solution composed chiefly of collodion, with the addition of a small percentage of castor oil, and in excess of five per cent.; that such solution is a liquid, which, after the mantle or hood is coated therewith by dipping or immersing said hood in such solution, will afterwards set at ordinary temperatures to such a degree of hardness as to strengthen the mantle or hood for the purpose of preventing breakage in transport and handling, and of such a character that it can afterwards be removed, by burning away, without mechanical destruction to the mantle, and without leaving any residue which would injure the light-giving properties of the mantle or hood."

Complainant contends that this collodion solution is included under the words, "paraffin, or other suitable material, substantially as set forth," in the first claim, notwithstanding the enumeration of equivalents in the patent. The invention of the patent in suit transformed the Welsbach mantle from a laboratory experiment into an article of commerce. That it has successfully overcome the obstacles previously encountered, and has accomplished results quite as important as the original Welsbach invention, is admitted. The evidence as to Welsbach's understanding of the limitations upon the practical use of his light, and the graphic illustration at the hearing herein of the bold and unique treatment of the fragile mantle, and the success of the adaptations employed in producing the desired results, indicate not only the presence of inventive genius, but claim for the invention the rank of a pioneer. For these reasons this patent should not be narrowly interpreted, but should be so construed as to cover a broad range of equivalents. The undisputed testimony of Drs. Chandler and

Morton shows that it was well known at the date of this invention that such a collodion solution would operate in the same way as a paraffin or shellac solution, in the treatment of such substances, and was therefore an "other suitable material." That in every other respect the defendant has appropriated the patented process, appears from his admission. While collodion is not chemically an equivalent of a hydrocarbon resin gum, and is not paraffin or shellac, it performs the same functions, in the same manner and with the same result. A patentee is not obliged, in his specification, to state all the known equivalents of the materials used by him. It is the patent as finally issued which the court is to construe, and upon which the patentee must stand. In this case the patentees have claimed "paraffin, or other suitable material, substantially as set forth." They have set forth that "other materials may be employed, as long as they set hard at ordinary temperatures, and burn away without mechanical destruction to the mantle." The defendant uses a suitable material, known at the date of the invention to have all these properties and characteristics, and has thereby appropriated complainant's product. Let a decree be entered for an injunction and an accounting.

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PAUL BOYNTON CO. v. MORRIS CHUTE CO. et al.

(Circuit Court of Appeals, Third Circuit. April 7, 1898.)

No. 4.

1. PATENTS—INTERPRETATION OF CLAIM.

Where it is necessary to construe an ambiguous claim, the specification may be resorted to for the purpose of arriving at a better understanding of its meaning, but this may not be done to ingraft on a perfectly plain claim a restrictive qualification, which the patentee omitted to "particularly point out."

2. SAME.

The words "substantially as described" do not warrant reading into the claim, as an additional element, a device mentioned in the specifications merely as a preferred form of construction; and a patentee who has claimed either more or less than was necessary cannot, in a suit for infringement, be relieved from the consequences thereof.

3. SAME—SPRAY DEFLECTORS.

When a boat so constructed that its sides will have the form of and operate as spray deflectors would not present patentable novelty, the objection is not overcome by fixing additional boards to it, and then using it as a toboggan as well as a boat.

4. SAME.

The Newburg patent, No. 411,255, for an inclined pleasure railway located near a sheet of water, combined with a boat-shaped car or toboggan, adapted, after descending the incline, to enter and float forwardly on the water, and with spray deflectors fixed to its sides, is for mere structural changes of a toboggan car and boat, and did not involve invention. 82 Fed. 440, affirmed.

Appeal from the Circuit Court of the United States for the District of New Jersey.

This was a suit in equity by the Paul Boynton Company against the Morris Chute Company and others for alleged infringement of a patent for improvements in inclined pleasure railways. The circuit

court dismissed the bill, holding that the patent is void for want of novelty and invention (82 Fed. 440), and the complainant has appealed.

P. C. Dyrenforth, for appellants.

Wm. C. Strawbridge and J. Bonsall Taylor, for appellees.

Before ACHESON and DALLAS, Circuit Judges, and BRADFORD, District Judge.

DALLAS, Circuit Judge. The patent for consideration in this case was issued to John P. Newburg on September 17, 1889, and is numbered 411,255. Although five of its six claims are alleged to have been infringed, but three of them have been urged upon the attention of this court, and these are as follows:

(1) "In an inclined pleasure railway, in combination with an inclined way and track which is located or erected near a body of water, a boat-shaped car or toboggan, adapted, when it reaches the foot of the incline, to enter and float forwardly on the water, substantially as described."

(4) "In combination with the boat-shaped car or toboggan, the spray deflectors fixed to its sides, substantially as described."

(6) "In combination with an inclined railway, which may be located near a body of water, a boat-shaped car or toboggan, having runners, J, guard plates, K, and spray deflectors, I, substantially as described."

1. It is not necessary to add anything to the opinion of the learned judge of the circuit court in support of his conclusion that the first claim, if its terms should be regarded as controlling, is void for lack of novelty. This has not been conceded by the appellant, but it has not been very strenuously denied, and we have no doubt about it. It is, however, contended that this claim, though expressly inclusive of any "boat-shaped car or toboggan adapted \* \* \* to enter and float forwardly on the water," should be construed to be exclusive of any such device which is not also "adapted to prevent the shipping of water and splashing of occupants." It is insisted that this limitation may be found in the specification and drawings, and that from them it may be imported into the claim. But we cannot accept either branch of this proposition. We are not at liberty to add to or vary the claim by reference to other parts of the patent, nor is there anything contained in it upon which the amendment desired (if allowable) could reasonably be founded. If interpretation of the claim were requisite, the specification might, of course, be resorted to for the purpose of arriving at a better understanding of its meaning, but this may not be done "for the purpose of changing it and making it different from what it is." *White v. Dunbar*, 119 U. S. 47, 7 Sup. Ct. 72. We are asked, not to construe an ambiguous claim, but to ingraft upon a perfectly plain one a restrictive qualification, which the patentee wholly omitted to "particularly point out" when he applied for his patent, and which it is proposed shall now be inserted only because the exigency of the appellant's case demands it. Authority to do this has not been vested in the courts. "The claim is a statutory requirement prescribed for the very purpose of making the patentee define precisely what his invention is, and it is unjust to the public, as well as an evasion of the law, to construe it in a manner different from the plain import of its terms." *White v. Dunbar*, supra. The words,

"substantially as described," do not warrant the insertion of an additional element in the claim. The combination, as there defined, does not include any provision against splashing, and by no reference to the context can the requirement that an applicant shall "particularly point out and distinctly claim" his invention be evaded. The words "substantially as described" must, therefore, be related to the matter designated (*Lake Shore & M. S. Ry. Co. v. National Car Brake-Shoe Co.*, 110 U. S. 229, 4 Sup. Ct. 33); and a patentee who has claimed either more or less than was necessary cannot, in a suit for infringement, be relieved from the consequences (*McClain v. Ortmyer*, 141 U. S. 419-425, 12 Sup. Ct. 76; *Durand v. Schulze*, 10 C. C. A. 97, 61 Fed. 819).

It would be as futile as it is inadmissible to explore the other parts of the patent for discovery of anything to justify the interpolation of a spray-deflecting device into this claim. If it were possible to sustain it as broadly as it is stated, the appellant might well insist that the specification and drawings supply no pretext for narrowing it by construction, and the question presented is, of course, the same where a constrictive interpretation is invoked by the owner of a patent as where it is sought to impose it upon him against his will. At the outset the specification informs us that:

"This invention relates to improvements in coasters or inclined pleasure railways; and the main feature of the invention consists in an inclined track or way erected near a lake, river, or any other suitable body of water, and a car or toboggan in the form of a boat, adapted to move or slide downwardly over said incline, mainly by the force of gravity, and at the foot of the incline to enter and float upon the body of water as it is propelled by the momentum acquired in its descent over the inclined railway. Besides this main feature, certain novel means are employed in carrying out my invention, as hereinafter described."

Not one word, it will be observed, is here said about spray deflectors. On the contrary, comparison of this general description with the first claim shows them to be, so far as the toboggan is concerned, substantially identical. All that is material in either is that it is said in the one that the toboggan is to be "in the form of a boat adapted to \* \* \* enter and float upon the body of water," and in the other that it is to be "a boat-shaped car or toboggan, adapted \* \* \* to enter and float forwardly on the water." Manifestly, the meaning of the language here quoted is, in each instance, precisely the same; and nothing further is anywhere said about the toboggan, except as follows:

"I have shown in the drawings a preferred form of construction for the boat-shaped car or toboggan, G, similar in the outlines to an ordinary flatboat, with its flat bottom curved or sloped upwardly at its forward end, g, so that it will enter the water without any shock or concussion, its rear end, g<sup>1</sup>, partly sloped upwardly and partly vertical, and with vertical or approximately vertical sides, g<sup>2</sup>, and with seats, ll, for the passengers. On each side of the toboggan it is preferable, also, to have a spray-deflecting board, I, which is broad at its rear end, runs to a point at its forward end, and which is fixed in position on the car or toboggan, as shown, with its upper edge or side in about same horizontal plane as the top of the boat. These boards will deflect the spray or water outwardly, which is thrown upwardly by the rapid movement of the car or toboggan, and prevent it striking the occupants thereof. The spray deflected by each board, I, may be utilized to produce a pleasant effect on the eye by means

of a scroll-shaped or convoluted plate, 1, placed at the upper edge or side of each board, 1, as shown at Fig. 7, which will concentrate the spray and discharge it from the rear end of the scroll in an ornamental stream."

We are not able to perceive in this statement any warrant whatever for supposing that the patentee intended to limit his assertion of invention to a boat-shaped toboggan when provided with "a spray-deflecting board." Indeed, he seems to have been solicitous that such intention should not be ascribed to him, for, although the drawings exhibit spray deflectors, he is careful to say that they show, not an exclusive form, but "a preferred form of construction"; and he adds, not that it is essential, but that "it is preferable, also, to have a spray-deflecting board." Furthermore, it is difficult to understand why, if the drawings should be considered as controlling, the "scroll-shaped or convoluted plate," which they also depict, ought not to be regarded as a material feature, and this plate, it is admitted, the appellees do not use. We are of opinion that the court below was right in refusing to read into this claim the additional element suggested, not only because its own terms, which are plain and absolute, inhibit it, but also because the patent, as a whole, does not sanction it.

2. Claim 4 is stated to be for a combination, but, substantially, it is simply for a toboggan of a certain configuration, for it is not denied that a boat may be so constructed that its sides will themselves have the form of, and operate as, spray deflectors; and, this being so, it follows that if a boat so formed, and intended for ordinary use, would not present patentable novelty, the objection is not overcome by giving it the required shape by fixing additional boards to it, and then using it as a toboggan as well as for a boat. "An ordinary flatboat," having all the features described by the patentee, was, of course, old. Such a boat the patentee adopted, and he altered its outline. In doing this, he was concerned with it only as and for a boat. Viewing it as a toboggan merely, all that he did to it was absolutely useless. Did he, then, contribute to the art of boat-making anything which, in the sense of the patent law, was new? He proposed that his craft should not ship water, and to this end he so fashioned it that the water would be deflected from its sides. Broadly speaking, this was as old as navigation. It has always been done, and we are not required to shut our eyes to the fact that with this object, among others, the sheer and the flare of vessels of all classes have been almost infinitely varied. *King v. Gallum*, 109 U. S. 99-101, 3 Sup. Ct. 85. To uphold, under these circumstances, a patent for so slight a deviation from pre-existing forms as, at the utmost, Newburg devised, it would be necessary, we think, to hold that it is not only the design of the patent laws "to reward those who make some substantial discovery or invention, which adds to our knowledge and makes a step in advance in the useful arts," but also "to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures." *Atlantic Works v. Brady*, 107 U. S. 192-200, 2 Sup. Ct.

225. Indeed, we do not believe that this claim would ever have been allowed if it had been plainly presented as for the contour of a boat, and yet it is, when rightly understood, a claim for precisely that, and for nothing else besides. But, even as a distinct device, this spray board was not new. Such boards, having more or less outward inclination, and serving to deflect the water from the boat, were well known before this patent was applied for, and are exemplified by several prior patents which appear in this record, and to which the learned judge who sat in the circuit court has sufficiently, though not completely, referred. Upon any view which can be taken of this claim, we find it impossible to sustain it.

3. Separately considered, none of the elements of the sixth claim was new. As to the "spray deflectors" nothing more need be said, and the proof that each and all of the remaining details were old is absolutely conclusive. Unless, therefore, the patentee exhibited invention in the assemblage of these parts, he did nothing upon which this claim could be supported; and that in bringing them together he did not perform an inventive act, the cases cited by the court below, as well as others to which it would be superfluous to refer, quite clearly show. The toboggan sport had been for some time pursued upon the land when this patentee conceived the idea that its attractiveness might be enhanced by having the "inclined track or way erected near a \* \* \* suitable body of water," and so arranged that, at the foot of the inclined track, the car (shaped like a boat) would enter and float upon the water. But "mere conception is not invention" (*Forgie v. Supply Co.*, 17 U. S. App. 254-288, 7 C. C. A. 551, and 58 Fed. 871), and, as for the means necessary to the practical realization of this conception, they were already at hand. These the patentee associated, but did not combine. The railway, the guard plates, and the car, in function and in result, he left unchanged; and the spray deflectors which he fixed to the latter are wholly inoperative until the water is reached and the entirely distinct and separate service of a boat becomes requisite. This requirement made it necessary, of course, that the toboggan should differ somewhat from those which had been used exclusively upon land, but the change which was made was merely structural, and did not involve invention. *Maitland v. Gibson*, 28 U. S. App. 53-82, 11 C. C. A. 446, and 63 Fed. 840. The decree of the circuit court is affirmed.

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#### THE T. F. OAKES.

KASBEK S. S. CO., Limited, v. THE T. F. OAKES.

(District Court, E. D. New York. April 29, 1898.)

#### SALVAGE COMPENSATION—SICKNESS OF SHIP'S CREW—TOWAGE.

Seventeen thousand dollars, with disbursements and interest thereon, awarded a steamer for bringing into port, a distance of about 300 miles, a full-rigged sailing ship, valued, with her cargo, at about \$200,000, where, on account of long-continued sickness, there were not sufficient men out of the ship's crew to navigate her, when the provisions of the ship were nearly

exhausted, and when the state of the weather rendered it difficult and dangerous to perform the service.

Cowen, Wing, Putnam & Burlington, for libellant.  
Butler, Notman, Joline & Mynderse, for claimant.

THOMAS, District Judge. This action is to recover for salvage service. The T. F. Oakes, a full-rigged, three-masted sailing ship, invited the libellant's aid under the following circumstances: The Oakes, bound for the port of New York, left Hong Kong, China, June 10, 1896, with a cargo of rattan, wool, and hides, and on Monday, the 15th day of March, 1897, at about 11 o'clock p. m., was in latitude 37° 52' N., longitude 69° 30' W. She left China with a crew of 22 men, besides the captain, who was accompanied by his wife. Before meeting the Kasbek, four sailors, the cook, and mate had died on the voyage; and at the time of such meeting the only persons capable of coming on deck were Abrams, the second mate, Regan, the third mate, Fraser, a sailor, the captain, his wife, and two Chinamen, who were the cook and steward. Eleven of the crew, including the boatswain and carpenter, were in the forecabin, sick,—if not in danger of death, yet utterly prostrated,—and some three of them were incapable of speech. The captain's power of speech had been impeded by a paralytic affection, and he had lost the use of one of his hands on the voyage; but, although of slight physical service, he was on deck, and gave directions concerning the ship. Abrams, the second mate, Regan, the third mate, and Fraser, the sailor, were suffering from weakness; their ability to walk was much impaired; and Fraser became substantially incapacitated after the arrival of the Kasbek. In the log book there is an entry on March 13th as follows: "Only three men on deck now." And on the 14th of March help was so scanty and incapable that the wheel was lashed, and the captain's wife stood watch over the same for the entire day. When the Kasbek arrived, the Oakes was only carrying the lower top sails, the foremast stay sail, and maybe the jib sail; and immediately thereafter the stay sail and jib sail seemed to have been hauled in. The Kasbek was a steamer of the value of \$175,000. The T. F. Oakes was worth about \$40,000. Her gross freight was \$17,000, \$4,000 of which was prepaid in China; and the port charges in New York, incident to the arrival of the vessel and delivery of her cargo, were about \$1,700. Her cargo was worth \$160,903. The wages of the crew of the Oakes, paid them in New York, were \$4,232.56; and those of the master, \$1,840. The Kasbek sailed under a charter from Barry Dock, England, February 17, 1897, for Philadelphia, Pa., where she was loaded with oil, and was proceeding thence to Fiume, Austria, at the time of meeting the Oakes. Her total freight was \$13,246.30. The Kasbek was a schooner-rigged, three-masted steamship, of 2,099 tons net register, 310 feet in length, and valued at \$175,000. She occupied 11 days in the salvage service, and her daily earnings on the basis of the freight were \$265, as computed by the libellant, and \$200, as computed by the claimant. The navigation of the Oakes depended upon the remaining capacity and endurance of the persons above described. They alone could

co-operate with those on the Kasbek to take her in tow. The weather was not dangerous for usual navigation, but arduous, if not perilous, in view of the condition of the Oakes' crew. Indeed, the attempt of the Kasbek to take in tow the Oakes on the night of March 15th resulted in the line that was attempted to be carried for this purpose fouling the Kasbek's propeller, and the consequent disablement of the steamer to such an extent that it was not until Thursday morning that the propeller could be again put in action, and the Oakes reached. The Oakes in the meantime had drifted into latitude  $38^{\circ} 29'$ , longitude  $68^{\circ} 9'$ . It is also noticeable that on the night of March 15th a collision of the vessels was barely escaped, while they were maneuvering to allow the passing of a line. The Oakes, in her long voyage, had met but one ship capable or willing to render aid; and that was the Gov. Robie, whom she spoke on the 12th of January, and from whom she obtained additional provisions. It will be observed that as early as January 12th there was anticipation of insufficient provisions, and, before the Kasbek's crew boarded the Oakes, the captain of the latter ship, by way of prompting the Kasbek's aid and expediting her movements, stated that the Oakes had provisions for five days; but thereafter this representation was claimed by the same person to have been false, and that there were supplies for nine days. The provisions of the Oakes were substantial enough, but quite unsuitable for a crew in a state of illness and impairment that prevailed. The Kasbeck furnished proper nutriment for all on the Oakes. There are two features of the Oakes' situation that seem to render her in a less dangerous condition than would appear from the narration of the incapacity of her crew: She was about 300 miles from her port, and had reached a position where she might hope to meet vessels with some frequency. In fact, after meeting the Kasbek, and before she was finally taken in tow, she was within signaling distance of at least two other ships, as her captain testifies. These facts should have their proper influence in diminishing the value of the salvage service. If the ship had been in midocean, her deliverance would have been possible, but improbable. As it was, the balance of probabilities favored her ultimate rescue through the aid of some passing vessel. But, as her dependence upon the few incapable persons aboard was of a most unsubstantial nature, her hope in any case was in the appearance of a vessel willing and able to assist her. The Kasbek was in fact that ship, and whether another would have appeared seasonably to save the lives of the sick, and to deliver the ship and her cargo, which was substantially at the mercy of the sea, is a matter of some speculation.

It is desirable that the award should be ample, but that its ascertainment should not be unduly influenced by the pitiful condition of the crew. Yet the physical state of the crew essentially affects the consideration of the question of compensation: (1) Because the salving vessel brought wholesomeness to the uncleanly quarters of the sick, and such strengthening aliment as was instantly demanded; thereby, it may be fairly inferred, saving life. (2) Because the reduced and enfeebled condition of the crew augured mishap for the

vessel and its cargo. Awards should be sufficient to invite vessels to the aid of others in distress, lest the prevailing prejudice against diversion from usual employments and fixed purposes, to obtain some unusual gain, be increased. It is noticeable that the welcome extended on the sea to salving vessels by imperiled mariners yields readily on land to a disclaimer of danger, or of valuable service rendered, with the result that the salvor is too often commended to a court for a just recognition of his merit. Such spirit of complacent recollection of jeopardy, and the rescue therefrom, should not be encouraged. In view of the facts in this case, somewhat peculiar in nature, it is considered that the libelant should recover for the services rendered the Oakes the sum of \$17,000, and also its disbursements, amounting to the further sum of \$2,350, with interest on such sum of \$2,350 from the date of the payments of the various items thereof, besides costs. Let a decree be entered accordingly.

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THE H. C. GRADY.

BLACK DIAMOND COAL-MIN. CO. v. THE H. C. GRADY (STRONG,  
Intervener).

District Court, N. D. California. March 2, 1898.)

No. 11,369.

1. **CONDITIONAL SALE OF VESSEL.**

Where, under a contract for the sale of a vessel, part of the purchase price is paid down, and the vendor retains the legal title as security for the balance, the transaction is a conditional sale, and not a sale with reservation of a lien, though the vendor may have believed the contrary.

2. **MARITIME LAW—AUTHORITY OF SHIPMASTER.**

The master of a ship in a foreign port, in the absence of the owner, has authority, under the general maritime law, to bind his owners for necessary repairs and supplies; and interested parties may assume that he has such authority, unless something appears to suggest the contrary, and put them on inquiry.

3. **SAME—FOREIGN PORT.**

With reference to any vessel, any port is considered foreign which is outside of the state where she belongs.

4. **SAME—PLEDGING CREDIT OF SHIP.**

Where a steam vessel has been conditionally sold, and repairs are being made to her by order of the vendees in possession, directions given by the master to the workmen that the work must be finished by a certain date do not bind the ship for the cost of the repairs.

5. **SAME.**

Possession of a vessel under an agreement for sale does not confer upon the vendee an apparent authority to create liens for supplies; and a person furnishing supplies upon the order of such a person is put upon inquiry as to his actual authority.

6. **MARITIME LIEN—SERVICES.**

One who, at the time of rendering services as a purser on board of a steamer, is a part owner of the steamer under an equitable agreement for its purchase, and who is also a partner in the business in which she is engaged, is not entitled to enforce a maritime lien for his services as against the vendor of the steamer.

**7. SAME.**

One employed as traveling agent for a vessel, soliciting trade for her at different points along her route, is not engaged in rendering a maritime service, and hence is not entitled to enforce a lien against the vessel for his compensation, though he is accustomed to give occasional assistance to her crew.

Morris M. Estee, for libelants and certain interveners.

Andros & Frank, D. T. Sullivan, H. W. Hutton, Craig & Craig, W. G. Holmes, John J. O'Toole, W. H. Schooler, and A. J. Treat, for certain interveners.

DE HAVEN, District Judge. Independent libels were filed by various persons against the steamer H. C. Grady, for supplies furnished in this state for its use, and for work done and materials furnished in this state, for its repair and equipment, and for services rendered on board said steamer. These actions were, by order of the court, consolidated and tried at the same time. Fred R. Strong appeared in the action, and filed a libel of intervention, making answer to the different libels filed, and further asking that he be given judgment against the proceeds of the sale of the steamer, for the sum of \$2,750 and legal interest on that sum from the 16th day of July, 1897. In his libel of intervention, he alleges that the steamer was on July 16, 1897, sold by him to W. D. Newhouse, James B. Brooks, Nathan Crocker, J. B. Tilley, and Edward Loughery, for the sum of \$3,750,—\$1,000 to be paid on her delivery to the purchasers, and the balance, of \$2,750, to be paid within 60 days thereafter; and that he "then and there delivered said vessel to said purchasers, and retained the legal title thereto, as security for the payment of said purchase price," the purchasers agreeing to keep her free from all liens and incumbrances, until such balance was paid. In another part of his libel of intervention it is alleged, in substance, that the said transaction between the intervener and the purchasers of the steamer constituted a mortgage. This latter allegation, however, is only the statement of a conclusion of law, and the question whether such transaction was a conditional sale or a mortgage is to be determined from the essential nature of the agreement itself, as disclosed by the evidence.

What was the agreement? It is not in writing, but there is no real conflict in the evidence as to its terms. The intervener, Strong, was on July 16, 1897, the owner of the H. C. Grady; and on that day he made a verbal contract to sell her to Nathan Crocker and James B. Brooks, for the sum of \$3,750, the purchasers to have immediate possession. One thousand dollars of the purchase price was paid by the vendees at the time of the delivery of the vessel to them, and the remaining \$2,750 was to be paid within 60 days thereafter. Strong retained the legal title, and I think it sufficiently appears from the evidence that, under the agreement, the legal title of the steamer was not to be transferred until the payment of the balance due upon the contract of purchase; and it was also agreed that the purchasers were, at their own expense, to make such repairs and changes in the construction and equipment of the steamer as they might deem necessary, and were to permit no liens to be filed against her while in their

possession, and prior to the time when they should make final payment on account of the purchase price, and Messrs. Crocker & Brooks subsequently gave to said Strong a bond to secure performance of their agreement in this respect. Strong was a resident of Portland, Or., and, prior to her delivery to the purchasers under this agreement, the steamer was duly registered in the office of the collector of customs for that district, by the said Strong, as owner; and one James E. Denny was appointed by him as her master, and he was instructed by Strong, in effect, to look after his interests, and see that no bills were incurred against the steamer until she was fully paid for. Denny was also the agent of Crocker & Brooks, and acted for them in the negotiation concerning the purchase and delivery of the steamer. After Strong parted with her possession, under the agreement above stated, the steamer was brought to this state, and from the time of her arrival here until some time in September, 1897, was employed by Crocker & Brooks and others, who seem to have made some agreement with them for interests in the steamer, in carrying passengers and freight between San Francisco and different places on the Sacramento river; and, during the time while she was thus in the possession of Crocker & Brooks, supplies were furnished to the steamer by certain of the libelants; and materials furnished for her use, and repairs made upon her, and services rendered on board, by other libelants.

1. In my opinion, the contract between the intervener, Strong, and Crocker & Brooks, and under which possession of the steamer was delivered to the latter, was a conditional sale; and the nature of the contract is not changed by the fact that Strong may have believed that he held only a mortgage on the steamer for the balance of the purchase price, and that he expressed such opinion when giving his testimony in this case. The court is not bound by the mere opinion of a party or witness in relation to the legal effect of a contract. It is sometimes difficult to determine whether, in a given case, the parties intended to make a completed sale, the vendor reserving or being given a mere lien on the property for the price, or whether the transaction was intended as a sale upon condition of payment of the purchase price. Each case must depend upon its own facts. In this case it is clear from the evidence that, under the agreement, the legal title to the steamer was to remain in Strong until the payment of the balance of the purchase price, and therefore payment of such balance was a condition precedent to the right of the vendees to demand a transfer of the title to the steamer. The legal effect of such an agreement is that the sale is not absolute, but conditional, and payment of the entire purchase price is essential in order to pass the legal title. This constitutes a sale upon condition. *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. 51; *Coggill v. Railroad Co.*, 3 Gray, 545; *Strong v. Taylor*, 2 Hill, 326; *Cole v. Mann*, 62 N. Y. 1; *Ballard v. Burgett*, 40 N. Y. 314.

2. The libels of the Black Diamond Coal-Mining Company, Meyer & Akmann, H. P. Christie, and C. J. Sbarbaro may be considered together. That of H. P. Christie is for materials furnished and used by him in making certain repairs upon the steamer, and for labor performed by him in making such repairs. The materials were furnished

and repairs made at the request of Captain Denny, the master of the vessel. The remaining libels referred to are for supplies furnished. The evidence shows that the supplies were also furnished for the use of the steamer upon the order of Capt. Denny. Neither of the libelants made any inquiry in relation to the ownership of the steamer, or as to whether she was being operated by any person other than her owner.

It is claimed by the intervener, Strong, that, under these circumstances, the libelants are not entitled to enforce a lien against the steamer. I do not think this contention can be sustained. The person upon whose order the supplies were furnished, and repairs made, was the master of the steamer, duly appointed such by the said Strong, her registered legal owner. Strong, as before stated, was and is a resident of Portland, Or., and the supplies were furnished for the use of the steamer, and the repairs made upon her, in San Francisco. It is the rule of the general maritime law that the master, in the absence of the owner, has authority in a foreign port to bind his owners for necessary repairs and supplies. 2 Pars. Shipp. & Adm. p. 8; Bliss v. Ropes, 9 Allen, 339. When these supplies were furnished, and repairs made to the steamer H. C. Grady, her owner, Strong, was absent in Portland, Or., and the steamer was in a foreign port, within the meaning of the maritime rule just stated, as it is well settled that a port is deemed to be foreign to a vessel which is not in the state where she belongs, and where her owner resides. The Nestor, 1 Sumn. 73, Fed. Cas. No. 10,126; The Canada, 7 Fed. 119; Pratt v. Reed, 19 How. 359; The Cumberland, 30 Fed. 449; Stearns v. Doe, 12 Gray, 482.

There was nothing, in the facts or circumstances under which the master contracted with either of the libelants, sufficient to suggest the slightest doubt of the actual authority of the master to order the supplies and repairs, and the libelants were therefore not required to make any inquiry as to his actual authority, but had a right to presume that he was clothed with the ordinary powers of a master, and that he was not acting in violation of instructions given him by his principal. The supplies and repairs were necessary, and therefore within the general authority of the master to procure.

3. The libels of John A. Whelan and James J. Whelan, co-partners, and McMurphy & McAvoy, may also be considered together. The claim of Whelan & Whelan is for \$624.58, for materials furnished and work done in repairing the steamer, and in the construction of certain fresh-water tanks for her use. The tanks were constructed under a contract made with Nathan Crocker, one of the vendees of the steamer; and some of the repairs, although it does not clearly appear just what portion of the whole, were also made under his direction, and the remaining repairs were made upon the order of the master of the steamer, but whether before or after the libelants signed the bond hereinafter referred to does not appear.

The claim of McMurphy & McAvoy is for the sum of \$763.92, for materials used and labor performed in making repairs upon the steamer. The evidence which relates to the making of the contract under which this claim arises is somewhat vague; but the conclusion

that such contract was made with Nathan Crocker, before referred to in this opinion as one of the purchasers of the steamer, seems the most probable. Certain it is, that gentleman first applied to the libelants to do the work subsequently performed by them. The libelants thereupon went on board the steamer for the purpose of ascertaining what repairs were needed to be made, and to bid on the work, and, upon examination, declined to give him a bid, because they were not able to ascertain just what repairs would be required. Subsequently, they received a telephone message to go down to the steamer, and meet the chief engineer, captain, and inspector, and "go ahead with the work." The libellant McMurphy is the only person who testified in relation to this telephone message, and he was unable to state from whom it was received; but the most reasonable presumption, in view of the surrounding circumstances, is that the message was sent by Crocker in behalf of himself and his partner, Brooks, and such was, doubtless, the understanding of the libelants at the time. In response to this message, the libelants performed the work, and furnished the materials mentioned in their libel. While the repairs were being made, Capt. Denny, the master, was on board, and more than once informed the libelants they must finish the work, so as not to delay the operation of the steamer beyond a certain date. This acquiescence of the master in the repairs made by the libelants, and his direction to hasten the completion of their work, cannot be construed as a contract on his part for its performance on the credit of the steamer. It is not claimed that the work was commenced under any contract made with the master, or in his presence, or that the master was informed that the libelants intended to rely upon the credit of the steamer, so that the acquiescence of the master does not bring the case within the principle which was made the basis of decision in *The Alfred Dunois*, 76 Fed. 586.

In addition to what has been said in relation to the contracts under which the several claims of Whelan & Whelan and McMurphy & McAvoy arise, it is proper to state that said libelants supposed that the steamer was responsible for the work performed and materials furnished by them, and that they would have a lien upon her for the value of such work and materials; but neither of said libelants made any inquiry regarding the ownership of the steamer, or whether Crocker & Brooks had any right to pledge the credit of the steamer for the work and materials ordered by them. On August 6, 1897, when perhaps about one-half of their respective claims had accrued, Crocker & Brooks, as principals, and said libelants as sureties, executed a bond, whereby they became "jointly and severally bound unto Fred R. Strong in the sum of one thousand dollars," and upon the following conditions, recited in the bond:

"That whereas, the said Brooks and Crocker are to purchase from the said Strong the steamer H. C. Grady, and are to operate and run the said steamer; and whereas, the said steamer may be liened or libeled within 60 days from the date hereof by persons having claims against the said steamer during the time the same is operated and run by the said Brooks and Crocker, or their assigns: Now, therefore, if the steamer is not libeled or liened by persons having claims against the said steamer while operated and run by the said Brooks

and Crocker or assigns, within 60 days from date hereof, then this obligation to be null and void; otherwise, to remain in full force and effect."

The intervener, Strong, not having pleaded the execution of this bond by way of estoppel, the only question that arises upon it is as to its effect upon that portion of the claims of libelants accruing after its execution. The libelants were informed by the recitals contained in this bond that Strong was the owner of the steamer, and that Messrs. Crocker & Brooks were in possession of, and were about to operate, the steamer, under a contract to purchase; and if they were not directly informed by such recitals that the vendees were to permit no claim or lien to accrue against the steamer, while in their possession, and until fully paid for by them, they were at least put upon inquiry as to the terms of such contract. The libelants, however, did not inquire as to the terms of the agreement, and, under such circumstances, there is a conclusive presumption that, if inquiry had been made, they would have been fully informed in relation thereto. They are therefore charged with knowledge of the fact that Crocker & Brooks were in possession of said steamer, under an agreement for its purchase, and by the terms of which they had further agreed with the intervener, Strong, that all alterations in, or repairs which they caused to be made to, such steamer, should be paid for by them, and that they were not to permit any liens to accrue against such steamer while it should be in their possession, under that contract.

The rule declared by the supreme court of the United States in the case of *The Kate*, 164 U. S. 458, 17 Sup. Ct. 135, is really conclusive upon this point. In that case it appeared that the United States & Brazil Mail Steamship Company was in possession and operated the *Kate* under a charter party, which provided, among other things, that the charterer should provide and pay for all coal used by the steamer during the time it was under such charter. The libelant there, knowing of the existence of the charter, but without actual knowledge of its terms, furnished coal for that steamer, upon the order of the charterer, and, in fact, relied upon the credit both of the charterer and of the vessel. It was held by the supreme court that, under these circumstances, the libelant was not entitled, under the maritime law, to enforce any lien against the *Kate*; and, in discussing the question, the court said:

"We are of opinion that, as the libelant knew, or under the circumstances is to be charged with knowledge, that the charter party under which the *Kate* was operated obliged the charterer to provide and pay for all coal needed by that vessel, no lien can be asserted under the maritime law for the value of coal supplied under the order of the charterer, even if it be assumed that the libelant in fact furnished the coal upon the credit both of the charterer and the vessel. As the charterer had agreed to provide and pay for all coal used by the vessel, he had no authority to bind the vessel for supplies furnished to it. His want of authority to charge the vessel for such an expense was known or could have been known to the libelant by the exercise of due diligence on its part. Under the circumstances, the libelant was not entitled to deliver the coal on the credit of the vessel, and its attempt to hold the vessel liable is in bad faith to the owner. The law cannot approve or encourage such an attempt to wrong the owners of the vessel. Neither reason nor public policy forbade the owner and the charterer from making the arrangement evidenced by the charter party of December 15, 1892."

As before stated, some portion of the claim of Whelan & Whelan is for materials furnished and repairs made by them upon the order of the master; what portion, however, does not appear, nor whether such materials were furnished and repairs made before or after the execution of the bond above referred to. If before, it was incumbent upon the libelants to prove the fact, and the value of such materials furnished and repairs made; and, if after its execution, their claim therefor must be held to be subordinate to that of the intervener, Strong, because, as we have seen, they were charged, by the recitals in the bond, with notice of the terms of the contract under which Strong had parted with the possession of the steamer, and such contract was sufficient to put the libelants upon inquiry as to the authority of the master to bind the steamer for materials and repairs while in the possession of Crocker & Brooks, under their contract to purchase; and they made no such inquiry.

There remains for consideration the further question as to the right of the libelants to enforce, as against the intervener, Strong, a prior lien against the steamer for the materials furnished and repairs made by them upon the order of Crocker & Brooks, before the execution of the bond above referred to. In passing upon this question, it is necessary to keep in mind the following facts: That Messrs. Crocker & Brooks had not been authorized by the intervener, Strong, to make such repairs upon the credit of the steamer, and that the libelants made no inquiry whatever as to the ownership of the steamer, or as to the authority of Crocker & Brooks to create a lien against the steamer for such materials and repairs, and such repairs were not necessary for her preservation. In view of these facts, the right of the libelants to maintain a prior lien as against the intervener, Strong, for that part of their claims now under consideration, must depend upon the answer to be given to this question: Were Messrs. Crocker & Brooks clothed by the intervener, Strong, with an ostensible authority to create liens against the steamer, for such alterations and repairs as they might choose to have made? If the possession of the steamer under their agreement to purchase gave to them such ostensible authority, then libelants might safely contract with them in relation to such materials and repairs, relying upon such apparent authority, and without making any further inquiry. If, however, the intervener, Strong, in delivering possession of the steamer to Messrs. Crocker & Brooks under the contract above referred to, did not confer upon them an ostensible authority to bind the steamer for materials and repairs, then the libelants failed to exercise ordinary business prudence in not making some inquiry as to the actual authority of Crocker or Messrs. Crocker & Brooks, in the premises, and their claims must be held subordinate to that of the intervener, Strong.

The question thus presented is, I think, set at rest by the decision of the supreme court of the United States in *The Valencia*, 165 U. S. 264, 17 Sup. Ct. 323. That was a libel for coal furnished the steamship *Valencia* for its specific use, and the coal was furnished upon the order of the New York Steamship Company, a corporation, who

operated the steamer under a charter requiring it to provide and pay for all coal. The further facts are thus stated by the court:

"The libelants were not aware of the existence of the charter at the time they furnished the coal, nor did they know where the ship bailed from, whether she was foreign or domestic, nor what was her credit. They were at the time without knowledge of the ownership of the vessel, or of the relations between it and the New York Steamship Company, except that the company 'appeared to be directing its operation.' They made no inquiry as to the solvency of the steamship company, or as to the ownership or nationality of the vessel, but, in the belief that the ship was responsible for the supplies furnished, delivered the coal as above stated, charging the same on its books to 'S. S. Valencia, and owners, New York,' in some cases 'city,' in others 'Pier 49, E. R., New York.' No fact proven in the case warranted the inference that either the master or the charterer agreed to pledge the credit of the vessel for the coal."

In passing upon the right of the libelants in that case to enforce a maritime lien against the Valencia upon that state of facts, the court said:

"Although the libelants were not aware of the existence of the charter party under which the Valencia was employed, it must be assumed upon the facts certified that, by reasonable diligence, they could have ascertained that the New York Steamship Company did not own the vessel, but used it under a charter party providing that the charterer should pay for all needed coal. The libelants knew that the steamship company had an office in the city of New York. They did business with them at that office, and could easily have ascertained the ownership of the vessel, and the relation of the steamship company to the owners. They were put upon inquiry, but they chose to shut their eyes, and make no inquiry touching these matters, or in reference to the solvency or credit of that company. It is true that libelants delivered the coal in the belief that the vessel, whether a foreign or a domestic one, or by whomsoever owned, would be responsible for the value of such coal; but such a belief is not sufficient in itself to give a maritime lien."

The principle thus laid down by the supreme court of the United States, when considered with reference to the particular facts to which it was applied in that case, goes to this extent, in effect: That possession of a vessel under a charter does not confer upon the charterer an apparent authority to create liens against the vessel for supplies; and that a person furnishing supplies to a vessel upon the order of one having no apparent authority to pledge the credit of the vessel is put upon inquiry as to the actual authority of such person so to do. I am unable to discover any reason why a different rule should be applied in this case. The owner who delivers possession of his vessel under an agreement for its sale upon condition is certainly entitled to no less protection against its unauthorized incumbrance than one who parts with possession of his vessel under a charter; and, if in the one case, then in the other, also, the person furnishing repairs, materials, or supplies to the vessel is put upon inquiry as to the authority of the person with whom he deals to pledge the credit of the vessel. Nor does the fact that in this case the materials furnished and repairs made may have enhanced the value of the steamer, and so, in a certain sense, have benefited the owner, change the rule declared in the case just cited. The materials and repairs were not necessary for the preservation of the steamer, although they may have been necessary in order to properly fit and equip her for the business in which she was employed by Messrs. Crocker & Brooks. The repairs were

in fact made for the benefit of Crocker and others interested with him in the purchase and operation of the steamer, and, as he was without actual or apparent authority to pledge the credit of the vessel therefor, the claim of the libelants must be held to be subordinate to that of the intervener, Strong.

4. The Libel of E. J. Loughery: This libel is to recover for services as purser while the steamer was being operated by Crocker & Brooks and others associated with them. The evidence shows clearly that he was employed for this purpose by Messrs. Crocker & Brooks, and I am satisfied from all of the circumstances in evidence that the libelant knew of the terms of the agreement under which they held possession of the steamer. Indeed, the evidence shows that the libelant advanced a portion of the money paid by Crocker & Brooks on account of its purchase at the time the steamer was delivered to them, and that, when this money was advanced, the libelant understood that he was to have some interest in the steamer. The evidence shows that the libelant considered himself a part owner, and that Crocker & Brooks also regarded him as such; and the evidence points to the fact that this understanding was the result of an agreement between them that the libelant was to have an interest, not only in the steamer, but in the business in which she was engaged while he was rendering the services as purser,—in short, that he was a partner in that business. Under these circumstances, I am satisfied that any claim the libelant may have against the steamer or its proceeds for services rendered by him is subordinate to that of the intervener, Strong.

5. Intervention of J. L. Kercheval: The evidence shows that Mr. Kercheval was employed as a traveling agent of the steamer, to solicit patronage along the Sacramento river. His own testimony is to the effect that he solicited trade at one place and another, and sometimes assisted on board when the steamer was making a landing, but he was not employed as one of the crew. I do not think the service this libelant was employed to render is a maritime service, and therefore he is not entitled to enforce a lien against the steamer therefor. *The Crystal Stream*, 25 Fed. 575; *Doolittle v. Knobloch*, 39 Fed. 40.

6. The Intervention of Frank Dalton: This libelant is entitled to recover the full amount claimed by him, less \$14, the amount of a hotel bill, including whisky, cigars, and lodgings, furnished certain persons connected with the steamer, but which can hardly be considered as having been furnished upon its credit.

The libels referred to in paragraphs 4 and 5 of this opinion will be dismissed, and the claims of all other libelants will be allowed, with costs, less the amount claimed by any of them for services rendered after September 15, 1897, the date when the steamer was attached and taken into custody by the United States marshal under the process issued upon the libel of the Black Diamond Coal-Mining Company. The claims of Whelan & Whelan and McMurphy & McAvoy are subordinate to that of the intervener, Strong, and that of Strong is subordinate to the claims of all the other libelants. Let such a decree be entered.

**MASON v. NEW YORK STEAM-POWER CO. et al.**

(Circuit Court, S. D. New York. May 19, 1898.)

**JURISDICTION OF CONTROVERSY—NONRESIDENT DEFENDANTS — MOTION TO SET ASIDE SUBPŒNA AND SERVICE.**

Where the court would have jurisdiction to decide the controversy as to a nonresident defendant who cannot be compelled to litigate, if he should waive his personal privilege and appear, a service of the subpoena upon him must be set aside, on his motion, but the subpoena itself will not be set aside.

Arthur H. Masten, for complainant.  
 Stephen G. Clarke, for defendants Moore and others.  
 Roger Foster, for defendant Synnott.

LACOMBE, Circuit Judge. Defendants Moore and Synnott reside in, and are inhabitants of, the state of New Jersey. Moore apparently was served with the summons. He now moves to set aside such service and to set aside the subpoena. Synnott apparently has not been served. He moves to set aside the subpoena. Complainant is a citizen, inhabitant, and resident of Connecticut.

I am not satisfied that this action is within the provisions of section 738, Rev. St. U. S. The nonresident defendants, therefore, cannot be constrained to litigate in this court, and for that reason the service of the summons on Moore must be set aside. The right to object to the jurisdiction of this court, however, is a purely personal privilege of the nonresident defendants, which they, or either of them, may waive. The court would have ample jurisdiction to decide the controversy, so far as they were concerned, if they should decide to waive their personal privilege and appear. For that reason, while service of the subpoena upon them will be set aside, the motion to set aside the subpoena itself as to them should be denied.

The other questions raised upon motion for receiver may best be disposed of at final hearing; and, in view of the admissions as to some of the irregularities charged in the bill, injunction may meanwhile be continued.

**MERCANTILE TRUST & DEPOSIT CO. OF BALTIMORE, MD., et al. v. LOW et al.**

(Circuit Court of Appeals, Fourth Circuit. May 3, 1898.)

No. 236.

**REORGANIZATION OF RAILROAD COMPANY—BONA FIDE PURCHASER OF BOND DEPOSITED.**

Railroad bonds were deposited with a security company subject to the order of a reorganization committee. The owners received certificates of deposit therefor, stating the terms of the agreement, which did not prevent the recovery of the bonds by the holder of the certificates, which were made transferable by delivery. Afterwards many of such bondholders approved a plan of reorganization, and signed an agreement giving such committee full and unrestricted control of their bonds. *Held*, that one purchasing such certificates, after the holder thereof had signed such subse-

quent agreement, and who was aware of the terms thereof, could not recover the bonds represented thereby.

Appeal from the Circuit Court of the United States for the District of Maryland.

E. J. D. Cross, John Phelps, John K. Cowen (Hugh L. Bond, Jr., on brief), for appellants.

John N. Steele (Charles Steele, on brief), for appellees.

Before GOFF, Circuit Judge, and BRAWLEY and PURNELL, District Judges.

GOFF, Circuit Judge. A bill in equity was filed in the circuit court of the United States for the district of Maryland by C. Adolphe Low, George F. Baker, and William E. Strong, citizens and residents of the state of New York, against the Mercantile Trust & Deposit Company of Baltimore, a corporation created by the laws of the state of Maryland, and William H. Blackford, William H. Perot, John H. Tompkins, Frank Redwood, Basil B. Gordon, and J. W. Middendorf, citizens and residents of Maryland. The suit grows out of the proceedings instituted in the circuit court of the United States for the Eastern district of North Carolina by the Farmers' Loan & Trust Company of New York, to foreclose a mortgage given to that company, as trustee, by the Cape Fear & Yadkin Valley Railroad Company, a corporation of the state of North Carolina. The mortgage was given to secure an issue of bonds to the amount of \$10,000 per mile upon the railroad line and property of said company, as fully described in the said conveyance. The bonds were divided into three series, "A," "B," "C," each series a first lien on separate divisions of the railroad, known as "A," "B," "C," respectively, and a second lien on the other two, subordinate to the series having the first lien on those other divisions, respectively. The railroad company having defaulted in the payment of interest on said bonds, by which the principal of the same became due and payable, the suit to foreclose was filed. The parties to this suit (excepting the Mercantile Trust & Deposit Company) intervened in that proceeding, the appellants as the "Baltimore Committee," and the appellees as the "New York Committee," of the bondholders, the former representing the holders of all series of said bonds, and the latter the series A bondholders. In such foreclosure proceedings, the New York committee insisted that the railroad should be sold in separate divisions, so that each series of bonds might have its own portion thereof as security; while the Baltimore committee claimed that the road should be sold as an entirety, in order to preserve the property as a working unit, and that the proceeds of sale should be apportioned among the various series of bonds, proportionately as their respective values might be ascertained by the court.

In order to perfect a plan of reorganization, an agreement was entered into on the 7th day of April, 1894, by a number of the holders of the first mortgage bonds, by which the appellants were constituted a reorganization committee, representing bonds of all the series, with power to take such measures as they might deem proper

to secure the interests of the bondholders in the reorganization of said railroad company. Such committee was also authorized to prepare a plan of reorganization and to act as a purchasing committee. The bondholders subscribing to said agreement were to deposit their bonds with either of the two depositaries mentioned in the agreement,—the Farmers' Loan & Trust Company of New York and the Mercantile Trust & Deposit Company of Baltimore. Under this agreement a large number of bonds of each series were deposited with the Mercantile Trust & Deposit Company of Baltimore, for which certificates were issued in the usual form. It was set forth in said certificates—which first described the bonds deposited—that the bonds had been placed with said company subject to the terms of the agreement mentioned, and to the order of the committee therein named, or a majority of them, and that the holder assented to the agreement by receiving the certificate. Also it was stated in said certificates that the holder was entitled to receive all the benefits and advantages coming to the depositor under the agreement, and that they were to be transferable by delivery to the purchaser thereof. The plan of reorganization, when prepared, was to be submitted to the bondholders, at a meeting to be called by the committee, of which notice was to be duly given, and copies of the plan sent to such holders, it being provided in the agreement that the plan should be declared adopted, if approved by a majority of each series of bonds.

The Baltimore committee prepared a plan of reorganization, dated October 31, 1895, which was mailed to the various depositors and holders of certificates, and shortly after a notice was sent to each certificate holder, whose address was known to the committee, advising him of the meeting of the bondholders to be held December 23, 1895, for the purpose of considering said plan and adopting or rejecting the same. With the plan and bearing the same date (October 31, 1895) was an agreement, printed in due form, by which the bondholders, or certificate holders, who signed the same, constituted the committee so appointed under the agreement of April 7, 1894, a reorganization committee, for the purpose of perfecting the agreement and plan submitted with it. This agreement provided in what manner persons could become parties thereto; it authorized the issuing of reorganization certificates in exchange for certificates issued under the agreement of April 7, 1894; regulated the terms and negotiability of the same; and set forth that the rights of the transferee thereof should be subject to the conditions of said agreement. The committee so appointed was given full and unrestricted power over the bonds, stock certificates, and securities of the signers of said agreement, and authorized to vote the same at any and all meetings of stockholders, bondholders, or creditors. It was empowered to make such changes as might be deemed proper in the plan of reorganization, and the signers of the agreement were to be bound by such changed or modified plan. With this last-mentioned agreement, which was dated October 31, 1895, the notice mentioned was sent requesting those holding certificates under the agreement of April 7, 1894, to assent to the new agreement by signing the same, provided

the owners approved of the plan. A large number of the bondholders did so assent, and returned the copies of the agreement, duly signed by them, to the secretary of the committee.

Before the Baltimore committee had matured their plan of reorganization, certain holders of the A bonds, who were not satisfied with the then existing situation, entered into an agreement with the appellees, the New York committee, by which certain rights relative to the bonds held by them were given to said committee, and certain duties, not essential to be now set forth, were imposed upon it.

It is quite evident that the New York committee was formed for the express purpose of providing especially for the protection of series A bonds, the intention being to secure for that purpose, if possible, a sale of the railroad by divisions, thereby necessarily opposing the plan of the Baltimore committee. On the 7th of November, 1895, the New York committee caused an advertisement to be inserted in certain of the Baltimore newspapers, in which it was set forth that the plan of reorganization adopted by the Baltimore committee was unsatisfactory; that better terms could be secured for the series A and B bonds; and requesting holders of the same to withhold their approval of the agreement sent them by the Baltimore committee until the situation could be further investigated by the New York committee. On the 12th of November, 1895, that committee published in said papers a further notice, calling attention to the fact that by the agreement of April 7, 1894, it was expressly provided that, when a plan of reorganization had been prepared by the Baltimore committee, a meeting of all the certificate holders should be called for the purpose of taking action upon the same; that no such meeting had been called, but that the Baltimore committee was asking the certificate holders to sign a new agreement, and commit themselves to a plan of reorganization, without having had the opportunity of considering the objections thereto that a meeting of such holders would have afforded. This notice also requested the certificate holders not to sign the agreement presented by the Baltimore committee, dated October 31, 1895, until such meeting should be called and held.

The Baltimore committee called a meeting of the certificate holders, under the agreement of April 7, 1894, for the 23d of December, 1895. Such meeting was duly held, at which the Baltimore committee represented the following bonds: Class A, \$366,000; class B, \$427,000; class C, \$536,000. At this meeting the certificates held by the New York committee were represented and voted against the plan as prepared by the Baltimore committee. The vote cast was as follows: For the plan of the Baltimore committee, A bonds 394, B bonds 497, C bonds 638; for the plan of the New York committee, A bonds 595, B bonds 30, C bonds 15. As the plan of reorganization prepared by the Baltimore committee did not receive a majority vote of the holders of certificates of each class of bonds, as required by the agreement of April 7, 1894, the same was not adopted.

The appellees then made demand of the Mercantile Trust & Deposit Company for the return of the bonds represented by the certificates

held by them, offering at the same time to pay all assessments then due on said bonds, as required by the agreement of April 7, 1894, and claiming that the Baltimore committee had no further authority or duties to perform under that agreement. The trust company delivered to the appellees all of the bonds represented by the certificates held by them, except those whose owners had signed the agreement of October 31, 1895, and which had been acquired by the appellees subsequent to such signing. This suit was then brought to compel the delivery of such last-mentioned bonds to the appellees.

The court below entered a decree by which the Mercantile Trust & Deposit Company was required to surrender to the appellees all the bonds in controversy, provided the appellees returned to said company the certificates representing the same theretofore issued by it. From this decree this appeal is prosecuted.

The bonds in controversy were deposited with the trust company, defendant below, under the agreement of April 7, 1894. The refusal to return them to the certificate holders was based upon the provisions of the agreement of October 31, 1895. As to the ownership of the bonds in suit, or the certificates representing them, there is no dispute, and the controversy is as to which committee has the right to vote and control the same pending the reorganization of the railroad. By the agreement of April 7, 1894, it was provided that if a majority of either class of bonds should disapprove the plan to be submitted, the same should not be adopted, and that the certificate holders should not be bound by it. Under that agreement, on the failure of the plan of reorganization to receive a majority of each series of bonds, there can be no doubt but that it was the duty of the committee to return the bonds on the surrender of the certificates representing them. The question we now have to dispose of depends upon and requires the construction of the agreement of October 31, 1895. Under it, was it the duty of the Baltimore committee to return the bonds, if the plan indicated by the agreement entered into should not be adopted? The provisions of the agreements of April 7, 1894, and October 31, 1895, are not the same, and the latter was evidently drawn to meet conditions not existing when the former was proposed. It is disclosed by the testimony that the New York committee—the appellees—was formed for the purpose of preventing the adoption of the plan referred to in the agreement of April 7, 1894. To accomplish this, certificates, under the agreement by which the Baltimore committee was organized, representing \$595,000 of bonds, were purchased by the New York committee, or those representing it. In this connection, it is well to note the fact that the certificates so purchased by the New York committee, now in controversy, were bought in open market, after the holders of the bonds represented by them had signed the agreement of October 31, 1895.

It is apparent that the plan of reorganization as presented with the agreement of October 31, 1895, was prepared with the full realization of the fact, subsequently disclosed, that the method originally contemplated under the agreement of April 7, 1894, would not receive the approval of those holding certificates of series A bonds.

The agreements are quite different, and clearly so, in order to meet the changed conditions in reference to the interests represented by the different bonds. Under the agreement of October 31, 1895, the Baltimore committee was given by those signing it absolute power over the bonds deposited by them,—such power as the owners of the same had prior to such signing. That committee held in the aggregate over \$1,500,000 of the bonds referred to in the agreement, and it was authorized to reorganize the road in such manner as to best protect the interests holding the same. It was also authorized to become a party to the foreclosure suit and to other suits, to bid for the railroad and its property, to purchase the same, and to sell any part thereof, to transfer the property to a new corporation, and to apportion the securities of the same among the parties entitled thereto.

The agreement of April 7, 1894, was a valid contract, and bound the parties thereto. The agreement of October 31, 1895, was entirely proper, binding the parties signing it, and as to them changing the terms of the contract of April 7, 1894, in several particulars, not now necessary to be set forth in detail. The agreement of April 6, 1895, by which the appellees were constituted a committee for the purposes mentioned therein, was regularly executed, and bound the parties assenting to it. The owners of the bonds and certificates so assenting had the right to adopt the course therein suggested, if in their opinion their interests would be best protected thereby. The New York committee was constituted under the agreement of April 6, 1895, which authorized those mentioned therein to act for the bondholders who signed the same, and who deposited their bonds as provided for therein. This entitled them, as such committee, to be heard on all matters affecting the bonds so represented by them, and in addition to their said fiduciary capacity, as holders of the certificates issued under the agreement of April 7, 1894,—not affected by the terms of the agreement of October 31, 1895,—the appellees were entitled to be heard by the court below, in their effort to obtain possession of the bonds referred to in said certificates. We therefore find no error in the ruling of the court below that the appellees, as a committee, were entitled to sue for the recovery of the possession of the bonds represented by certificates issued by the defendant below. The contention of the appellants in this particular is without merit.

Those who, after the agreement of April 7, 1894, purchased bonds issued by the Yadkin Valley Railroad Company—especially the appellees—were aware that the same were in default; that a foreclosure suit was pending; that the bonds had been dishonored; and therefore they took such title thereto as the transferrer had therein. *Parsons v. Jackson*, 99 U. S. 434; *Wood v. Deposit Co.*, 128 U. S. 416, 9 Sup. Ct. 131; *White v. Railroad Co.*, 21 How. 575; *Daniel*, Neg. Inst. §§ 1500, 1502, 1505; *Arents v. Com.*, 18 Grat. 773. In this case, the purchaser of the certificates representing the bonds would take them subject to the terms of the agreements under which such certificates were issued, concerning which it was his duty to be fully advised. The certificates issued under the agreement of April 7, 1894, were to be negotiable and transferable subject to the provi-

sions of that agreement. Those provisions did not prevent the recovery of the bonds described in the certificates, by such holders of the latter as should present them, but the terms of the agreement of October 31, 1895, did prevent it, so far as the bonds were concerned whose owners had signed that contract. The evidence fully discloses the fact that the appellees were aware that many of the holders of certificates issued under the agreement of April 7, 1894, had signed the subsequent contract of October 31, 1895, and also that they were fully advised as to the provisions of that agreement. The agent of the appellees states that he was directed to purchase any bonds concerning which he had not been advised that the owners had assented to the agreement mentioned. It is impossible to escape the conclusion that the appellees, or those representing them, desired to purchase as many of the series A bonds as they could obtain in the market, without their special attention being called to what one of their agents refers to as "legal knowledge" of the fact that the former owners of the same had "assented" to the terms of the contract of October 31, 1895, by subscribing their names to the same. That those who so represented the appellees intentionally refrained from ascertaining if the bonds purchased by them had assented to and were bound by the trust created by the contract of October 31, 1895, is clearly shown by the testimony. If they, in fact, were without the legal information they speak of, the ignorance was willful, and such conduct on their part involves the appellees in the bad faith that results from it, so far as the interests of the appellants in the bonds so purchased are concerned.

The Baltimore committee was lawfully in possession of the bonds in controversy, and the burden was on the parties demanding them to show that they were bona fide purchasers. This, we conclude, in the light of the evidence, the terms of the agreements, and the intention and conduct of the parties, they have failed to do.

We see no error in the action of the court below in overruling appellants' exceptions to the testimony offered by the appellees, and we do not find it necessary to dispose of the other matters suggested by the assignments of error.

The decree appealed from will be reversed, and this cause will be remanded, with instructions to enter a decree permitting the Mercantile Trust & Deposit Company of Baltimore to retain the possession of the bonds of the Cape Fear & Yadkin Valley Railroad Company, now in controversy, described in the certificates issued by said trust company, under the bondholders' agreement of April 7, 1894, numbered 458 to 467, inclusive, and 974 to 978, inclusive; and as to other matters, to dispose of the case as indicated by this opinion. Reversed.

**EISENMANN v. DELEMAR'S NEVADA GOLD-MIN. CO.**

(Circuit Court, D. Nevada. April 23, 1898.)

No. 657.

**1. REMOVAL OF CAUSES—DELAY IN FILING RECORD.**

Where a cause is removed from a state to a federal court, the mere fact that the record is not filed in the federal court until after the first day of the next term does not furnish sufficient ground for remanding the cause, it not appearing that the delay was for the purpose of delaying the trial or causing some other injury to the opposing party, and no inexcusable neglect of duty on the part of counsel being shown. The court, however, may, in its discretion, impose such conditions as may seem just and proper under the circumstances.

**2. SAME—JURISDICTION OF FEDERAL COURT.**

Where a cause is removable under the statute, upon the filing of a petition and bond for removal, the jurisdiction of the federal court attaches at once, in advance of the filing of a copy of the record, and no order of the state court for removal is necessary.

Benjamin Sanders and Torreyson & Summerfield, for plaintiff.  
Henry Rives and J. R. Judge, for defendant.

HAWLEY, District Judge (orally). On the 16th day of December, 1897, the defendant filed its petition in the state district court of Lincoln county, Nev., for the removal of this cause to the United States circuit court for this district, upon the ground of diverse citizenship. The plaintiff is a resident and citizen of Nevada. The defendant is a corporation organized under and by virtue of the laws of New Jersey. Accompanying this petition, the defendant filed a bond for the filing of the record in the circuit court on the first day of the next term thereof, which was March 21, 1898. The record was not filed in this court until March 28th,—seven days after the commencement of the term. Plaintiff moves to remand the cause, on the ground that the record thereof was not filed in this court on the first day of the March term. Undoubtedly, there may be cases where the circumstances attending the delay of filing the record would justify the court, in the exercise of its discretion, in remanding the case; as, for instance, where it clearly appears that the failure to file the record on the first day of the term was for the express purpose of procuring a delay in the trial of the case, or causing some other injury or damage to the adverse party. And it may be that inattention, ignorance, or other inexcusable neglect of duty upon the part of counsel might be shown to be of such a character as to warrant such action to be taken. But the mere fact that the record in the present case was not filed in this court on the first day of the March term does not furnish sufficient ground for remanding the cause.

Under the law, this court is not deprived of its jurisdiction by the mere failure of the removing party to have the record here on the first day of the term. The provision in the act requiring the record to be filed in this court at that time is intended to aid the United States courts in regulating the practice in removal cases so as to prevent any injustice or unnecessary delay; and, if not strictly

complied with, the court may impose such terms as may be deemed just and proper in the premises. No advantage can ever be gained by a failure to comply with the law in this respect.

The rules of this court which regulate the proceedings to be taken in removal cases from the state courts provide that:

"Whenever the papers in a case removed from a state court have not been filed in this court, at the day appointed by law, the party then, after filing the papers, shall give notice thereof to the adverse party, and such adverse party shall, after such notice, have the time allowed in this rule to enter his appearance in this court and plead, or amend his pleading." Rule 78.

See, also, Rule 79.

The object and purpose of these rules is to carry out the express terms of the statute for the advancement of justice and the prevention of delays in proceedings. *Chiatovich v. Hanchett*, 78 Fed. 193, 194.

Were it not for certain matters set forth in an affidavit filed by Henry Rives, attorney for defendant, with the apparent intention of excusing himself from any negligence for not having the record in this court on the first day of the term, the plaintiff would have no ground whatever upon which to support his motion. The attempted excuses are based upon an erroneous idea as to the requirements of the law. Affiant seems to think that the case is not properly before this court, because no order was made by the district court of Lincoln county approving and accepting the petition and bond, nor any order obtained from said court requiring the clerk thereof to forward to this court a copy of said record. The affidavit upon this point states, among other things:

"That on account of there having been no session of said district court, nor any judge thereof, in said Lincoln county, since said petition and bond were filed therein, this defendant has not been able to present either said petition or bond to said district court, or to any judge thereof, for the purpose of having said petition and bond accepted as provided by law; that he caused a certified copy of the record of said cause to be filed in this court on or about the 28th day of March, 1898, only from an abundance of caution, and not because he believes this, the circuit court of the United States, acquires thereby any jurisdiction thereof, owing to the fact that the defendant has never had an opportunity to and has never presented said petition or bond to said court for acceptance or for its approval of the sureties on said bond, or to have it make the requisite order that the clerk of said court forward to this court a copy of said record; that said record which was filed in this court on the day last above mentioned is not a complete or sufficient record, because it does not show that said district court ever accepted said petition or bond, or ever ordered said record certified to this court."

The law is now well settled (although a few stray cases may be found to the contrary) that, when a sufficient cause for removal is made in the state court, its jurisdiction ends, and no order of the state court for removal is necessary. In other words, upon the filing of the petition for removal, accompanied by a proper bond,—the suit being removable under the statute,—the jurisdiction of the federal court immediately attaches in advance of the filing of the copy of the record; and whether that court should retain jurisdiction is for it, and not for the state court, to determine.

In this case there were no objections made either to the sufficiency of the petition, or of the bond, or to the sureties on the bond.

If the case rested solely upon the facts, which are above quoted from the affidavit of counsel, this court would be called upon to determine whether such facts offered any excuse. As a general rule, ignorance of the law does not furnish any excuse for not complying with its provisions; but it is unnecessary to pass upon that question. It is sufficient to say that the affidavit does state other facts which reasonably account for the delay in the present case, viz.: That, on the day the petition and bond were filed in the state court, the clerk of the district court "was directed to at once make a certified copy of the record in said cause, and was told to hold the same in readiness, so that he could at once forward the same to this court whenever so directed; that on the 10th day of March, 1898, affiant telegraphed to said clerk to forward said certified copy of said record to T. J. Edwards, the clerk of this court at Carson City, Nevada." It is the duty of this court to guard with jealous care against any abuse of the privilege of removing causes from the state court for the mere purpose of securing a delay in the trial of the case. But it does not affirmatively appear that the failure to present the record in this court on the first day of the March term was from any desire, intent, or purpose on the part of defendant to hinder or delay the trial, or any other proceedings, in this case. The application for removal was based upon statutory grounds, and appears to have been made in good faith. And, inasmuch as the delay has not caused any injury or damage to the plaintiff,—the question being within the discretion of the court,—I am of opinion that it ought not to be held, under all the circumstances of this case, that the delay was so unreasonable or inexcusable, under the principles announced in the decided cases upon this subject, as to justify remanding the cause.

The following authorities support the views herein expressed: Removal Cases, 100 U. S. 457, 472; Railroad Co. v. Mississippi, 102 U. S. 135; Kern v. Huidekoper, 103 U. S. 485, 491; Railroad Co. v. Koontz, 104 U. S. 5, 14; Steamship Co. v. Tugman, 106 U. S. 118, 1 Sup. Ct. 58; Railway Co. v. McLean, 108 U. S. 212, 216, 2 Sup. Ct. 498; Kidder v. Featteau, 2 Fed. 616; Woolridge v. McKenna, 8 Fed. 650, 666; Hall v. Brooks, 14 Fed. 113; Rowell v. Hill, 28 Fed. 433; Wilson v. Telegraph Co., 34 Fed. 561; Lucker v. Assurance Co., 66 Fed. 161; Pierce v. Corrigan, 77 Fed. 657; Lund v. Railway Co., 78 Fed. 385; Jackson v. Insurance Co., 3 Woods, 413, Fed. Cas. No. 7,141; Dill. Rem. Causes (5th Ed.) § 157.

Motion to remand denied.

## NUGENT v. PHILADELPHIA TRACTION CO.

(Circuit Court, E. D. Pennsylvania. May 31, 1898.)

No. 31.

## COURTS—CONCURRENT JURISDICTION—CONCLUSIVENESS OF ADJUDICATION.

Where suits on the same cause of action are pending simultaneously in the state court and in the United States circuit court, a final judgment entered in the former is binding on the latter.<sup>1</sup>

This was an action by one Nugent against the Philadelphia Traction Company. Plaintiff demurs to the plea.

Ingham & Newitt, for plaintiff.

Thad. L. Vanderslice, for defendant.

BUTLER, District Judge. The plea sets out a good defense, and the demurrer must be overruled. The judgment in the common pleas is conclusive. If the suit there had terminated with the order of reversal, there might be some question about its effect. The question need not however be considered. The subsequent judgment entered was a final disposition of the rights of the parties. I am not at liberty to consider the propriety of entering that judgment; the question is not before me. The judgment is not here for review, and cannot be disregarded; it must stand until reversed. The scope and construction of the statute under which the court proceeded, and its applicability to the facts, were matters for the consideration of that court; and its judgment respecting them is conclusive. The suit here did not oust the jurisdiction which had previously attached in the common pleas. The two courts thereafter had concurrent authority to proceed and dispose of the cause of litigation (if it was not disposed of previously to the suit here), and a disposition of it by either would conclude further proceeding by the other. The situation is unlike that which arises in cases of removal, or appeal. The plaintiff was at liberty to seek final judgment in either suit, and the defendant equally at liberty to invoke the aid of the court in either, to that end. The defendant invoked and obtained such aid in the state court. If the plaintiff had obtained permission to discontinue the first suit, before commencing the second, the situation would be different. Discontinuances are treated as if at the option of the plaintiff alone, but they nevertheless rest upon an implied assent of the court, and should not be allowed in any case after verdict, where the object is to prolong the litigation. A discontinuance would not have been allowed by the court in this case after the order of reversal. It is sufficient that it was not allowed, however, and that the case remained open to further action, as the court determined.

<sup>1</sup> As to "Res Judicata as between Federal and State Courts," see note to Railroad Co. v. Morgan, 21 C. C. A. 480.

**ELKHART NAT. BANK v. NORTHWESTERN GUARANTY LOAN CO. et al.**

(Circuit Court of Appeals, Third Circuit. April 12, 1898.)

No. 17.

**1. JURISDICTION OF FEDERAL COURT—FOREIGN CORPORATION—SUIT TO ENFORCE LIABILITY OF STOCKHOLDERS.**

Unless it voluntarily appears, a foreign corporation cannot be made a party defendant to a suit in a federal court by one of its creditors, who seeks the appointment of a receiver, an accounting, and to enforce the individual liability of stockholders who are within the jurisdiction of the court.

**2. SUIT TO ENFORCE STOCKHOLDERS' LIABILITY—NECESSARY PARTIES.**

The corporation and all its stockholders are necessary parties defendant to a creditors' suit for the appointment of a receiver, an accounting, and to enforce the personal liability of stockholders, and, if the corporation cannot be brought in, the suit must be dismissed.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was a suit by the Elkhart National Bank, of Elkhart, Ind., against the Northwestern Guaranty Loan Company, of Minnesota, and Edward P. Allison and others, stockholders of said corporation, residing within the Eastern district of Pennsylvania. The purpose of the suit was to enforce the individual liability of stockholders. The bill was dismissed for want of necessary parties defendant, and plaintiff appeals.

M. H. Boutelle, for appellant.

John G. Johnson, for appellees.

Before ACHESON, Circuit Judge, and BUTLER and BRADFORD, District Judges.

BUTLER, District Judge. Can the suit be sustained? The bill avers, substantially, that the loan company was organized under the laws of Minnesota; that the individual defendants named, together with a large number of other persons not residents of Pennsylvania, hold its stock; that in May, 1893, the district court of Hennepin county, Minn., adjudged the company insolvent, in proceedings instituted under a statute of that state, and appointed a receiver, who took possession of its assets, and continues to hold them; that the plaintiff obtained a judgment against the company, since that date, which is unpaid; that the assets of the loan company do not exceed \$500,000, while its indebtedness exceeds \$3,000,000; that the individual defendants named hold 846 shares of its stock, worth at the par value \$84,000, and reside in Pennsylvania; that by the laws of Minnesota the stockholders of the company are personally liable to its creditors, each in an amount equal to the par value of the stock held by him, or so much thereof as is necessary to pay his proportion of the balance due creditors, after the assets of the company have been exhausted; that the deficiency of assets is more than \$2,500,000, and that the amount of stock liable to call for contribution, on account of this deficiency represents in money \$1,250,000. The relief sought is stated as follows:

"That said defendants may make a full disclosure, discovery and answer to all and several the matters aforesaid, and according to the best and utmost of their knowledge, remembrance, information and belief, full, true, direct and perfect answers make to all and several the allegations and charges herein contained, as though specially interrogated on each thereof, and that an account be taken, ascertaining the value of all and several the assets, properties and effects of whatsoever kind or character of said defendant Northwestern Guaranty Loan Company, applicable to the payment of its indebtedness, the stockholders of said corporation and the amount of stock held by each at the date of the adjudication of insolvency of said Northwestern Guaranty Loan Company; the amount of indebtedness of said corporation and to whom due; the amount due on plaintiff's judgment, and that a receiver herein and in this suit be appointed, and that each of said several stockholders within the jurisdiction of this court, defendants herein, be adjudged and decreed to pay to said receiver, for the equal benefit of your orator and all other creditors of said Northwestern Guaranty Loan Company, who may become parties hereto, and prove their claims herein, a sum equal in amount to the par value of the shares of stock held by each."

Thus it appears that the suit is an ordinary proceeding in equity by creditors' bill, for an account and settlement of the rights and liabilities of parties. The individual defendants served demurred, assigning among other causes the absence of essential parties, to wit, the loan company, and stockholders outside this state. The court sustained the demurrer and dismissed the bill. The loan company is improperly joined as a defendant. Under the act of congress of March 3, 1887, it is not liable to suit here. *Phosphate Co. v. Brown*, 20 C. C. A. 428, 74 Fed. 321; *Anderson v. Watt*, 138 U. S. 694, 11 Sup. Ct. 449; *Shaw v. Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935. The suggestion that the company may voluntarily come in is immaterial; it is not here, and the presumption is that it will not come. The nonresident stockholders are not joined.

We are now called upon to decide whether the company and non-resident stockholders are necessary parties to the litigation. This is the only question presented. The argument addressed to us for the plaintiff took a wide range, and was largely devoted to a consideration of the local laws of Minnesota. With these laws, however, we have no present concern, except in so far as they bear on the question of personal liability sought to be enforced. This question is not raised, nor is it open to controversy. Are the loan company and nonresident stockholders necessary parties? In determining this question we are not governed by the laws of Minnesota, but by the ordinary rules and practice of courts of equity. The practice adopted in proceedings under the local laws of that state against stockholders, or in equity proceedings there, based upon such laws, is unimportant to the inquiry before us. As before stated the suit is an ordinary one to ascertain the rights and liabilities of parties and to enforce contribution and settlement. The relations of the parties arise out of their mutual connection with the loan company—the plaintiff as a creditor, and the individual defendants as stockholders. The laws of Minnesota impose on such stockholders a personal liability equal to the par value of the stock held, and render them subject to call for payment of so much thereof as may be necessary to pay creditors, after the company's assets have been exhausted. To enable the court to make a decree it must take

an account, determine the amount of assets, the extent of indebtedness, and the names and situation of the stockholders, the number of shares held by each, and thus determine what each should contribute, if contribution is found to be necessary. And this is precisely what the bill asks to have done. Can it be done in the absence of the loan company and the nonresident stockholders? We are confident in the judgment that it cannot: First, because they are directly interested in the result, and, second, because the defendants sued cannot protect themselves and secure a just determination of their liabilities. How can the extent of the company's indebtedness be determined without its presence and assistance,—who else can defend against unjust claims? It is no answer to say that the extent of indebtedness and the value of assets will be determined by the insolvent proceeding pending in Minnesota. That proceeding will not conclude, nor affect, the stockholders, who are not parties to it. It involves only the creditors and the company. The creditors might have made the stockholders parties and thus have had their liabilities ascertained. They did not however choose to do so; and appear to have contented themselves with a decree declaring the company insolvent and appointing a receiver, who took possession of the assets, but has filed no account and made no distribution, although five years have since elapsed. Nor is it an answer to say that the plaintiff must bear the burden of proving its allegations and establishing a case that will justify the decree sought. It might be easy to prove the allegations in the absence of defense, but the question recurs, how can the stockholders defend, standing alone? And again, how can the equity of stockholders between themselves, be settled and enforced, without all being made parties? It will not do to say they have no such equities. By the terms of the statute they have. As is said in *Arthur v. Willius*, 44 Minn. 413, 46 N. W. 852:

"As to the alleged defect of parties, the rule undoubtedly is that in an action under chapter 76, when it is sought to enforce the individual liability of stockholders, all of the stockholders should be made parties, and that if they are not, it constitutes a defect of parties which may be taken advantage of by answer or demurrer. *Allen v. Walsh*, 25 Minn. 543; *Johnson v. Fischer*, 30 Minn. 173, 14 N. W. 799. \* \* \* The rule requiring all stockholders to be made parties is one peculiarly for the benefit of those stockholders who are made parties, the object being that all who are similarly liable should be brought into court and made to stand their proportionate share of the liability, and thus save their associates from being compelled to pay more than their share."

See, also, *Clarke v. Opera-House Co.* (Minn.) 59 N. W. 632.

We cannot doubt therefore that the loan company and nonresident stockholders are necessary parties. As has been well said by the courts, all persons having an interest in the subject-matter of controversy, of such a nature that a final decree cannot be made without either affecting them, or leaving the controversy in such a condition that its final determination may be inconsistent with equity and good conscience, are necessary parties. *Shields v. Barrow*, 17 How. 139; *Ribon v. Railroad Cos.*, 16 Wall. 446; *Bailey v. Inglee*, 2 Paige, 278; *Cattle Co. v. Frank*, 148 U. S. 603, 13 Sup. Ct. 691.

It is urged that the creditors will be remediless if the suit is not

sustained. If this were true the fact would afford no justification for sustaining it and thus inflicting injustice on the defendants. The plaintiff's misfortune in such a case would result from its own want of care in dealing with the loan company, in ignorance of the law. It does not seem however to be true. The plaintiff says in the brief furnished us "the laws of Minnesota impose the ordinary stockholders' liability, and prescribe an essentially equitable remedy for its enforcements." This is true; and the remedy seems to be fully adequate to secure the creditors' interests, under all circumstances. It provides for ascertaining the amount of assets, extent of indebtedness, who the stockholders are, what amount each holds, and for settling the rights and liabilities of all parties interested. This statutory remedy may not be exclusive; (we do not suggest that it is or is not), but if creditors choose to disregard it and proceed as they have done here, they are bound by the ordinary rules which govern equity practice, independently of the Minnesota statute and the administration of the remedy it provides, by the courts of that state. There may, possibly, be difficulty in applying that remedy to foreign stockholders. Do not such stockholders, however, bind themselves to it by taking stock, as fully as they do to the provision for personal liability? We need not answer this question at present. The statute seems to contemplate a proceeding against all stockholders, in corporations organized under the laws of the state, and a final decree therein. The process of the court cannot be executed outside the state; but would not foreign stockholders, after notice and opportunity to be heard, be concluded? If not so concluded it seems probable that the creditors, having exhausted this remedy, and the foreign stockholders having been afforded opportunity of hearing, might support an auxiliary bill elsewhere. Of course if the decree is conclusive the court could not enforce it against foreign stockholders, but in such case it might be enforced by auxiliary equity proceedings where the stockholders reside. It is thus made apparent, we think, that the plaintiff's present situation is not such (to say the least) as warrants the adoption of extreme measures to sustain the bill.

The decree must be affirmed, but with a slight amendment, necessary to avoid possible embarrassment hereafter. The addition of the words "without prejudice" will accomplish this; and the cause is remanded with directions to add these words to the decree dismissing the bill. Indeed, as the court said in *Cattle Co. v. Frank*, 148 U. S. 612, 13 Sup. Ct. 691, they should always be added where a bill is dismissed without disposing of the merits. The costs of the appeal must be paid by the appellant, who might have procured the amendment, by application to the circuit court.

## GRISWOLD v. HILTON.

(Circuit Court, S. D. New York. May 14, 1898.)

**1. BILL OF REVIVOR—PATENT INFRINGEMENT SUIT.**

Where, pending a bill against a corporation for injunction and accounting for infringement of a patent, the corporation is dissolved by a state court, and its assets placed in the hands of a receiver, the federal court has power to grant a bill of revivor against the receiver.

**2. SAME—SURVIVAL OF ACTIONS—PATENT INFRINGEMENT SUITS.**

A cause of action in equity for an injunction and accounting in respect to the infringement of a patent survives so that the estate of the defendant may be held liable for the profits made by the infringement.

This was a bill of revivor brought by J. Wool Griswold against William H. Hilton, receiver of the Kilmer Manufacturing Company.

W. Laird Goldsborough, for complainant.

W. H. Van Steenbergh, for defendant.

**SHIPMAN**, Circuit Judge. The complainant, J. Wool Griswold, brought in this court in the year 1895 a bill in equity against the Kilmer Manufacturing Company, a corporation of this state, which was founded upon the alleged infringement of the complainant's letters patent, and prayed for an injunction and an accounting. After the pleadings had been filed, and after the complainant had taken proofs in his *prima facie* case, which was substantially closed, the manufacturing company was dissolved by order of the supreme court of the state of New York dated June 25, 1896, and the present defendant, Hilton, was appointed permanent receiver of its assets and property. The proceeding now before the court is a bill of revivor, which prays that the action may be revived, and that Hilton, as receiver, may be made a party defendant, and that the suit may proceed to a decree in accordance with the prayer of the original bill. The receiver denies that the complainant is entitled to, or that the court has power to grant, a revivor, and insists that the original suit was an action of tort, and cannot be revived.

The question whether a federal court of equity has power to grant a bill of revivor of a suit in equity against the representative of a defendant who died pending the original suit, and before decree, the original bill praying for an injunction against the infringement of letters patent and for an accounting, is not a new question in the federal courts. The opinion of Judge Shepley in *Draper v. Hudson*, Holmes, 208, Fed. Cas. No. 4,069, was strongly adverse to the existence of such power, and subsequently the language of the supreme court in *Root v. Railway Co.*, 105 U. S. 189, was supposed to confirm this opinion. In the later cases of *Kirk v. Du Bois*, 28 Fed. 460, and *Head v. Porter*, 70 Fed. 498, the subject was carefully considered by Judges McKenna and Colt, and a contrary opinion was reached, which was based upon the better reason, and Judge McKenna's decision was followed in *Hohorst v. Howard*, 37 Fed. 97. In *Root v. Railway Co.*, *supra*, the court held that a federal court was without jurisdiction of a bill in equity which was brought after the expiration of infringed letters patent for an invention, and

merely prayed for an accounting of the profits of the infringement, and could not properly ask for an injunction, or for other equitable relief. The ground of the decision was that in that class of cases a decree for an accounting was incidental to the equitable right to an injunction, and that it appeared from the case as made by the bill that no ground of equitable jurisdiction existed. The court did not intend to decide that, where the complainant had an apparent right to an injunction, or other equitable relief, when the bill was brought, the court was ousted of jurisdiction if subsequently, by the expiration of the patent, or other reason, the power to decree an injunction was taken away. On the contrary, it was expressly said in *Clark v. Wooster*, 119 U. S. 322, 325, 7 Sup. Ct. 217, that "if the case was one for equitable relief when the suit was instituted, the mere fact that the ground for such relief expired by the expiration of the patent would not take away the jurisdiction, and preclude the court from proceeding to grant the incidental relief which belongs to cases of that sort."

The next point which is made by the defendant is that an action in equity to restrain the infringement of a patent is to restrain a tort, and to obtain damages for a tort by the accounting of profits, and does not survive. This question was considered with great care by Judge Colt in *Head v. Porter*, *supra*, who showed clearly that it does not follow, because the injury which the defendant committed is called a tort, that the estate of a deceased defendant cannot be made to repay the amount of gain which he received by reason of the wrong. A court of equity declares that the profits which the infringer has made should be delivered and passed over to the complainant, "as it would be inequitable that he [the infringer] should make a profit out of his own wrong." These profits are in equity considered to justly belong to the owner of the patent. 3 Rob. Pat. p. 3, § 1062, note 7. The fact that the tortfeasor has made gains out of his wrong which equitably belong to the complainant differentiates the remedies for this class of torts from those applicable to ordinary classes, such as against libel or slander, where the wrongdoer has simply committed an injury without benefit to himself. The principle which is applicable to these two classes is stated in *U. S. v. Daniel*, 6 How. 11, 13, as follows:

"No action will lie against an executor for a personal wrong by the testator. Com. Dig. "Administrator," B. Nor does it lie against the executor of a jailer for an escape. *Id.* Waste does not lie against an executor or administrator, nor an action upon a penal statute. So trover is said not to lie against an executor upon a trover and conversion by his testator, though a different form of action will lie for the same cause. Cowp. 371. If the person charged has secured no benefit to himself at the expense of the sufferer, the cause of action is said not to survive; but where, by means of the offense, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor."

Let there be a decree in favor of the complainant, with costs.

## FLIPPIN v. KIMBALL et al.

(Circuit Court of Appeals, Fourth Circuit. May 3, 1898.)

No. 239.

## 1. CHANCERY PRACTICE—SUITS AGAINST RECEIVER—JURY TRIAL.

Where a complainant, instead of proceeding at law, under 25 Stat. 433, against a receiver appointed by a federal court, intervenes in the receivership proceeding on the chancery side, he waives his right to trial by jury; and, if the court submits an issue of fact to a jury, the verdict and findings are merely advisory.

## 2. MASTER AND SERVANT—FELLOW SERVANT.

One of a gang of men engaged in clearing away a railway wreck is a fellow servant of the acting foreman of the gang, and cannot recover damages from the company for an injury received through the alleged negligence of such foreman.

This case comes up on appeal from the circuit court of the United States for the Eastern district of Virginia.

Upon bill filed in the court below by the Fidelity Insurance, Trust & Safe-Deposit Company et al. against the Norfolk & Western Railroad Company, and the proceedings thereunder, the appellees, F. J. Kimball and Henry Fink, had been appointed receivers. While the company was in operation under them, the appellant, one of their employes, was injured. He intervened in the main cause by petition, setting forth the facts attending his injury, with this alternative prayer for leave to file his petition, and "to sue the receivers in the circuit court of the United States for the Eastern district of Virginia, on its common-law side, and that your honors may order and direct that the said receivers do appear and defend said suit whenever the same is instituted, or that your honors will make the petitioner a party to this cause now pending, and direct an issue out of chancery to settle the facts above recited, and will award such damages unto your petitioner as he is entitled to recover hereby," and for general relief. On motion of the petitioner leave was given to him to file the petition, which was done, and the receivers were ordered to answer the same. The answer was filed as directed, and on motion of the petitioner a jury was impaneled to try the issues raised upon petition and answer. These issues grew out of the allegations of these pleadings. The petition, after stating that the petitioner was in the employment of the receivers as a yard hand, and that his duties were confined to labor upon section 22, alleges that he was ordered by the foreman of his section to go with him to the scene of a train wreck upon section 21, for the purpose of assisting in removing a certain wrecked train of the company from the track; that he had no knowledge of this kind of work, but that he obeyed orders, and went to the wreck, and worked under the direction and control of Emmett Ferrell, sometimes called Hanna, who was not a regular manager of such work, but was that day a substitute for B. C. Hanna, the regular manager; that by reason of the inexperience of Emmett Ferrell, sometimes called Hanna, and by reason of the negligence and carelessness of the officers and agents of the receivers, and also by reason of defective appliances used in and about the wreck, the derrick which was then and there used was negligently and carelessly upset, and fell over and upon the left foot of the petitioner, crushing it, and necessitating its amputation. The answer says that Emmett Ferrell (called Hanna in the petition) was not manager of the wreck car, but acting foreman wrecker. It denies that he was either ignorant or inexperienced, and avers that he was thoroughly competent for the work. It denies that there was any carelessness or negligence on the part of any of their agents or employes, or that there were any defective appliances, or that defective appliances had anything to do with the accident, which was one of those inexplicable and unavoidable accidents that are liable to occur with the best management; and that the danger, if any, was as apparent to petitioner as any one else. A jury having been impaneled,

testimony was taken before the judge who ordered the trial and a verdict was found by the jury on the issues joined for the petitioner, fixing his damages at \$13,500. The respondents entered a motion to set aside the verdict on the grounds that it was contrary to the law of the case, contrary to the evidence in the case, unsustained by the evidence, and that the damages were excessive. The court below, "being of the opinion that the negligence, if any, was that of a fellow servant with petitioner, and that the damages awarded are excessive," set aside the verdict, and dismissed the petition. The case comes here on five assignments of error. The first, second, and third assign as error the setting aside of the verdict, and not entering a decree thereon for the petitioner. The fourth assigns as error the dismissal of the petition on the ground of negligence of a fellow servant, because the persons through whose negligence the accident occurred were not fellow servants of the petitioner, because the accident was caused by defective appliances, and because the person whose negligence caused the accident was known to be unfit and improper. The fifth assigns as error the holding the damages excessive.

Edmund Waddill, Jr., and Edgar Allen, for appellant.

Robert M. Hughes, for appellee.

Before GOFF and SIMONTON, Circuit Judges, and PAUL, District Judge.

SIMONTON, Circuit Judge (after stating the facts). The appellant, Flippin, could have proceeded in an action at law against the receivers without leave of the court. 25 Stat. 433, Act 1888. Of his own accord he intervened in a suit in equity, and submitted himself to the jurisdiction of the court. By doing this he waived his right to a trial by jury, for it is a fundamental principle that the right of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction. If it be conceded or clearly shown that a case belongs to this class, the trial of questions involved in it belongs to the court itself, no matter what may be its importance or perplexity. *Barton v. Barbour*, 104 U. S. 133. This case being one of equitable jurisdiction only, the court was not bound to submit any issue of fact to a jury, and, having done so, was at liberty to disregard the verdict and findings of the jury, either by setting them, or any of them, aside, or by letting them stand, and allowing them more or less weight in its final hearing and decree according to its own view of the evidence in the cause. *Improvement Co. v. Bradbury*, 132 U. S. 509, 10 Sup. Ct. 177. So, when the court below, in accordance with the prayer of the petition, ordered an issue out of chancery to try the issues, the verdict was only advisory, and not conclusive upon the court. It had the right to disregard it, and even to render a decree contrary to it. *Watt v. Starke*, 101 U. S. 247. These authorities dispose of the assignments of error which look to the result of the verdict of the jury. It was for the court below alone to determine its force and effect, and this court cannot deny its right to disregard it.

Having set aside the verdict, the circuit court proceeded to consider the case, and dismissed the petition. This was in accordance with rules of equity procedure. A similar course was sustained by the supreme court in *Kohn v. McNulta*, 147 U. S. 238, 13 Sup. Ct. 298. It is alleged as error that the court dismissed the petition upon the ground that the negligence, if any, causing the accident, was that

of a fellow servant of the petitioner. The assignments of error proceed upon the grounds that the foreman in charge of the wreck was wholly incompetent for the performance of his duty; that the appliances used were defective, and that superior officers of the receiver were present directing, in whole or in part, the operations; and that the foreman in charge of the wreck was entirely inefficient; and that in no event was he the fellow servant of petitioner. As this is an appeal in equity, we must examine the testimony, which is spread out in full on the record. The petitioner, at the time of the accident, was 24 years of age. He had been in the employment of the receivers one month as a section hand, and had seen service before on railroads for two months and a half. The wreck occurred about two miles from Crewe, where he was employed, and he was ordered by his section master to go with other hands to the wreck to assist in clearing the track. The gang engaged in this work was made up of hands from several parts of the road, who were under the direction of Emmett Hanna or Ferrell. This man was the adopted son of Capt. B. C. Hanna, who was wrecking master, and was his chief assistant, acting for him in his absence. On this day the elder Hanna was engaged on another part of the road. The evidence shows that Emmett Ferrell had the perfect confidence of his chief; that, notwithstanding his youth (he was either 22 or 23), he had had large experience; and he enjoyed among the railroad people the reputation of a skillful and efficient man in charge of wrecks. It also appears from the evidence that on the day of the accident he was in full charge, and although there were present Sowers, the track supervisor, Wells, the road foreman of engines, Sanderson, assistant superintendent of the motive power, and perhaps other officials, none of them assumed charge of the wreck, as it was not in the line of their duties, but left everything to Ferrell. Nor does the preponderance of the evidence lead to the conclusion that the appliances used were defective. It is true that in the beginning a rope used at the derrick broke, but nothing occurred as the result of it, and, the rope having been mended, or another substituted, no further break occurred. The accident probably occurred because, the cars not having been fastened to the track, there was too much weight upon the derrick, and a lateral strain. These caused it to upset, and so the petitioner was hurt. If there was negligence in this, it was the negligence of Emmett Ferrell, who was at the time directing the operations, and himself assisting in arranging the blocks to the wheels of a car. These blocks were not regularly prepared, but were made of fence rails, parts of cross-ties, and wood picked up on the track. Evidence was offered showing that on one system of railways wrecking cars always carried blocks prepared for and suitable to this purpose. But there is no evidence of a custom or usage of this character; nor is there evidence that ordinary blocks, obtained as those were on this occasion, do not serve their purpose. It must be remembered that there is no presumption of negligence in this case against the defendant, the action being by an employé against an employer. The burden is on the petitioner. *Railroad Co. v. Barrett*, 166 U. S. 617, 17 Sup. Ct. 707. So the case really turns upon the

point, which controlled the circuit court, if the accident was the result of negligence, the negligence was that of Emmett Ferrell; and the question is, was he the fellow servant of the petitioner? He was the foreman or acting foreman of a wreck car at the wreck. His position is thus explained by Mr. Sanderson, who seems to be an intelligent witness:

"He is a boss or acting foreman at that time in charge of a gang or collection of men who may have been gathered up as has been most convenient; exactly the same relative position as a section foreman or car foreman would be with a gang working under him."

In determining this question it is unnecessary to quote the multitude of decisions bearing upon it, often contradictory, and frequently obscure. The general rule is well stated in a note to *Railroad Co. v. Smith*, 8 C. C. A. 670 (s. c. 59 Fed. 993), quoting for its support many authorities:

"It makes no difference in the application of the rule exempting the master from liability for injuries to his servants for the acts of the co-servants that the one receiving the injury is inferior in grade and subject to the orders of the one by whose negligence the injury is caused, if both are engaged in the same general business, accomplishing one and the same general purpose."

We held in *Thom v. Pittard*, 8 U. S. App. 597, 10 C. C. A. 352, and 62 Fed. 232, that section men and laborers on repair trains, being engaged in the common purpose of keeping the railroad in order, are fellow servants. In *Deavers v. Spencer*, 25 U. S. App. 411, 17 C. C. A. 215, and 70 Fed. 480, this court held that a track hand, who was injured by the alleged negligence of the track foreman while he was working on a railroad, was the fellow servant of the foreman, and could not recover against the receivers for the injuries he had suffered. In the circuit court of appeals of the Fifth circuit—*McGrath v. Railway Co.*, 23 U. S. App. 86, 9 C. C. A. 133, and 60 Fed. 555—it was held that "a railroad employé, who was one of a gang of men employed to remove a wreck, cannot recover from the company for injuries caused by the negligence of the wreck master, who has charge of the wrecking car." And in *Railway Co. v. Rogers*, 13 U. S. App. 547, 6 C. C. A. 403, and 57 Fed. 378, the same court held that the acting foreman of a gang of laborers engaged in repairing a bridge was the fellow servant, engaged in the same employment, with a member of the gang who was injured by the falling of a piece of timber during the repairs of the bridge. Besides this, the petitioner is a man matured. He was in the employment of the receivers as a section hand to work on the track. He was not placed in a position of undisclosed danger; but he was doing work whose risks were obvious. Necessarily he assumed those risks when he went on with his work, and the mere happening of the accident cannot impute negligence to his employer. *Kohn v. McNulta*, 147 U. S. 238, 13 Sup. Ct. 298. The judgment of the circuit court is affirmed.

## CHANDLER et al. v. POMEROY et al.

(Circuit Court, D. New Jersey. June 1, 1898.)

## 1. TRUSTS—WILLS.

By the terms of a will certain funds were deposited in trust, the proceeds to be paid to decedent's daughters. Other funds were also placed in trust, the proceeds to go to decedent's son, and on his death the principal to go to the said daughters. The daughters and son entered into an agreement by which the proceeds from the trust funds were to be made a "joint fund," and divided equally among the beneficiaries. *Held* that, on the death of the son, the trust as to his estate terminated, and passed to the daughters, and they were not liable, under the agreement, to his estate for the principal of such fund, nor for the interest received thereon after his death.

## 2. REFERENCE—FINDINGS—PRESUMPTIONS.

Every presumption is in favor of the correctness of a master's decision on questions of fact.

## 3. COURTS—DECREE OF ORPHANS' COURT.

An alleged surcharge in the amounts received through the distribution of a trust fund under a decision of an orphans' court of a state cannot be recovered in the United States circuit court.

## 4. REFERENCE—REPORT—EXCEPTIONS.

On exceptions to a master's report, the court will not verify each interest calculation.

## 5. TRUSTS—ACCOUNTING.

On the termination of a trust, the fund, which was to be divided among a son and two daughters, was intrusted to the son by the daughters, who received payments from him from time to time. *Held* that, in an accounting under an agreement between the daughters and another beneficiary under another trust, to make the moneys from their trusts a joint trust, to be equally divided, the daughters must account for the payments secured from the son.

## 6. DOCUMENTARY EVIDENCE.

In an action for an accounting, bank books showing drafts drawn to the order of some of the parties are inadmissible, where it is not shown that the books are original entries, or that the entries were made by the clerk producing the books, and where it is not shown that the drafts were paid.

This was a bill for an accounting by Frank R. Chandler, trustee and executor, and another against Josephine Pomeroy and another.

C. C. Bonney and William B. Guild, for complainants.

George Baldwin Newell and S. H. Grey, for defendants.

**KIRKPATRICK**, District Judge. In June, 1880, George Pomeroy died, having made his last will and testament, in which, *inter alia*, he directed his executors to pay to the New York Life Insurance & Trust Company securities to the amount of \$50,000 par value, to be held in trust for the benefit of his wife, and at her death to divide the said securities and their proceeds equally between his three younger children, Edward, Julia, and Josephine. In February, 1883, the wife of George Pomeroy died, and the securities above mentioned went into the hands of Edward. Julia and Josephine, though entitled to a share thereof, received no part of the same. George Pomeroy, in his will, also directed his executors to pay to the New York Life Insurance & Trust Company securities to the par value of \$30,000, to be by them received and held in trust to pay the interest as the same accrued to his son George P. Pomeroy during his life, and

at his death to pay and divide the said securities, or the proceeds thereof, to his three younger children, Edward, Julia, and Josephine, and the survivors of them. The issue of either of said children were to take a parent's share whenever the principal of either of said above-named funds became distributable by the death of the person entitled to the interest accruing thereon. The said will also provided that there should be deposited with the New York Life Insurance & Trust Company, from the first proceeds of the sale of real estate, the sum of \$100,000, and that the same should be invested for the benefit of the two daughters, Julia and Josephine, \$50,000 for each, and that the said fund should be held on the following trusts: (1) To collect and pay the interest on \$50,000 to Julia during her life; (2) to collect and pay the interest on \$50,000 to Josephine during her life; and at the death of either daughter to pay the \$50,000 constituting the trust fund to her issue, failing which to pay said principal sum to Edward and the other daughter, and the survivor of them, with, however, the right of representation to their children. After making the foregoing provisions, the will directs as follows:

"All the rest and residue of my property and estate, real, personal, and mixed, I give, bequeath, and devise to my three younger children, Edward, Julia, and Josephine, their heirs and assigns, forever, to be divided between the said Edward, Julia, and Josephine, share and share alike."

Edward was named as one of the executors of the will. He made no accounting of the funds of the estate, and it was charged by the sisters, Julia and Josephine, that he was speculating with them, and they therefore brought a suit against him both in his individual capacity and as such executor. In March, 1887, Edward, while this suit was pending, died, and by his last will and testament gave and devised the whole of his estate, subject to a few specific legacies, amounting to about \$6,500, to his brother George P. Pomeroy. In May of the same year (1887) Julia and Josephine and George P. (who then represented Edward's interest in the estate of his father, George Pomeroy) entered into an agreement for an adjustment and settlement of all the differences, and to terminate all suits then pending between Julia and Josephine and Edward, deceased. Under the terms of this agreement certain securities, etc., were surrendered by Julia and Josephine and George P., representing Edward's estate, to Frank R. Chandler, one of the complainants herein, by whom a distribution was made, whereby each of the parties to the agreement received a large amount of securities and cash. An accounting was rendered by Chandler, acting as the agent of all the parties, and was by him designated as the "Grand Statement," containing a detailed description of the collection and distribution of the estates of Edward and George Pomeroy, excepting therefrom the real estate and the trust funds in the New York Life Insurance & Trust Company, set apart for the benefit of Julia and Josephine and George P. Pomeroy. Three months after this distribution George P. Pomeroy died, leaving a will, in which Chandler, one of the complainants herein, became a contingent beneficiary. Differences arose between Julia and Josephine Pomeroy and Chandler in relation to the agreement, and this bill was filed for an accounting under it. Upon a final hearing at cir-

cuit the bill was dismissed for want of equity, but upon appeal to the supreme court this decree was reversed and the agreement held to be valid. In the opinion filed by Mr. Justice Brown (12 Sup. Ct. 410), the supreme court say:

"We do not find it necessary upon this appeal to put a construction upon this agreement. \* \* \* These questions will arise more properly upon settlement and enforcement of the decree. It is sufficient for the purposes of this case to hold, as we do, that the settlement was a valid one, and that the defendants should be required to account under the written agreement so to be construed."

The mandate of the supreme court was handed down to the circuit court, and in January, 1894, the parties were heard, and a decree entered construing the agreement and directing an account under it to be taken before the master in accordance with the construction so put upon it by the court. The master has taken the testimony, heard the parties, and made his report, to which both parties have filed exceptions.

In so far as the report conforms to the decree and order of reference, it must be confirmed; and the court proposes at this time to consider only such matters as were reserved by the court at the time of making such decree and order of reference, and in so doing to be guided by the general principles of construction laid down therein, and give to the agreement that interpretation heretofore placed upon it by the court. A careful reading of the agreement sued upon will show that the parties thereto had in mind three separate and distinct matters, which seemed to them to require separate and distinct and different methods of treatment. First, there was the estate of George Pomeroy; second, the estate of Edward Pomeroy; and, third, the trust funds which had been created by the will of George Pomeroy. It will appear that one of the declared objects of the agreement was to settle the estates of George Pomeroy and Edward Pomeroy in such manner that the surviving children and heirs at law of said George Pomeroy might be equally charged with, and equally share in, the estate of both said George and Edward, deceased. It was recognized by the parties that these estates of George Pomeroy and Edward Pomeroy stood upon a different footing. George P. Pomeroy, being the sole beneficiary (except as to a few legacies) under the will of his brother Edward, had absolute control over that estate. Therefore it was provided that Edward's will should be disregarded in so far as it conflicted with the terms of said agreement, while the will of George Pomeroy should be disregarded only "in so far as the same might be done" by the parties to the agreement. The agreement was made to relate to the whole of Edward Pomeroy's estate, but only to the "remainder" of the estate of George Pomeroy. By this expression of "the remainder of the estate of George Pomeroy" I understand the parties to have meant that part of the estate of George Pomeroy which was included in the eighth item of his will, which provides for the disposition of the "rest and residue" of his estate. At the time the agreement was made the will of George Pomeroy had been partially executed. Four trust funds had, as directed by the will, been set

apart and placed in the hands of trustees for specific purposes, and control over them had been lost by the heirs at law, the parties to the agreement. Three of these trust funds were then in the hands of the trustees named in the will, and the persons who would be entitled to the principal thereof unknown, while the fourth had passed into the hands of Edward, and was to be considered a part of his estate, to be equally distributed. It is apparent that these were facts known and fully recognized by the parties, not only from the words of limitation of power set out in the agreement, but also from the insertion of the special clause in the contract which provided the manner in which these trust funds which did not form any part of "the remainder of the estate of George Pomeroy" should be dealt with. The estate of George Pomeroy consisted of the trust funds which he had carved out of it, and set apart for specific purposes, in a manner which gave his children no power over its disposition, and the "rest and residue" which by the eighth clause of his will he gave to his three younger children absolutely, with full authority to do with as they liked, and which, in the agreement, was called the "remainder." "In so far as they were able," the heirs at law of George Pomeroy set aside the provisions of his will, and distributed among themselves, in the way specifically set out in the agreement, first, the "remainder," and then the trust funds, the two constituting the whole estate.

As has been said, George P. Pomeroy was entitled, during his life, to the interest or income arising from the trust fund of \$30,000 in securities held by his trustee, the New York Life Insurance & Trust Company; and in like manner Julia and Josephine were each entitled to receive the income from their \$50,000 trust fund held by the same trustee. Over the principal of said funds none of the parties had any right of disposition, because it had been made by the will of George Pomeroy, and would be carried out by the trustee appointed thereunder; but the income was their own, to do with as they pleased. Desirous of making equal distribution of the estate of George Pomeroy, so far as they were able, and recognizing their inability to dispose of the principal of the trust funds, this clause was incorporated in the agreement in relation thereto:

"It is further covenanted and agreed that in the division of the said estate the proceeds or revenue to be derived from the trust fund for the benefit of George P. Pomeroy, Julia Pomeroy Morrison, and Josephine Pomeroy, created by the will of George Pomeroy, deceased, shall be treated as a joint fund, and divided equally between the said last three parties; and, so far as lies in our power, we, the parties hereto, covenant and agree that the said trust fund shall be considered and be the joint fund of the said last three parties."

By the will of George Pomeroy the principal of the fund had been disposed of. Neither of the contracting parties had any power or control over it, and therefore they did not undertake to exercise it. They did not, because they could not, agree to whom, upon the death of either life beneficiary, the principal should go; but they did expressly agree that as to the proceeds or revenue which had been or might be derived therefrom they would share equally. In the agreement the parties recognized the limitation of their authority, and did not seek to exceed it. Upon the death of George P. Pomeroy, his

interest in the trust fund set apart for his benefit ceased, and, by the terms of the will of George Pomeroy, Julia and Josephine received from the trustee the principal of said trust fund; but they do not, on this account, occupy any different status, so far as relates to the agreement, than if it had been paid to strangers. Julia and Josephine had made an agreement with George P. Pomeroy by which they had stipulated that they would make a "joint fund," by contributing the proceeds and revenue which they derived from their several trust funds, and divide with him equally. Upon the death of George P. Pomeroy, this "joint fund," to which each was to contribute, and which was to be divided equally, ceased to exist. There was no longer a trust fund, the proceeds or revenue of which George P. Pomeroy or his heirs could contribute to the "joint fund" which was to be divided. That trust fund had been distributed according to the terms of the will of George Pomeroy, and it is immaterial where it went. It followed the terms of the will of George Pomeroy. That trust was ended. There was no longer any trust fund, or trustee, or cestui que trust. If the principal of this fund had gone to strangers, it could not for a moment be contended that Julia and Josephine could be called upon to account for the interest which others received on the same, nor to share with the heirs of George P. Pomeroy the interest on the trust funds set apart for their benefit; and I fail to see that the fact that they were themselves the residuaries of the fund under the will of George Pomeroy casts any additional obligation upon them under the agreement.

It follows, from what has been said, that the complainants' first, second, and third exceptions, relating to the principal of the trust fund which had been set apart for the benefit of George P. Pomeroy, must be overruled, and the exception of the defendants (being the fourth) relating to the charge against them of interest received on the said trust funds after the death of George P. Pomeroy sustained.

The fourth exception of the complainants relates to specific sums with which complainants allege each of said defendants Julia and Josephine should be charged. The master has heard the testimony relating to these charges, and has decided that they should not be allowed against defendants. The items were before him, and on the evidence he has made his decision. "Every presumption is in favor of the correctness of the master's decision." *Fost. Fed. Prac.* p. 563. The court finds nothing in the testimony to justify a reversal of the master's finding.

The fifth exception of the complainants is also disallowed. It appears that the estate of Edward Pomeroy was duly settled by the orphans' court of the county of Morris, in the state of New Jersey. So far as Edward's estate is concerned, the terms of the agreement have been carried out. The amount distributable was ascertained, and one-third part thereof paid to Julia, Josephine, and the representative of George P. Pomeroy. If they, or either of them, received more than they were entitled to, through error or otherwise, the "surcharge" cannot be recovered in this court upon this accounting. The orphans' court of the county of Morris would seem to be the proper tribunal to which resort should be had.

In regard to the subject-matter of the sixth of complainants' exceptions, viz. the trust fund set apart for the benefit of the mother, the master's report is silent. The master has not charged either the principal or interest on the same to the defendants. On the hearing the defendants denied having received the principal or interest. They alleged, and the master, in the absence of evidence to the contrary, found, that the principal of this fund had been taken over by Edward. Under those circumstances, it, in the absence of an accounting between Edward's representatives and the defendants, no doubt formed a part of his estate, which was divided equally between the parties.

The seventh exception of the complainants is so vague and uncertain that it is impossible for the court to determine the same. It is not framed in accordance with the rules of the court, requiring the exception to be specific, and the exceptant to specify why it is made, and the grounds upon which it rests. I notice from complainants' brief that some of the items intended to be included in the exception relate to erroneous calculations of interest. It can hardly be expected that the court should, on exceptions to a master's report, verify each and every interest calculation. Should it be necessary to refer back this report to the master for any purpose, his attention may be called to the calculations of interest alleged to be erroneous, and he be directed to rectify any mistakes.

The first and second exceptions of the defendants will be disallowed. It appears that they had intrusted the whole, or a large part, of their distributive share of the estate of their father, George Pomeroy, to the care of their brother Edward, and that he retained the whole of the principal and part of the interest. Whatever sums he paid to his sisters were on account of the amounts which he had received from their share of the estate of George Pomeroy. If Julia and Josephine had retained the securities which they received from the estate of George Pomeroy, and received the interest thereon, they must, under the agreement, have accounted for both. They are in no different position because they intrusted the fund to Edward. Whatever Edward actually paid them should be accounted for, and inasmuch as there is no denial of the actual receipt of the money, even though the receipts run to Edward individually, they were properly charged against them in the account by the master. The payment made the sisters by Edward represented, in part, at least, the income from the securities of the estate of George Pomeroy which they had placed in his hands, and they should be charged with the amounts received from Edward, acting as their agent, as if they had retained the securities and received it directly. These exceptions will be overruled.

The only remaining exception, being the eighth of complainants', and which relates to the partition of the real estate, is withdrawn, and needs no consideration. The partition has been effected in the courts of the several states in which it was located.

It only remains to notice the request that additional charges be made against the defendants for money said to have been received by them, represented by certain letters of credit which appear by

the books of King's Sons, of New York, to have been drawn to the order of Julia and Josephine, and payable by Messrs. Hottinguer & Co. of Paris. The books of the New York bankers were produced by a clerk. It was not shown that they were books of original entries, or that the entries were made by the clerk who produced the books. It was not made to appear whether the drafts had been paid, nor whether, if paid, the money was used for the benefit of the payees. The books of King's Sons were not in any way books of account of transactions between them and the parties sought to be charged by the entries. Books of account are prima facie evidence only between the parties, and to a limited extent. The general rule is that a man cannot put in evidence his own written memoranda, and the exceptions are when they are necessary to show the sale and price of personal property in the usual course of business, and for work and labor done, with the sums due for the same. *Oberg v. Breen*, 50 N. J. Law, 145, 12 Atl. 203. If it be true that the drafts were issued as shown by the entries on the books, that would not establish the fact that the moneys were received or paid as a part of the income of the estate of George Pomeroy. The master would not have been justified in presuming that more money was paid to Julia and Josephine by Edward than the proofs showed, nor will the court presume that the master has erred in his finding of fact without testimony which would clearly justify it in coming to that conclusion.

Let a decree be drawn in accordance with these views.

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THWEATT v. JONES et al.

(Circuit Court of Appeals, Eighth Circuit. May 16, 1898.)

No. 978.

**SPECIFIC PERFORMANCE.**

Plaintiff entered into negotiations to purchase land in his own name for defendant B. from defendant J., and, after plaintiff had made a payment as earnest money, B. purchased from J. direct, ignoring plaintiff. *Held*, that plaintiff could not maintain a bill for specific performance against defendants, his remedy at law against B. being adequate.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

John J. Hornor and E. C. Hornor, for appellant.

P. C. Dooley and George C. Lewis, for appellees.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

THAYER, Circuit Judge. This was a bill filed by J. G. Thweatt, the appellant, against Anna A. Jones, W. B. Williams, and A. Boyesen, the appellees, for the specific enforcement of a contract for the sale of 3,852.73 acres of land situated in Lee county, in the state of Arkansas. The suit was commenced in the circuit court for Lee county, Ark., from whence it was removed to the circuit court of the United States for the Eastern district of Arkansas, where the original

bill was amended. After the amendment, the defendants interposed a general demurrer to the complaint, which was sustained, and a decree was thereupon entered dismissing the action.

The case as made by the original and amended bills was substantially as follows:

On March 16, 1896, and for some time previous thereto, Anna A. Jones, one of the defendants, was the owner of the lands in controversy. W. B. Williams, another of the defendants, was her brother, and had been duly authorized by a power of attorney to sell and convey said lands. Williams had placed the property in the immediate charge of J. T. Robertson, who resided at Marianna, Ark., and had authorized Robertson to sell the property subject to the approval of said Williams. On March 16, 1896, the plaintiff, Thweatt, at the instance and request of the defendant Boysen, applied to Robertson to purchase the property, whereupon Robertson telegraphed Williams as follows:

"W. B. Williams, Chicago, Ill.: Have sold Geoghegan lands at three dollars per acre, third cash, balance in one and two years seven per cent., two hundred dollars forfeit up. Shall I close deal? Wire at once.

"J. T. Robertson."

In answer to this telegram, Williams replied by telegraph as follows, under date of March 17, 1896:

"J. T. Robertson: Sell tract land net to me three dollars per acre.

"W. B. Williams."

On receipt of the latter telegram, the plaintiff drew the following check, and delivered it to Robertson:

"German National Bank of Little Rock, Ark.: Pay to the order of J. T. Robertson, agent, two hundred dollars, \$200.00, earnest money on 3,852.73 acres in 3 N. 1 W. Lee County.  
J. G. Thweatt."

This check was subsequently returned to Thweatt by the bank on which it was drawn, and, when it was returned, it bore the following indorsements:

"Pay to the order of W. B. Williams. J. T. Robertson, Agent."

"For deposit. W. B. Williams."

"For collection and remittance, on account of Bank of Montreal, Chicago. Wm. Munro, Manager."

Plaintiff also advanced to Robertson the sum of \$70.63 to pay certain taxes that had been assessed against the property in controversy, which sum was retained by Robertson, and has never been refunded. Anna A. Jones, the defendant, subsequently executed a deed for the lands in favor of the plaintiff, and delivered it to Williams; but this deed was afterwards recalled and destroyed, and was not delivered to the plaintiff. Eventually, Anna A. Jones sold and conveyed the lands to her co-defendant A. Boysen and to his wife, Selma Boysen, who had full knowledge of the negotiations that had previously taken place between the plaintiff and said Anna A. Jones.

In addition to the allegations which we have stated in substance, the amended bill also contained the following averment:

"That in March, 1896, the said defendant A. Boysen having proposed to the plaintiff to purchase said land for the sum of \$4.00 per acre, said plaintiff commenced an investigation for the purpose of ascertaining at what price

he (the said plaintiff) could buy said lands, intending to buy the same if they could be obtained at a price sufficiently below \$4.00 per acre to pay to plaintiff a reasonable profit on his investment; that, having ascertained who controlled the lands and was authorized to offer the same, he proceeded to negotiate for the purchase thereof; that, before he had concluded the contract, the defendant Boysen, being anxious to obtain the land, and fearing that some one else might become the purchaser, approached the plaintiff again to know whether he was in a position to close up the trade with him, and told plaintiff that he feared the Union Land Company would obtain a contract from J. T. Robertson, of Marianna, Arkansas, who he learned was the agent for the sale of said lands, and offered to give to the plaintiff twenty cents additional to the four dollars theretofore agreed to be given him, if he (the plaintiff) would take the train that night, and go directly to Marianna, and close the same with the said Robertson; that thereupon the plaintiff did take the train, and went at once to Marianna, Arkansas, for the purpose of buying the lands through the said Robertson; and that the said Robertson wired without delay to the said Williams as follows: [Here follows the telegram first above quoted of date March 16, 1896.]"

This allegation of the amended bill, taken in connection with other averments, must be construed to mean that the plaintiff was requested to buy the land for Boysen's benefit; that he accepted such employment, and entered into the alleged negotiations with the defendant Williams for the purchase of the property, upon the understanding between himself and Boysen that he should receive for his services in buying the property from Anna A. Jones the difference between the price at which he should purchase the land and \$4.20 per acre. This arrangement between the plaintiff and Boysen was entered into, evidently, as a means of fixing the compensation for a service which the plaintiff had agreed to render for and in behalf of Boysen, who was the real purchaser of the land in controversy. The bill contains no allegation that the plaintiff ever advised Boysen of his intention to buy the land and hold it for himself as an investment; and, in the absence of such an averment, it must be presumed that the plaintiff acted in good faith towards his principal, as it was his duty to do; that he entered into the negotiations through Robertson with Williams, at Boysen's instance and request and as his agent; and that whatever right, title, or interest he may have subsequently acquired in the land by virtue of his alleged contract with Anna A. Jones, the owner of the property, he held solely for the benefit of his principal.

Viewing the case in this light, the sole question for consideration is whether the case is one which entitles the plaintiff to equitable relief; and that question, we think, should be decided in the negative. It is clear that the title to the property in controversy, which is now vested in Boysen and wife, ought not to be disturbed, because the plaintiff undertook to acquire the land for their benefit, and confessedly acted as their agent throughout the transactions which culminated, as he now claims, in the execution of a binding contract for the purchase of the property. Under these circumstances, the plaintiff is not entitled to a decree setting aside the conveyance to the Boysens, and compelling a conveyance of the property to himself, even if it be true that they did in effect revoke his authority to act in their behalf by dealing directly with the owner of the property, and making the purchase for themselves. If the plaintiff was dis-

charged by his principal without good cause, or if he accomplished the object for which he was employed, then in either event it is clear that he has an adequate remedy at law to recover the compensation which was promised him for his services, and there would seem to be no adequate ground for seeking equitable relief.

It results from these views that the general demurrer to the complaint was properly sustained, because the wrong complained of therein appears to have been committed by the defendant Boysen, and can be fully redressed by an action at law. It is not even alleged in the bill that the defendant Boysen is insolvent, and that it is necessary for that reason to set aside the conveyance to Boysen, and to vest the title to the property in the plaintiff, for the purpose of securing his claim to compensation for services rendered in negotiating the alleged purchase.

It is urged with much force by the appellees that the demurrer was properly sustained for another reason, viz. because the complaint does not show that any note or memorandum of the contract of sale was made and signed by Anna A. Jones, the party to be charged, or by her duly-authorized agent, which will satisfy the requirements of the statute of frauds as adopted in the state of Arkansas (Mansf. Dig. 1884, c. 68, § 3371), and because the complaint fails to show any such part performance of the contract of sale as will serve to take the case out of the operation of the aforesaid statute. While this point of the demurrer has received some attention, we shall express no opinion thereon, inasmuch as we feel constrained to hold that the demurrer to the bill was properly sustained, for the reasons above indicated. The appellees' motion to dismiss the appeal because the transcript was not filed in time seems to be without merit, and is accordingly overruled. The decree of the circuit court is therefore affirmed.

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FIRST NAT. BANK OF BUTTE v. WEIDENBECK et al.

(Circuit Court, D. Minnesota. May 27, 1898.)

1. CORPORATIONS—LIABILITY OF TRUSTEES—STATUTES.

Comp. St. Mont. c. 25, § 460, making trustees of domestic corporations liable for corporate debts, on the failure of the corporation to make and file an annual report, was not repealed by Const. Mont. art. 15, § 11, which provides that "no company or corporation formed under the laws of any other country, state or territory, shall have or be allowed to exercise or enjoy within this state, any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of the state."

2. ALTERATION OF INSTRUMENTS—GUARANTY.

Where, without the knowledge of the maker of a note, the payee secures a third party to guaranty it by adding his signature to it, such guaranty is an alteration which will release the maker.

3. SAME.

Where a corporate note, which had been altered by adding the signature of another without the knowledge of the maker, is again altered by removing such signature, subsequent to the fixing of the liability of the trustees of the company for its debts by a failure to publish its annual report, such subsequent alteration relieves the trustees from liability.

Young & Lightner and Hinkle & Shelton, for plaintiff.  
Cobb & Wheelwright, for defendants.

LOCHREN, District Judge. Defendants demur generally to the petition or complaint of plaintiff, which seeks to hold the defendants, trustees of the Twin City Butte Mining Company, a Montana corporation, during the year 1893, and ever since, upon an indebtedness of said corporation to the plaintiff, alleged to have arisen upon a loan of \$4,000 made by plaintiff to said corporation on or about February 15, 1893, and for which said corporation gave its note, signed also by another, to plaintiff, on January 27, 1894, bearing interest at the rate of 1 per cent. per month, on which there is alleged to be owing, August 18, 1894, the sum of \$3,221.98, still unpaid. The personal liability of the defendants for said indebtedness is claimed under a section of the same statute of Montana under which said Twin City Butte Mining Company was incorporated, which provides that every corporation organized under that statute shall annually, within 20 days from the 1st day of September, make a report which shall state the amount of the capital of such corporation, and the proportion thereof actually paid in, and the amount of existing debts; and which report shall be signed by the president and a majority of the trustees of such corporation, and be verified by the oath of its president and secretary, and be filed in the office of the clerk of the county where the business of said corporation is carried on; and that, if any company shall fail to make or file such report as above stated, all the trustees of the company shall be jointly and severally liable for the debts of the company then existing, and for all that shall be contracted before such report shall be made. Comp. St. c. 25, § 460. The complaint alleges that said Twin City Butte Mining Company did not make or file such report within 20 days from the 1st day of September, 1894, nor at any time thereafter, prior to February 3, 1895.

In the case of Fitzgerald v. Weidenbeck, 76 Fed. 695, it was, upon like allegations, held that these defendants are jointly and severally liable for the debts of the corporation existing in September, 1894, for reasons then stated, and which need not here be repeated. But in this case it is urged, upon the authority of Criswell v. Railway Co., 18 Mont. 167, 44 Pac. 525, that as the statute of Montana above referred to, making trustees personally liable for corporate debts on the failure of the corporation to make and file the required report (Comp. St. div. 5, c. 25, § 460), was a statute of the territory of Montana, applicable only to domestic corporations, it was repealed or annulled by section 11 of article 15 of the constitution of the state of Montana, which ordains:

"And no company or corporation formed under the laws of any other country, state or territory, shall have or be allowed to exercise or enjoy within this state, any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of the state."

In the case just cited it was held that section 20 of "An act to provide for the formation of railroad corporations in the territory

of Montana," passed May 7, 1873 (Laws 1873, Ex. Sess. p. 93), which extended the liability of railroad corporations formed under that act, in cases of personal injury to servants and employes, beyond the liability at common law, was annulled by the section of the constitution above quoted, for the reason that such increased liability was not also in terms extended to or made to include railroad companies of other states or countries doing business in Montana.

The reasoning seems faulty. The provision of the constitution does not purport to control or limit the power of the legislature to grant rights and privileges, or prescribe regulations or liabilities, as to domestic corporations. No regulation respecting domestic corporations can contravene that section of the constitution which relates only to foreign corporations, making the rights and privileges of domestic corporations the maximum measure of those which foreign corporations can have or be permitted to exercise. It follows that any enactment or rule of law, under which a foreign corporation could claim greater rights or privileges than those accorded to domestic corporations, must be held to be contrary to the constitution and nugatory. The decision in *Criswell v. Railway Co.*, as to the validity of the Montana statute under consideration in that case, is not sufficiently persuasive to warrant its application by analogy to other statutes of that state.

The promissory note made and delivered by the mining company to plaintiff is set forth in the complaint, as follows:

"\$4,000.

St. Paul, Minn., Jan. 27, 1894.

"Thirty days after date, without grace, for value received, we promise to pay to the order of the First National Bank of Butte, Montana, four thousand dollars, payable at the First National Bank, Butte City, Montana, with one per cent. interest per month from date until paid.

"Twin City Butte Mining Co.,

"G. J. Heinrichs, President.

"C. L. Caldwell, Secy. & Treas.

"Theo. Schweitzer."

This is the joint promissory note of the Twin City Butte Mining Company and Theodore Schweitzer, and its acceptance by plaintiff satisfied and merged in it the previous debt of the mining company to the plaintiff.

The complaint further alleges that, after the execution and delivery of this note, the plaintiff, at its own instance, and without the knowledge of the Twin City Butte Mining Company, procured one George H. Tong to guaranty said note by writing his name at the bottom of said note. Whatever might be the purpose and understanding between the plaintiff and Tong as to the effect of the signature of said note by Tong, there is no allegation that he so signed it by any mistake or inadvertence, and the legal effect of his signature at the bottom of said note must be determined by the terms of the note itself, when so signed. Tong became apparently a joint maker of the note with the Twin City Butte Mining Company and Theodore Schweitzer, and this constituted such a material alteration of the note by the plaintiff, who was the holder, or by plaintiff's direct procurement, as discharged the makers. 2 Daniel, Neg. Inst. §§ 1373, 1387; 3 Rand. Com. Paper, §§ 1742, 1744, and cases cited. As to the

contract of the original makers of the note, Tong was merely an intermeddler, changing by his signature the note which was the written evidence of the contract of the makers, and doing this at the instance of the payee and holder of the note. The sanctity of written contracts will not admit of such material changes, willfully made by a party to the contract, and the rule should be held strictly in the case of commercial paper.

The case of *Mersman v. Werges*, 112 U. S. 139, 5 Sup. Ct. 65, is not, when carefully examined, opposed to this rule, although it contains some dicta so broadly stated as to appear to trench upon it. In that case the maker of the note was a partner of one Krueger, and, to raise money for the partnership business, made the note payable in terms to Krueger, and with his wife executed a mortgage to secure the note, both being delivered to Krueger to negotiate, who, before negotiating the same, without authority, signed the name of the maker's wife to the note, and indorsed the note himself, and negotiated it to plaintiff for moneys for the use of the partnership firm. Krueger was never the owner of the note, but intrusted with it by the maker to negotiate. The alteration was therefore made by the maker's agent, and before the note was actually negotiated and delivered; and the plaintiff, to whom Krueger negotiated it, had no participation in or knowledge of the change, and the suit was in equity, to foreclose the mortgage. The decision was manifestly correct, upon the facts of the case; but it is unsafe to hold that some unguarded dicta contained in the opinion have overturned the wholesome rule in respect to the willful alteration of written instruments by parties claiming under them. See *Smith v. U. S.*, 2 Wall. 219, 232.

The liability of defendants as trustees, under the statute referred to, became fixed upon the failure of the Twin City Butte Mining Company to make and file the required report within 20 days from the 1st day of September, 1894. If at that time the alteration of the note by the signature of George H. Tong had discharged the makers, the defendants incurred no liability to plaintiff. But, if the defendants did become liable to pay that note to plaintiff, their liability, on whatever theory it might rest, was secondary to that of the principal debtor, the Twin City Butte Mining Company, and, if compelled to pay the debt, they would be entitled to be subrogated to all rights and securities in respect to the debt held by the plaintiff; and at that time the note had upon its face the signature of George H. Tong, either as maker or guarantor. As one or the other, he was liable to plaintiff for the amount of the note; and being a voluntary intermeddler, without the request or knowledge of the original makers, he would not, by merely paying the note, have any claim for reimbursement against the original makers. The complaint, however, alleges that on or about January 15, 1895, a date after the liability of the present defendants (if any) was fixed, and when defendants, if to be called on to pay the note, were interested in the preservation of its integrity as it then was, and of all securities for its payment which then existed, the plaintiff again altered and changed the note by removing from it the signature of said George

H. Tong. This, again, was spoliation (Hall's Adm'x v. McHenry, 19 Iowa, 522), which should prevent any recovery against these defendants.

The demurrer is sustained, with leave to plaintiff, if so advised, to amend on or before the rule day in July, 1898.

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EVANS v. MANSUR & TEBBETTS IMPLEMENT CO. et al.

(Circuit Court of Appeals, Fifth Circuit. April 26, 1898.)

No. 634.

1. FRAUD—EVIDENCE OF COMPLICITY.

Where one, who was doing a large business, and was considered solvent and prosperous, borrowed money at a time when his financial affairs were hopelessly involved, and only two days before executing a trust deed of all his property (alleged to have been in fraud of certain creditors), the facts that the lender was, and had been for several years, the borrower's attorney; that he already held his note, long overdue, for borrowed money; and that he drew up the deed of trust, under which he was one of the preferred creditors only two days later,—are not conclusive that the lender knew of the borrower's financial condition when he made the loan, or that he was a party to the fraud, when such knowledge and complicity are denied by both borrower and lender.

2. TRUST DEED—ATTORNEY'S FEES.

Where a conveyance of property in trust to pay certain debts does not provide for the addition of attorney's fees to such debts, such fees should not be allowed, although stipulated in the notes which are the evidence of certain of the debts.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

On December 3, 1896, one W. E. Dupree executed a deed of trust, by which he conveyed, for the benefit of his creditors, his goods, wares, merchandise, and other personal property described in the deed of trust. The deed of trust divided the creditors into three classes, A, B, and C; the total amount of claims intended to be secured being \$211,611.98. William W. Evans, the intervener herein, was included in class A; and provision was thus made for payment to him of a debt of \$3,518, represented by notes. The deed of trust provided that the trustee should sell the property conveyed, and that if the proceeds of the sale should be insufficient to pay all the creditors, a certain claim of the Provident National Bank of Waco, Tex., should first be paid by preference, and the remainder of the proceeds of sale should then be divided pro rata among the creditors composing class A, which, as already stated, included the claim of the intervener, Evans. On December 5, 1896, the Mansur & Tebbetts Implement Company and the Washburn & Moen Manufacturing Company filed their bill in the circuit court of the United States for the Northern district of Texas, at Waco, against Dupree and one J. C. Birkhead, the trustee, and the Provident National Bank; setting up, among other things, the execution of said deed of trust, and the provisions thereof; estimating the value of the property not to exceed the sum of \$65,500, and alleging that the time within which such property must be sold by Birkhead was insufficient to permit a prudent and fruitful administration of the trust conferred on him, and, on account of the character of goods conveyed to him therein, that the same could not be marketed for a fair price, for cash, within the next ensuing five months; charging a combination between Birkhead and Dupree in the making of said deed of trust; that Birkhead was a man of small means, and that by the terms of said instrument he was not required to give bond to secure the beneficiaries under the deed of trust for a faithful administration of his trust; that suits by creditors had been insti-

tuted against Dupree, and writs of attachment issued thereon, and that the same had been levied and attempted to be levied upon the goods conveyed by the instrument, not by seizure and appropriation, but by giving notice to Birkhead and his employés in charge and custody of the property; that writs of garnishment against Dupree were sued out in different courts of McLennan county, Tex., and served upon Birkhead and his employés in charge of said assets and property; and alleging that controversies have arisen and will arise between the attaching creditors and garnishing creditors of Dupree; that the assets and property conveyed in said deed of trust were not sufficient in value to pay off the expense of administering the trust and the debts in Exhibit A of said instrument, and also pay off and discharge in full the debts mentioned, including the debts of the complainants, who are in class B, and will not pay the complainants and other creditors in class B more than 50 per cent. of their claims. The bill charges combination and confederacy between Dupree and Birkhead; that, unless restrained by injunction, Dupree and Birkhead will, acting together and in concert, take from the assets and property conveyed to Birkhead by the provisions of said trust deed a sufficient sum of money to pay off and discharge the debt due by Dupree to the Provident National Bank, and will cancel and discharge said debt, and that Birkhead will turn over and deliver to Dupree the collateral securities which the Provident National Bank holds to secure the payment of this debt, unless enjoined from so doing. The bill further prays for the appointment of a receiver to take charge of, and administer under the orders of the court, the assets and property of every kind conveyed by the deed of trust, as well as the collateral securities held by the Provident National Bank, and that the property be administered and the proceeds thereof be distributed under the orders of the court, and the receiver be required to collect the collaterals, and that the same be applied, by proper orders of the court, towards the payment of the debt first due to the Provident National Bank, and that complainants' claims be established and declared a lien upon the funds in the hands of the receiver, according to the priorities that may be established therein, and that all parties entitled to participate in said fund be required to intervene therein and establish their rights thereto, and that the injunction therein prayed for might be perpetual.

On this bill of complaint, the judge of the United States circuit court appointed a receiver of all the property covered by the deed of trust, or held by the Provident National Bank as security for Evans' debt to it. The injunction prayed for was also granted. On December 6, 1896, the receiver qualified and took possession. Thereafter, W. B. Belknap & Co. filed their bill of complaint, asking for the removal of Birkhead as trustee, and for a receiver of all the properties which by a chattel mortgage of date December 3, 1896, Dupree conveyed to Birkhead as trustee; also, of the property held by the Provident National Bank as collateral security; and also of property held by one S. W. Slayden and one J. B. Baker as collateral security,—the last two not being defendants in the original bill. The court thereupon ordered that F. F. Fink, who had previously qualified as receiver in the cause in which the Mansur & Tebbetts Implement Company et al. are plaintiffs, be also appointed receiver under the bill filed by W. B. Belknap & Co. Subsequently, as shown by three orders, the court directed that all persons interested be granted leave to intervene in the proceedings, without further leave of court, subject to exception; that all interventions, without further order, be referred to a standing master of the court named in the order; and that the master report on the law and facts of all interventions.

The intervener herein, W. W. Evans, filed his petition of intervention, setting up that on March 7, 1896, the defendant W. E. Dupree made and delivered to him his promissory note for the sum of \$1,000, payable at Waco, Tex., 60 days after date, bearing interest at the rate of 10 per cent. per annum from date until paid, and providing that if default was made in the payment of said note at maturity, and it was placed in the hands of an attorney for collection, the maker thereof would pay the amount of 10 per cent. additional on the principal and interest of said note as attorney's fees. The intervener further showed that said Dupree on or about the 1st day of December, 1896, for a valuable consideration, made and delivered to the intervener his certain other promissory note for the sum of \$2,500, payable at Waco, Tex., 60 days after

the date thereof, and bearing interest at the rate of 10 per cent. per annum from date until paid, and providing for attorney's fees as in the first note. Intervener further showed that he was the legal owner and holder of said notes, and set up the fact that on or about the 3d day of December, 1896, said Dupree made his deed of trust to J. C. Birkhead, as trustee, conveying all of his stock of goods, wares, and merchandise owned by the said Dupree in McLennan, Falls, and Hill counties, Tex., as is fully set out and described in said deed of trust, and that the said Birkhead accepted as such trustee, under the provisions of the said deed of trust, and that, on the application heretofore mentioned, said Birkhead was removed by the court, and Frank F. Fink appointed as receiver in his stead, who qualified as such, and is now acting as such, under the direction of the court. Intervener further showed that in said deed of trust the aforesaid indebtedness due by said Dupree to intervener was secured in class A, as provided for in said deed of trust, and this intervener became invested with a valid and subsisting lien on all the property conveyed in said deed of trust, to secure the payment of said moneys as aforesaid. Intervener further showed that he accepted under the provision of the said deed of trust before any intervening rights of any other creditors attached, and he is now the legal holder and owner of a valid and subsisting lien conveyed in said deed of trust to secure the payment of said moneys. The prayer of his plea of intervention was that the said notes be adjudged to be secured by a valid and subsisting and prior lien on the property conveyed in said deed of trust, and the funds arising from the sale thereof by the receiver in this cause, and that said notes, interest, and attorney's fees be paid. To this petition of intervention the receiver, Frank F. Fink, filed an answer on April 5, 1897, which said answer consisted of a general demurrer and general denial.

A hearing was had before the master on intervener's petition, and testimony taken, and said standing master filed his report in court as to all the claims presented before him for trial under the court's order. Among other things connected with said report is the finding as to claim of intervener, William W. Evans: "No. 83. W. W. Evans, Intervener. This claim is duly verified as required by order of court. Exceptions of complainant overruled. This claim is for two notes,—one for the sum of \$1,000, dated May 7, 1896, due sixty days after date, bearing interest at the rate of 10 per cent. per annum, and providing for 10 per cent. attorney's fees; also, a note dated 1st of December, A. D. 1896, for \$2,500, due sixty days after date, bearing interest at same rate, and containing the same stipulations,—the two notes aggregating \$3,518. I consider the claim a just claim, to be paid as provided in class A. See testimony, pp. 199 to 212, inclusive." The master found, also, among other things, as follows: "I would state that before hearing these causes I notified the parties in interest that I would consider the deed of trust, together with the exhibits thereto attached, set forth in and accompanying complainant's bill, in evidence, in all the cases where they were proper to be used; and I further announced that any evidence heard in any case would be used and considered by me, wherein it was applicable to such other cases."

On the same day that the master's report was filed, the Mansur & Tebbetts Implement Company and the Washburn & Moen Manufacturing Company filed an answer to intervener's petition of intervention, in which they set up: First. That they excepted to the intervening petition, and said the same was insufficient in law. Second. They denied every allegation in the petition. Third. They set up, in substance, that on the 1st day of December, 1896, the defendant W. E. Dupree was insolvent and unable to meet his existing liabilities, and had not property within his possession at that time sufficient to pay his creditors, and had then a large amount of mercantile indebtedness, about to mature and maturing on said date, which said Dupree was wholly unable to pay; that said Dupree on the 1st day of December was preparing, and had for some week or 10 days prior thereto been preparing and arranging his matters, with a view of disposing of all of his property subject to execution for the purpose of placing the same beyond the reach of his creditors; that on the said 1st day of December, 1896, and long prior thereto, the intervener herein had been and was the confidential adviser and attorney of said Dupree, and was fully advised respecting the financial condition of the said W. E. Dupree, and well knew that said Dupree would within a few days strip himself of all property liable

to be taken in execution, and subject by law to the payment of Dupree's indebtedness; that in fact on said 1st day of December, 1896, the plans of the said W. E. Dupree (which were well known to the said W. W. Evans, intervener) for the purpose of disposing of said Dupree's property were well advanced towards maturity, and were certain and definite; that the tangible property of the said Dupree at that time was of such a character as might be taken in attachment or execution or other legal process, and consisted of certain stocks of goods, wares, and merchandise, specifically set forth in bills of complaint filed herein, and of certain real estate in the city of Waco, Tex.; that it was then in contemplation and known to intervener that said Dupree contemplated deeding and conveying his homestead and exempt property in the city of Waco to his wife, in consideration of love and affection; that it was also well known to intervener that the other real-estate property standing in Dupree's name on said 1st day of December, 1896, had been covered by mortgages and securities, either valid or fictitious, and that a large part of such securities were then held by intervener, or were intended by said Dupree and the intervener then to be transferred to the intervener; that while said Dupree was in the condition aforesaid, and on the eve and brink of hopeless insolvency, the said intervener advanced to the said Dupree the sum of \$2,500 in cash money, which said Dupree then and there placed in his pocket, and beyond the reach of his creditors, as the said intervener then well knew he would do, and the note for \$2,500, set forth in intervener's petition herein, was executed only in consideration for said \$2,500 so handed and delivered by intervener to the said W. E. Dupree on December 1, 1896; that on, to wit, December 4, 1896, the said Dupree, in pursuance of his former intention, known to intervener as aforesaid, did convey all and every character of tangible property which he then owned, and placed the same beyond the reach of legal process, and did not leave in his possession in this state sufficient property to pay his then existing indebtedness. They averred that the intervener's claim, as propounded, was fraudulent in law, as to the complainants, who were on December 1, 1896, existing creditors of said W. E. Dupree, and that said claim so propounded was void as to complainants. While, according to their file mark, the foregoing exceptions and answer of complainants to Evans' intervention would appear not to have been filed until the day on which the master made his report, it is contended that in point of fact they were in the hands of the master when he heard the intervention, and that his findings so show.

The intervener, Evans, excepted to the master's report, as to that part finding that the two notes aggregated the sum of \$3,518. The intervener alleged that this was a mistake on the part of the master, in this: that said two notes only aggregated the sum of \$3,500, and that both of said notes bore interest from date at the rate of 10 per cent. per annum, and provided also for 10 per cent. attorney's fees, which said notes (principal, interest, and attorney's fees) the intervener understood, from said report, were intended to be allowed by said master as the amount due. Subsequently the Mansur & Tebbetts Implement Company et al. filed exceptions to the master's report, alleging that the master has allowed the claim of the said intervener for the sum of \$3,518, whereas said master should have disallowed said claim in toto. They averred, substantially, that the testimony established the charges made in their answer to Evans' intervention, and they alleged, among other things, that it is incredible that Evans, with his means of knowledge, did not, at the time said \$2,500 was loaned to Dupree, know that Dupree was then insolvent, and intended to defraud his creditors by the withdrawal of a large part of his assets, in the shape of notes and accounts.

The court heard the exceptions filed by the intervener and the complainants, and on June 26, 1896, entered a final decree overruling complainants' objection to the master's report as to the \$1,000 note, and interest thereon, and allowing Evans' claim as to the same, and overruling the master's report as to Evans' claim on the \$2,500 note, and interest thereon, and rejecting intervener's entire claims as to attorney's fees; from which action, so far as the same was against him, the intervener, Evans, has appealed. The assignment of errors is as follows: "(1) Because the intervener in this case claimed that the note sued on, and for which he intervened in this cause, to wit, for \$2,500, dated December 1, 1896, was given him for a valuable consideration, and at said

time he had no notice, actual or constructive, that said W. E. Dupree, the maker thereof, was insolvent, or contemplated insolvency, but regarded him as perfectly solvent, and good for his debts, and the uncontradicted evidence in this cause shows such to be the case; and when said W. E. Dupree failed on the 3d day of December, 1896, he preferred said Wm. W. Evans for the amount of said debt, in the trust deed executed by him, in class A thereof, and said preference was valid, and a just charge against the property conveyed in said trust deed; and the evidence not only fails to show that the said intervener, Wm. W. Evans, had notice at the time of contracting said debt with said W. E. Dupree that the said Dupree was insolvent, or contemplated insolvency, but conclusively shows that the said Wm. W. Evans had no notice whatever of the insolvency of the said W. E. Dupree, and did not know that he owed any debts at said time; and said indebtedness to said Wm. W. Evans was a valid indebtedness, and constituted a valid charge against the funds in the hands of the receiver in this cause, and should have been so adjudged by the trial court, there being no evidence of any kind or character to authorize the court in finding that said Wm. W. Evans had either actual or constructive notice that said W. E. Dupree was insolvent or contemplated insolvency; and that the evidence showed conclusively that the said transaction was bona fide, and made in good faith by the said Wm. W. Evans, and not with the intention of assisting the said W. E. Dupree in defrauding his creditors. (2) Because the evidence in this cause showed conclusively that the claim of the said Wm. W. Evans was secured in class A in the deed of trust, which created a valid and subsisting lien, to secure payment thereof, on the funds in the hands of the receiver, and should have been so charged and established by the judgment of the court in this cause. (3) This intervener shows that no contest was made of his claim in the hearing before the master appointed to hear and determine the intervention in this cause, and the objections filed in this court were not filed before said master, and he had no opportunity to pass upon the questions raised in this cause by the complainants; and said complainants had no right to raise said questions in this cause, because they were not raised before the master, on the hearing of this intervener, and therefore were waived by complainants. (4) The court erred in refusing to allow attorney's fees provided for in the note in favor of intervener, Wm. W. Evans, secured in class A of the deed of trust, because said attorney's fees were part of the debt secured; and no exceptions were filed, either before the master in chancery, or in the court of final trial, to said attorney's fees, as such, but the exceptions filed by complainants to the claim set up by the intervener were to the whole claim of intervener, on the ground that it was fraudulent, and did not except to the attorney's fees as such."

Geo. Clark and D. C. Bolinger, for appellant.

J. M. McCormick and E. B. Parker, for appellees.

Before McCORMICK, Circuit Judge, and NEWMAN and PARLANGE, District Judges.

PARLANGE, District Judge (after stating the facts as above). The main question in this matter is whether the charges of fraud made by the complainants have been proved by them. Fraud is not presumed, and the party who alleges fraud must prove it. It is true that frequently fraud cannot be proven by direct, affirmative evidence, and that, in order to discover and expose it, resort must be had to circumstantial evidence. But, whether the evidence be direct or circumstantial, the effect of it must be to produce a reasonably clear and distinct conviction that fraud has been committed. Mere suspicions are not sufficient. While it is also true that in civil matters fraud need not be proven beyond a reasonable doubt, yet a charge of fraud should not be fastened on any one, even in a civil matter, unless the proof satisfies the mind. There are frauds

which are closely allied to criminality, and there are crimes of which fraud is an integral part. It is clear that it would be unjust to judicially declare a person to have perpetrated a fraud upon slight proof or bare presumption. With these principles before us, we have carefully examined and considered the evidence, and it has failed to produce upon our minds the effect which it had upon the learned trial judge. The charges of fraud, as we understand them to be set out in complainants' pleadings, are, substantially, that one Dupree was insolvent, and intended to commit a fraud upon his creditors; that Evans, the intervener, knew of Dupree's insolvency and fraudulent intention; and that, for the purpose of assisting Dupree to perpetrate the fraud, the intervener loaned him \$2,500, which Dupree appropriated, and which he subsequently secured in class A of the deed of trust. We note that while complainants' pleadings prefer, in effect, a charge of actual fraud, the brief of their counsel virtually concedes that there is no proof supporting such a charge, and limits itself, as we understand it, to an attempt to prove a constructive fraud; that is to say, the complainants now contend that the circumstances existing at the time when Dupree applied to the intervener for the loan of \$2,500 were such as to put the latter upon inquiry as to the financial condition and intention of Dupree. These circumstances, as stated in the brief for complainants, are substantially as follows: For several years prior to the loan of \$2,500, and at the time the same was made, the intervener was Dupree's attorney. At the time Dupree applied for the \$2,500 loan, he already owed the intervener a note for \$1,000 and interest, five months past due. The \$2,500 loan, represented by a note of Dupree payable in sixty days, was made two days before the deed of trust. When making the second loan, the intervener did not ask Dupree when he would pay the first note, nor did the intervener ask for security as to either loan, nor did he ask Dupree what his financial condition was. The deed of trust was executed on December 3, 1896. On May 28, 1896, Dupree had conveyed to one Birkhead, whom he afterwards made trustee, certain real estate, for \$1 cash, and eight notes of \$1,000 each. The deed was acknowledged before one J. T. Harrison, a notary public, whose name is signed as attesting witness to the intervener's petition in this cause. About six days before the second loan was made, Dupree conveyed other real estate to Birkhead for \$100 cash, and ten notes of \$1,000 each. About two weeks prior to the second loan, Dupree conveyed a storehouse to one Pickett, a kinsman of his, for \$100 cash, and a note of \$5,000. The deed of trust was drawn up by the intervener, as counsel for Dupree; and complainants claim that it shows upon its face evidence of careful preparation, and that it was practically impossible for the intervener to have prepared it in the interval between the moment when it is said that Dupree first informed the intervener that he wished to execute a deed of trust, and the moment when the deed of trust was actually executed. When Dupree borrowed the \$2,500, there were notes of his, aggregating a large amount, held for collection by several of the banks of the city of

Waco, and these notes were to fall due in a few days; and the intervener was the attorney for one of these banks, which held Dupree's notes for some \$6,000 or \$7,000. Dupree told the intervener at the time the second loan was made that he (Dupree) owed the Provident National Bank some money, but he did not say how much. Dupree owed sundry accounts to his butcher, and for other household and office expenses, as also debts to local capitalists. The evidence introduced before the master on the hearing before him of the present intervention consisted only of the following: On the part of the intervener, the two notes, of \$1,000 and \$2,500, respectively, were offered, as also the deed of trust, and the intervener testified in his own behalf. The complainants offered Dupree as their own witness, and one Kelly, a clerk in one of the banks of Waco. It was admitted by the intervener that the complainants could prove that the several banks in Waco held for collection, at the time the \$2,500 loan was made, some \$50,000 or \$60,000 of Dupree's commercial paper, which was to mature in a few days. We understand that the master, to whom the numerous interventions in the main cause were referred, announced at the outset of the hearings that any evidence heard by him during the hearings would be used by him in any one of the interventions, if applicable thereto. It does not appear that the parties either agreed or objected to this. In the briefs before us, reference is made to evidence which was not introduced at the hearing of the present intervention before the master, but which was introduced in other interventions in the cause. It would seem that, when fraud is charged, the party having the onus upon him should distinctly offer the proof upon which he relies to establish the fraud, so that the party charged may know what the alleged inculpatory evidence is, and may have a fair opportunity to meet it. But, however this may be in the present matter, even upon consideration of all the evidence before us, we are unable to come to the conclusion that the complainants have proven fraud on the part of the intervener. The evidence directly offered on the hearing of the present intervention is brief. The intervener testified in his own behalf, positively and distinctly stating, among other things, that he acted in good faith, with the belief that Dupree was abundantly solvent, and without any knowledge of a fraudulent intention on Dupree's part. The intervener testified that on a number of previous occasions he had loaned money to Dupree; that he would have refused to lend him the money, had he believed him to be embarrassed; that when Dupree came to him, and told him that he wanted to execute a deed of trust, he (the intervener) was as surprised as if one of the most prosperous banks in Waco had applied to him for the purpose. The intervener further said that Dupree came to him with the lists of his creditors already prepared and classified, and the intervener handed them over to his stenographer. Dupree, called by the complainants as their witness, substantiated and corroborated the intervener. Kelly, the only other witness for the complainants, testified that, while the bank in which he was employed held for collection notes of Dupree, he never informed the intervener of that fact; and, as already stated, it was admitted that other banks held Dupree's

notes for collection. The other evidence relied on by the complainants was not directly offered at the hearing, and consisted of the proof, already referred to, that Dupree owed some household, office, and other local debts, and had made certain conveyances of property, one of which antedated the deed of trust by more than six months. The complainants, with the burden of proof upon them, have failed to show knowledge by the intervener of Dupree's condition or intention. There is no proof that the intervener knew of the conveyances of property, or that notes of Dupree, to a large amount, were held by the banks. Even under the restricted charge made in the brief for complainants, there is no proof that the intervener knew of any circumstances which could fairly put him upon inquiry as to Dupree's condition or intentions. It is urged upon us by the complainants' counsel that it is incredible that Evans, as Dupree's attorney, did not know Dupree's financial condition. This would appear to mean that although both the intervener and Dupree (the latter being complainants' witness) swear that the intervener did not know of Dupree's condition, and although their testimony contains no internal indication of untruth or incorrectness, and is consistent with the other evidence in the cause, yet we should wholly disbelieve it, virtually, on the ground that it is impossible that an attorney should not know the financial condition of his client. This apparently amounts to saying that there is an irrebuttable presumption in such a case. Of course, we cannot agree to such doctrine. The banks which held Dupree's commercial paper for collection, and his other debtors, had no distrust of him. He was evidently doing a large and extensive business, and was considered a prosperous and abundantly solvent business man. But, after Dupree's insolvency was discovered (to the surprise of all who had dealt with him), the complainants seem to have assumed and taken for granted that the intervener necessarily knew Dupree's condition, merely because he was Dupree's attorney. Under all the proof before us, we find in this matter nothing more tangible than a suspicion created merely by the relation between the parties. Complainants' counsel concede in their brief that the intervener is a reputable attorney, in good standing, and they do not charge him with giving false testimony. Yet, even under the restricted contention that the intervener was put upon inquiry, it is plain, in view of the intervener's testimony, that we could not decree against him without finding his testimony false. It is conceded that the intervener paid the \$2,500 to Dupree. If we are to deal with mere speculation or possibility, we think it would be extremely improbable, to say the least, that an ordinarily intelligent attorney, even if dishonest, would engage in a fraudulent conspiracy with a client, when the only result which the attorney could hope to attain would be the return to him, by means of perjury, and after hazardous litigation, of the money which he would disburse at the outset of the conspiracy. The intervener had been Dupree's attorney for years. Doubtless he had reason to believe that he would continue to be employed by Dupree. A bare suspicion that the intervener disbursed the \$2,500 to obtain preference for the \$1,000 previously borrowed, or to be employed as attorney in executing the

deed of trust, and in the proceedings growing out of it, or to enable Dupree to obtain a settlement of his large aggregate indebtedness, of over \$200,000, would be entirely unsupported by anything fairly deducible from the evidence before us, and would be, in our opinion, utterly beyond any probability which, under the evidence, could properly be taken into account. A consideration of much weight is that the master, who heard and saw the witnesses, found unhesitatingly in favor of the intervener.

The deed of trust not having provided for attorney's fees on the note, the master was correct in disallowing such fees.

The decree herein, in so far as it rejects the claim of the intervener, Evans, on the note for \$2,500 and interest, is reversed, and the cause is remanded to the lower court, with instructions to grant a rehearing, to sustain the master's report as to said claim, and to proceed in accordance with the views herein expressed.

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PATTEN et al. v. GLATZ et al.

(Circuit Court, E. D. New York. May 24, 1898.)

**FALSE REPRESENTATIONS—SUFFICIENCY TO WARRANT SETTING ASIDE CONTRACT.**

Representations which consist partly of exaggerated expressions as to the importance and value of defendant's property, which he evidently believed to be true, partly of statements as to specific facts which were true at the time they were made, but not when the contract was entered into, and statements as to other specific facts not demonstrated by the evidence to be false, are not sufficient to warrant setting aside, as fraudulent, a written contract procured thereby.

Final hearing upon pleadings and proofs of a bill in equity to set aside a written contract between Patten and Glatz, who will be hereinafter referred to as "plaintiff" and "defendant," respectively, the other plaintiff and the other defendant being substantially nominal parties only.

John Patten, per se.

Briesen & Knauth, for defendants.

LACOMBE, Circuit Judge. It was stated upon the argument that the record was not printed because both sides were financially embarrassed and unable to pay the expense. Assuming that they should be saved all avoidable expense, it has been most unfortunate for both sides that, in taking the testimony, such extravagant and unnecessary prolixity has been indulged in. The court, upon a demurrer, most clearly indicated that the only issue cognizable in equity was whether the written contract had been obtained by false and fraudulent representations, and should for that reason be set aside. If plaintiff failed to sustain the affirmative of that issue, the bill should be dismissed. Whatever he might be entitled to recover under the agreement could be equally well recovered in an action at law. If, on the contrary, plaintiff maintained the affirmative of such issue, the court would, no doubt, direct an accounting; but, until such issue was maintained, it would be a waste of time

and money to take any evidence bearing upon such accounting. The record here presented, however, is stuffed full of irrelevant matter, contains page after page of testimony concerned with transactions long subsequent to the making of the written contract, and is at least 10 times as voluminous as it should have been.

The written contract which it is sought to set aside was entered into February 20, 1890. It recited that Patten had invented certain improvements in apparatus for concentrating soap lye in the manufacture of crude glycerine, described in an application for letters patent then in course of preparation; that, by other instruments of even date, the exclusive right to use said improvements was granted to Glatz; and that Glatz was in receipt of certain royalties from certain soap manufacturers, to whom he had theretofore granted licenses under certain patents owned or controlled by him, covering certain processes of recovering glycerine from soap lye. By the terms of the contract, Glatz, in consideration of said exclusive right to use Patten's said improvements, agreed to "use his best endeavors to persuade other soap manufacturers to also take licenses for the use of said processes (i. e. Glatz's processes), and for the use of said Patten's improvements." He further agreed to keep books of account, and to enter therein "all the gross royalties received from any and all patents and improvements which he may license others to use for the concentration of soap lye in the manufacture of crude glycerine." This language covers licenses under any patent or improvement separately, or under any two or more conjointly, on one or more of Patten's improvements, or on one or more of the "certain patents owned or controlled by" Glatz. He further agreed to pay to Patten 5 per cent. the first year, and 7½ per cent. thereafter, of "all the gross royalties and moneys enumerated" in the statements which he bound himself to make periodically to Patten. Patten and Glatz had been working together in this business since 1888, apparently without making much of a success of it. On January 10, 1889, they entered into a written contract, which recited that Patten "claims to have invented an improved evaporating apparatus and evaporating process for which he intends to apply for letters patent," etc.; that Glatz "is desirous of obtaining the exclusive right and license to use said invention as applied to the evaporation of soap lyes, glycerine, and salt." By this contract, Patten gave to Glatz an exclusive license to make, use, and vend said apparatus and process throughout the term of any letters patent that might be secured therefor, in consideration of a license fee of 50 cents per square foot of heating surface on every apparatus containing said invention. Plaintiff avers that prior to February 20, 1890, this contract of January 10, 1889, had been abrogated by consent of the parties, and a new verbal agreement made, whereby, without being himself required to contribute to any losses, Patten was to have 50 per cent. of any profit which Glatz might make out of any plant embodying either the improvements or the process, all the expenses and losses to be borne by Glatz. The burden of proving such agreement is, of course, upon the plaintiff, and his testimony tends to prove it; but in view of the positive denials of defendant, of the inherent improba-

bilities, and of the failure to produce corroborating testimony by Quimby, who, according to the plaintiff's story, was informed as to the fact, I am not satisfied by any fair preponderance of proof that such verbal contract was entered into. Therefore, until the contract of February 20, 1890, was entered into, the contract of January 10, 1889, was still in force.

Plaintiff asks to have this contract of 1890 vacated and set aside, on the ground that he was induced to enter into it by certain representations of Glatz, which were false and fraudulent, were made by Glatz with the knowledge that they were false, and with the fraudulent intent of inducing Patten to enter into the contract, which representations were material, were believed by Patten, and relied upon by him. The representations alleged in the complaint are:

"That said Glatz owned or controlled a large number of patented inventions of the controlling processes for the concentration of soap lye in the manufacture of crude glycerine, and has licensed a large number of parties who were engaged in the said work, and received from said parties large sums of royalties from said licensees, and was obliged to pay out large sums in royalties for the use of said patented processes."

The testimony of the plaintiff supports the averment that such representations were made. Indeed, although covered by the denials in the answer, defendant did not testify that he did not make such statements; nor, indeed, was he interrogated on the point. The evidence of the plaintiff, however, does not localize these representations relatively to the contract complained of. They seem to have been made at the very outset of the intercourse between the two men, and to a large extent were then true. Certainly, at that time Glatz's rights under the Domeier and Hageman process had not been assigned to W. S. Kirk & Co. Glatz did own patents, and did have licenses to use patents, and had licensed a number of parties, and was obliged to pay out sums in royalties. Whether or not the number of patents and the number of licensees and the sums paid out in royalties were "large" is difficult to determine. What looks large to one man may look small to another. It is quite likely that Glatz represented that "he had the only successful processes for properly treating soap lye," and that he "controlled the process he was using by a large number of patents." But it is equally likely that he believed his own statements (men who hold patents and exclusive licenses are apt to think they control the only method of manufacture); and he certainly acted as if he fully believed he controlled a process destined to be most profitable, at least down to the time when the Buffalo plant failed to work, and plaintiff undertook, as he says, to make it practicable. From that time plaintiff was in as good a position as the defendant to judge of the value of the process they were both experimenting with. The vague and glittering generalities with which business men commend their property are not usually sufficient to warrant the setting aside of written contracts on the ground of fraudulent misrepresentations. They are rather expressions of opinion than statements of fact.

The "representations" upon which plaintiff alleges that he relied are thus stated in his own language:

"He told me that his most valuable patents related to the chemical treatment of the soap lyes to prepare them for concentration; informed me that he had obtained control of a very large number of patents, some of which he had bought, and others he was paying royalty for their use. He said that he had about a dozen very valuable patents, that practically controlled the art of purifying the soap lyes. He represented that in obtaining control of that industry, that he had secured a very large number of patents that might prove of no great value. On two or three occasions he stated that he controlled as high as eighty patents, but he did not claim that more than about a dozen of them were valuable. He informed me that while he was all right with his chemical processes for treating the lyes preparatory for their concentration, that he had had a sad experience with the apparatuses he had used for concentrating them. \* \* \* He told me that he had the only successful processes for properly treating soap lye, and that he controlled the processes he was using by a large number of patents."

Other than as to ownership or control of a large number of patents, there is in this no specific representation of fact—such as an assertion that he was receiving some stated amount of royalties, or that his profits had aggregated some named sum—the truth or falsehood of which must have been known to the defendant. There is little doubt that, when he told Patten that he controlled the only successful process, he believed he did control such a process; and there is as little doubt that he was mistaken in such belief. But he had actually paid out money to obtain several different patents and exclusive licenses; had made contracts with third persons under which he was to receive royalties; and he was no doubt quite as much surprised as was the plaintiff when it turned out that his effort to reap some profit from his patents and exclusive licenses involved him in financial disaster.

The plaintiff further testified (and he was not contradicted) that just prior to the making of the contract of February 20, 1890—

"When the question of what percentage I would get out of the whole thing came up, he represented that on one set of his patents he was paying 30 per cent. of the profits, and that on another set he was paying 15 per cent. He made the remark that if he should pay 45 per cent. on his other patents, and 50 per cent. on mine, he would only have 5 per cent. left. He used this expression, of course, only in a way of illustration. I expressed the opinion that the royalties he was paying were very high. He asked me how much I thought he was entitled to, and in reply I complimented him on the enterprise he had shown in putting up the plants, and told him that I thought he was certainly entitled to at least one-half of all that might be made out of the enterprise. He, in reply to my remark, stated that if he should have half for himself, that that would only leave me 5 per cent. \* \* \*

There is here a specific statement, but the evidence does not demonstrate its falsity; indeed, the weight of the proof would seem to indicate that, when the expenses and losses were deducted from the gross royalties, half of the residuum would be considerably less than 5 per cent. of such gross royalties.

For these reasons, the court is constrained to decide that plaintiff has failed to show sufficient ground for setting aside the written contract. That being so, the bill must be dismissed, for this is not a partnership, and there is no ground for maintaining the bill solely for an accounting of the royalties under the contract. Plaintiff has his action at law for his 5 per cent. or  $7\frac{1}{2}$  per cent. thereof. The bill is dismissed.

## BRADDOCK v. LOUCHHEIM et al.

(Circuit Court, E. D. Pennsylvania. May 23, 1898.)

No. 89.

## PROOF OF FRAUD IN COURTS OF EQUITY—SUFFICIENCY OF EVIDENCE.

Where plaintiff's evidence, and the circumstances upon which he relies, produce only a vague misgiving as to the good faith of defendants in the transaction complained of, which misgiving the testimony on their behalf is sufficient to dispel, the evidence is insufficient to sustain a charge of fraud, even in a court of equity.

This was a bill filed by Isaac A. Braddock against Henry S., Samuel K., and Joseph Louchheim, to set aside transfers of property, and for injunction and an accounting. On final hearing.

H. A. Drake, for complainant.

N. Dubois Miller, for respondents.

DALLAS, Circuit Judge. If this bill had been demurred to for multifariousness, it would, I think, have been difficult to sustain it. With the matters to which it mainly relates, one of the defendants is not in any manner connected, and with the single subject which does affect him at least one of the other defendants is not at all concerned. But as the case has now been heard upon pleadings and proofs, I will dispose of it on the merits, without reference to this defect in the bill, or to the objection for prolixity, to which, under rule 26, it appears to be subject.

There can be no decree against Joseph Louchheim. None could be made effective, except by injunction to stay proceedings in a state court, and such an injunction cannot be issued. Rev. St. U. S. § 720. The note held by Joseph Louchheim, which it is asked that he shall be required to deliver up for cancellation, has been sued upon in a court of New Jersey; and in plaintiff's brief it is said, "If complainant is to pay this note [and this court has difficulty in restraining a suit in a state court], the amount of this note ought to be charged to [Henry S.] Louchheim." This seems to admit that the prayer of the bill is, substantially, for an injunction which congress has inhibited. The fraudulent schemes, devices, and acts charged against Henry S. Louchheim and Samuel K. Louchheim, by means whereof, as is alleged, the latter acquired and holds the legal title to certain property, real and personal, in fraud of the plaintiff, have not been proved. In arriving at this conclusion, I have not been unmindful of the rule that in courts of equity express and positive proof of fraud is not required. Fraud may be deduced from collateral facts, and can seldom be shown by direct evidence. But it is not to be presumed upon circumstances of mere suspicion, leading to no certain result; and in this case the evidence of the plaintiff, and the circumstances upon which he relies, produce, at the utmost, but a vague misgiving as to the good faith of the defendants in the transactions complained of, and this misgiving the testimony on their behalf, when fairly considered, is amply sufficient to dispel. It could serve no useful purpose to discuss the proofs in detail. They are

quite voluminous, intricate, and involved. An exhaustive review of them is not practicable, and no partial analysis of them would be satisfactory. It is not necessary to determine whether or not a technical partnership was created, as is alleged in the bill, between Henry S. Louchheim and the plaintiff. It is sufficient to say that out of their dealings with respect to the property in question there arose a liability on the part of Henry S. Louchheim to account. This he has conceded by annexing an account to his answer, which, however, the plaintiff insists is not correct, and to which, in the course of his examination as a witness, he has indicated—at least to some extent—his objections. This he did not do with certainty or precision, but it was not then requisite that he should. The account is for settlement after, and not before, decree; and a reference to a master to take and state an account will, if desired, be made; but it will, of course, be understood that the proceedings in the master's office are not to be so extended as to reopen any of the questions now decided.

As to the defendants Joseph Louchheim and Samuel K. Louchheim, the bill is dismissed, with costs. As to the defendant Henry S. Louchheim, the bill is retained for the purpose only of directing an accounting, and an order of reference to that end will be made, if applied for; but, in default of such application within 10 days, the bill will, on motion, be dismissed as to Henry S. Louchheim also.

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CENTRAL TRUST CO. OF NEW YORK v. GEORGIA PAC. RY. CO.

BROOKS et al. v. CENTRAL TRUST CO. OF NEW YORK et al.

(Circuit Court of Appeals, Fifth Circuit. April 12, 1898.)

No. 644.

CONTRACTOR'S LIEN ON RAILROAD PROPERTY—FORECLOSURE SALE SUBJECT TO LIEN—RIGHTS AND LIABILITIES OF PURCHASER.

Interveners recovered judgment for \$10,000 in a state court, and a decree that it be a lien on that part of the railroad and right of way embraced in their construction contract, which lien they seek to enforce in the foreclosure case. The decree of foreclosure in the main case provided that the purchaser should take the property upon the express condition that he would pay all claims which should be adjudged by the court to be prior in lien to the mortgage foreclosure, and this provision was preserved in the decree confirming the sale. The master found and reported, after the sale, that interveners have a lien, as established by the decree of said state court, which is superior to the lien of the mortgage foreclosure, only as to the improvements placed by them on the railroad right of way; that it would be destructive of the interests of the defendant railway company, of the interveners, and of the purchasers to allow such improvements to be detached from the premises; that they should have been and were sold together, and the reasonable value of the improvements has passed ratably into the common fund. The master's report was approved by the court. *Held* that, a lien having been found, the purchasers had no right to contest its limits or extent on the railroad property, and it was immaterial whether it covered any specific structures or other integral part of the railway. Interveners were entitled to a decree ordering the purchasers to pay the amount of their judgment, with interest thereon from the date of its recovery in the state court.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

Frank A. Critz and R. C. Beckett, for appellants.

John T. Glenn, John M. Slaton, and Benj. Z. Phillips, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

PARDEE, Circuit Judge. This is an intervention to enforce a mechanic's lien in the main case, which is a foreclosure suit brought by the Central Trust Company of New York, trustee in a mortgage of May 1, 1888, against the Georgia Pacific Railway Company. The interveners allege that on June 8, 1888, R. M. and J. M. Brooks made a written contract with the Georgia Pacific Railway Company to do all their earthwork, woodwork, clearing, and grubbing in the construction of 11 miles of its railroad, from sections 40 to 50, inclusive, in the counties of Clay, Oktibbeha, and Webster, in the state of Mississippi; that they commenced work about June 23, 1888, under this contract, and worked until November 14 or 15, 1888, doing a very large proportion of work, and furnishing a very large amount of the material for the woodwork, on said 11 miles, for a large part of which work and material the railway company failed to pay; that on November 28, 1888, said R. M. and J. M. Brooks commenced a suit in the chancery court of Oktibbeha county, Miss., to enforce their mechanic's lien under the laws of Mississippi against said railway company, and on November 15, 1893, the said court rendered a final decree in their favor for the balance due of \$10,000 and costs, amounting to \$895.88, and decreed that the same be a lien on that part of the railroad and right of way embraced in their contract, which lien, by an amended decree on April 28, 1894, was extended so as to cover all the railroad in Mississippi; that part of the railroad from Atlanta, Ga., to Columbus, Miss., had been completed and in operation several years before the date of the trust deed of May 1, 1888, but no part of the railroad from Columbus west to Johnsonville, Miss., a distance of 140 miles, had been built at that date; that the trust deed to the Central Trust Company provided for the building of this 140 miles, and also provided that the bonds secured by the trust deed could be issued on each section of 10 miles when completed, but not before; that interveners have a lien under the Mississippi statutes upon all of said railroad in Mississippi for said \$10,000, with interest at 6 per cent. from November 15, 1893, and all costs; that said lien is superior to, and entitled to priority over, any and all bonds issued under and by reason of said trust deed; and that the holders of said bonds, or any part thereof, are in no sense bona fide purchasers or holders so far as interveners are concerned. The intervention, in suitable averments, contains, besides the above, all the specifications necessary to a full understanding of the case presented. The interveners pray, among other things, that the Georgia Pacific Railway Company, the Central Trust Company, and the receivers be made parties; that the court would require said decree of the chancery court of Oktibbeha county, in the state of Mississippi,

to be paid in full, according to the directions therein contained, out of the income of said railway in the hands of said receivers, or out of the proceeds of said property; and that said decree be given priority over all said bonds, and be paid off in full, including interest and costs, before anything is paid upon said bonds or upon the interest due upon said bonds. This intervention was filed in the clerk's office June 8, 1894, and was ordered by the court to be treated as an intervention as of that date. On August 18th the Central Trust Company of New York and the Georgia Pacific Railway Company and the receivers acknowledged service of the intervention, and consented that the matter should be referred at once to a master, whereupon, on the same day, the court ordered that the intervention be referred to W. D. Ellis, special master, to hear and report upon the same.

On the 26th of March, 1894, a decree of foreclosure was entered in the main case, directing the sale of the Georgia Pacific Railway, to satisfy the principal and interest of the bonds secured by the trust deed to the Central Trust Company of May 1, 1888, and therein, among other things, it was provided as follows:

"The purchaser or purchasers at said sale shall, as part of the consideration for such sale, take the property purchased upon the express condition that he or they, or his or their assigns, approved by the court, will, notwithstanding, pay off and satisfy any and all claims filed in this case, but only when the court shall allow such claims, and adjudge the same to be prior in lien to the mortgage foreclosed in this suit, in accordance with the order or orders of the court allowing such claims, and adjudging with respect thereto; but this provision shall not be in any manner applicable to the rights and claims of the complainant, as trustee under the said first mortgage of May 6, 1882, or of the trustee under said mortgage of October 1, 1883, or of the complainant, as trustee, under either of the equipment sinking fund mortgages; and the purchaser or purchasers or their approved assigns shall be entitled to appeal from any and all orders or decrees of the court in this respect to such claims, or any of them, and shall have all the rights in this respect to such appeals which the complainant Central Trust Company of New York would have in case such appeals had been taken by it."

The sale under the decree occurred on August 18, 1894; and the solicitors for the interveners appeared at the sale, and gave a written notice to bidders of the claims of the interveners. The mortgaged property was adjudicated to Charles H. Costa and Anton H. Thomas, purchasing committee for the Southern Railway Company, for the sum of \$500,000, and the decree of confirmation recites as follows:

"And it appearing by the report of the special master that such purchasers have fully complied with the directions of said decree as to the sale of the said property, and that such purchasers were the highest and best bidders for such railroad property and franchises, and that the same was struck off to them for the sum of five hundred thousand dollars (\$500,000), subject, however, as recited in said decree, to the mortgages, receivers' debts, and other preferential liens and claims, and to all and singular the terms and conditions in said decree set forth, and that such purchasers have made the payment thus far obligatory upon them, and it being shown to the satisfaction of the court that the recitals in the report of the special master are true, and no cause being shown against such report; \* \* \* and the court further reserves full power from time to time to enter orders binding upon the said Southern Railway Company and the said Southern Railway Company in Mississippi, as such purchasers under its decree, requiring them to pay into the registry of this court all such sums as have been, or may be, ordered by

this court for the payment of any and all receivers' debts or claims adjudged, or to be adjudged, by it as prior in lien or equity to the mortgage foreclosed in this cause, or entitled to preference in payment out of the proceeds of sale prior to the bonds secured by the said mortgage of the Georgia Pacific Railway Company."

On November 3, 1894, the following written agreement was filed in the case, and submitted to the master:

"We hereby withdraw the demurrer heretofore filed to the intervening petition of said J. M. Brooks, surviving partner, et al., in the above-stated case, and admit the statements of fact contained in said petition to be true. We agree that Exhibit A to said petition is a true copy of the contract between the Georgia Pacific Railway Company and R. M. and J. M. Brooks, under which the work was done for which allowance is claimed in said intervention; that Exhibit B to said petition is a true copy of the original decree; and Exhibit C to said petition is a true copy of the amendment of said decree in the case of R. M. & J. M. Brooks et al. vs. the Georgia Pacific Railway Company, in the chancery court of Oktibbeha county, Mississippi, as stated in said petition; and we further agree that said Exhibits A, B, and C may be used as evidence in the trial of all issues presented by said petition without further authentication or proof of said exhibits. It is further admitted that on the 18th day of August, 1894, Frank A. Critz, as solicitor of said interveners, in the city of Atlanta, Ga., at the time and place appointed for the sale of the Georgia Pacific Railway in the decree in the above-stated case, and at the sale of said railway under said decree, before any bid was made by the purchaser at said sale, read in the presence and in the hearing of said purchaser notice of the claim of said interveners, and of said intervention, as shown by said written notice filed in this case on said 18th day of August, 1894; and it is agreed that said written notice, with the indorsements thereon, may be used as evidence in the trial and disposition of said intervention. The Mississippi statutes referred to in said petition need not be pleaded more fully. The above agreement, however, is made subject to the right, which is hereby expressly reserved, to object to any and all matter offered as evidence which may not be material and relevant to this issue in this intervention.

"Signed this November 3rd, 1894.

James Weatherly,

"Sol'r for Ga. Pac. Railway, and Southern Rwy. Co., Purchaser.

"Henry Crawford,

"Sol'r for Same Parties."

After hearing the parties, the special master, on the 7th of May, 1896, filed a very exhaustive and well-considered report, concluding as follows:

"The special master finds and reports as follows: (1) That the interveners, as contractors, have a lien set up and established by the decree set forth in the record of this case, which is superior to the lien of the bondholders only as to the improvements and erections placed by them on the railroad right of way. (2) That the lien of the bondholders is superior to the lien of the interveners upon the realty composing the right of way and substructure of the railroad, as distinguished from anything like depots, bridges, cross-ties, culverts, or rockwork which the interveners may have furnished and erected. (3) The proof does not show what work, improvements, or erections the interveners did on the line of road covered by their contract with sufficient detail or certainty or value to authorize any finding in their favor for any particular amount, and therefore the special master is forced to find against their claim as presented and proven in the proceedings in this case. (4) The special master finds that it would be destructive of the interests of the defendant railway company, and of the interveners, and of the purchasers, to allow the improvements, whatever they were, erected by the interveners, to be detached or moved away from the premises; and therefore they should have been and were sold together, and whatever was the reasonable value of such improvements and erections has passed ratably into the common fund. (5) The railway east of Columbus, Miss., was not subject to the lien

of the interveners, and therefore should not be taken into account in estimating the pro rata value of the improvements and erections made by the interveners."

The scope and effect of this report do not seem to have been fully understood by the counsel for the interveners, for they filed elaborate exceptions to it, and thereafter sought to amend their intervention, presenting new matter and new questions, all of which resulted in a dismissal of their intervention (83 Fed. 386), from which they appeal to this court.

The assignment of errors is very elaborate, and presents many questions which have been very learnedly and elaborately argued in this court; but, under the view which we take of the case, many of these questions need not be considered. The master finds and reports that the interveners have a lien, as established by the decree of the chancery court of Oktibbeha county, which is superior to the lien of the bondholders as to the improvements and erections placed by them on the railroad right of way, and that it would be destructive of the interests of the defendant railway company and of the interveners and of the purchasers to allow the improvements, whatever they were, erected by the interveners, to be detached or moved away from the premises. Therefore they should have been, and were, sold together, and whatever was the reasonable value of such improvements and erections has passed ratably into the common fund. By the decree of foreclosure in the main case it is provided that the purchaser shall, as a part of the consideration for the sale, take the property purchased upon the express condition that he will pay off and satisfy all claims filed in court which should be adjudged by the court to be prior in lien to the mortgage foreclosed,—that is to say, prior in lien on the railway property to the rights of the bondholders under the mortgage of May 1, 1888; and this provision is substantially preserved in the decree confirming the sale. The report of the special master, finding the lien in favor of the interveners, appears to have been approved by the judge of the circuit court; and, for the elaborate and convincing reasons given by the special master, we think it was correct. And the same may be said of the fourth finding of the special master, to the effect that the improvements made by interveners should not have been detached or moved away, and that it was necessary and proper to sell the whole property together, the value of the improvements and erections passing to the common fund. This being the case, we are of opinion that, under the terms of the decrees of foreclosure and confirmation, the purchasers have no right, a lien being found, to contest the limits or extent of the lien on the railway property. Under the terms of sale, the interveners were deprived of all power to protect themselves by purchasing the property on which they had a lien, and they had a right to rely upon the provisions made for their protection in the decrees of the court, under which whatever amount should be adjudged in their favor as a lien the purchasers agreed to pay as a part of the consideration; and we conclude that it is now wholly immaterial whether the lien adjudged in favor of the interveners on a portion of the railway property covers specific superstructure, wood-

work, right of way, or any other integral part of the railway. This view of the case is fully supported by the principles declared and followed by the supreme court in *Swann v. Wright's Ex'rs*, 110 U. S. 590, 599, 4 Sup. Ct. 235, *Trust Co. v. Newman*, 127 U. S. 649, 659, 8 Sup. Ct. 1364, and *Compton v. Jesup*, 167 U. S. 1, 33, 17 Sup. Ct. 795, et seq., and disposes of this appeal.

The decree of the circuit court is reversed, and this cause is remanded, with instructions to enter a decree in favor of the interveners, J. M. Brooks et al., for the amount found by the master to be due upon their claim, to wit, the sum of \$10,000, with interest thereon from November 15, 1893, until paid, at the rate of 6 per centum per annum, and the further sum of \$895.88, costs of suit in the state court of Mississippi, and ordering the purchasers of the railway property to pay said amounts, together with the costs of the cause.

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BOWERS v. VON SCHMIDT.

(Circuit Court, N. D. California. April 21, 1898.)

No. 10,244.

**VIOLATION OF INJUNCTION—CONTEMPT—PATENT INFRINGEMENT SUIT.**

One selling a machine contrary to the terms of an injunction in a patent infringement suit is guilty of a technical contempt, though he in good faith supposes himself authorized to make the sale under an arrangement made subsequent to the decree, and to which complainant is a party. Before making the sale, it is his duty to bring such arrangement to the notice of the court, and procure a modification of the injunction; but the arrangement, and the defendant's good faith, will be considered in mitigation of the punishment.

This was a proceeding brought in the above-entitled case against A. W. Von Schmidt to punish him for an alleged contempt in violating an injunction.

John H. Miller, for complainant.

Wheaton & Kalloch, for respondent.

MORROW, Circuit Judge (orally). The interlocutory decree of this court, dated July 23, 1894, ordered, adjudged, and decreed:

"That the said Alexey W. Von Schmidt, his agents, servants, workmen, attorneys, and employés, be, and they are hereby, perpetually enjoined and restrained from making, using, or selling any dredging machine, appliance, or apparatus containing the inventions claimed, covered, and patented in and by claims 10, 16, 25, 53, 54, and 59, or any or either of them, of patent No. 318,859, dated May 26, 1885, and also from making, using, or selling any dredging machine, apparatus, or appliance containing the inventions claimed, covered, and protected by claims 13, 17, and 18, or any or either of them, of letters patent No. 355,251, dated December 28, 1886." 63 Fed. 572, affirmed by 25 C. C. A. 323, 80 Fed. 121.

In an affidavit filed by Mr. Bowers, it is alleged:

That the respondent, A. W. Von Schmidt, had full knowledge of this decree, and of the terms thereof, and "that the dredging machine involved in this case, and claimed to be an infringement, was a certain machine known as the 'Von Schmidt Dredger,' sometimes called the 'Oakland,' and at the time of the settlement with the McNee Bros., hereinafter mentioned, said

defendant owned a one-half interest in said machine, and the McNee Bros. owned the other half; that after the entry of said decree the said McNee Bros. settled with affiant for the infringement of which they had been guilty by the use in conjunction with A. W. Von Schmidt of the dredger Oakland, and by the use of similar machines in the Eastern states, and outside of California; that in and by the settlement, and as a part thereof, and in addition to the money and other property paid by the McNees to affiant for said infringement, they transferred and conveyed to affiant their one-half interest in the said dredger Oakland, and thereafter this affiant owned a one-half interest therein, and the defendant, Von Schmidt, owned the other half interest; that a few days ago affiant was informed by John McMullen, who is president of the San Francisco Bridge Company, a corporation engaged in the dredging business, that the said Von Schmidt has sold to the San Francisco Bridge Company his (the said Von Schmidt's) one-half interest in said dredger Oakland, and that the San Francisco Bridge Company has purchased of and from the said Von Schmidt the said one-half interest in said dredger Oakland, and has paid to the said Von Schmidt a large sum of money, to wit, about thirteen thousand dollars, of which sum they have paid the said Von Schmidt, for his own use, ten thousand dollars, and have paid the remainder to various persons in liquidation of claims against said dredger Oakland; that affiant was very much astonished at the information, inasmuch as the decree in this case enjoined and prohibited the said Von Schmidt from selling the said dredging machine, or his interest therein; that affiant never gave the said Von Schmidt permission to sell the said machine, or his interest therein, and the said Von Schmidt sold his said interest in said machine without the knowledge or consent of affiant; that the said dredger Oakland contains and embodies the inventions claimed, covered, and patented in and by the several claims of the two patents hereinabove referred to."

In reply to the order to show cause, and the affidavit of Bowers, Von Schmidt filed this affidavit:

"A. W. Von Schmidt, being duly sworn, deposes and says that he is the respondent in the above-entitled cause; that he has read the affidavits of A. B. Bowers and J. H. Miller in this proceeding. Affiant admits that on or about the 8th day of September, 1897, he did sell to the San Francisco Bridge Company an undivided one-half interest in and to the Von Schmidt dredge."

Mr. Von Schmidt then proceeds to relate the circumstances of the transaction which is charged as a violation of the injunction, showing that there had been negotiations concerning the use of the dredge Oakland by the San Francisco Bridge Company, and that, as the result of those negotiations, he deemed himself permitted to sell his interest in this dredge to the bridge company. But all of the matter contained in this affidavit, after the statement that he admits having sold his interest in the dredge, is, in my judgment, irrelevant and immaterial in determining whether or not Von Schmidt has violated the order of this court. The order of this court was that he should not make, use, or sell any dredging machine, apparatus, or appliance containing the invention claimed. He did sell his half interest in that dredge. That constituted a violation of the order; and all matters that are set up in the affidavits, and in this affidavit in particular, showing the circumstances of the transaction, and that they were negotiations in which Mr. Bowers was involved as a part owner of the dredge,—in my judgment,—only go in mitigation of the punishment which should be inflicted by the court in this case. When the matter was presented to the court upon argument, it occurred to me that Mr. Bowers had, by his transactions with the bridge company, in giving them permission to use his half interest in

that dredge, and by agreeing with the bridge company that they might procure the use of the other half of the dredge owned by Von Schmidt, gone so far that there was no contempt of court on the part of Von Schmidt in the sale of his half of the dredge. But, upon further examination of the question, I am convinced that Von Schmidt cannot be excused by the matter set up in his defense, and that all these transactions with which Bowers was connected, and that between Von Schmidt and the bridge company, to which it is alleged Bowers consented, can only be considered, as I said before, in mitigation of the punishment to be inflicted upon the respondent. If, under the circumstances, Von Schmidt should have been allowed to dispose of his half of the dredge, then the order of the court should have been so modified. I find that I am justified in this view of the law by the rule that was adopted in the case of *Williamson v. Carnan*, 1 Gill & J. 184, and followed in this court in the case of *Muller v. Henry*, 5 Sawy. 464, Fed. Cas. No. 9,916. In the first-named case, the levy court of Baltimore had authority, by proceedings for that purpose, to close a public road which ran through the lands of the defendant in the injunction suit. The defendant was about to close the road, and an injunction was obtained from the Baltimore county court, sitting in equity, restraining him from so doing. A writ of certiorari had in the meantime been issued by the Baltimore county court, and the proceedings of the levy court reviewed. The action of the levy court in respect to the road was determined to be invalid, for the want of some formality. The parties thereupon applied to the proper tribunal by petition in the regular course, and obtained another order for the closing of the road. All the parties, including the complainants in the injunction suit, had notice of the application, and the latter attended, and opposed the granting of the order. In pursuance of this authority, supposing that it would protect him from the operations of the injunction, the party enjoined again proceeded to close the road. In a showing, upon attachment, why he should not be punished for contempt in thus disobeying the order of the court, the defendant alleged:

"That the said order [referring to the last order obtained for closing the road] being final and conclusive, without appeal, and no writ of certiorari having been applied for, and the said road so authorized to be closed passing transversely through the farm of the petitioner, and the complainants by the altering of the said road having another and a better and shorter road, and the petitioner being greatly aggrieved by the passing of the said road through his lands, and conceiving himself fully authorized to do so by the said order, he, by virtue of said order, and not, as he avers, in contempt of the court, did proceed to close the said road, and that he shut up or closed the same without force, and before any attachment had issued against him; that, since he had closed the road, he had removed his inner fences, and planted an orchard on either side of, and through the bed of, the said road; and that the removal of his fences will be attended with great and irreparable damage to him."

In commenting upon this explanation of defendant's conduct, the chancellor says:

"It appears, then, by the defendant's petitions of the 3d of January and 22d of April, that he had conceived himself fully and legally authorized to close this highway, by virtue of the order of the levy court, notwithstanding the injunction of this court, which had positively prohibited him from closing or

obstructing it in any way whatever; or, in other words, that the final order he had obtained had virtually, yet effectually and completely, dissolved and annulled the injunction heretofore granted by this court. \* \* \* By the second petition, this court is, in effect, gravely asked to make a most extraordinary transit over all its own proceedings, into those of the levy court; to approve and act upon them, and totally disregard its own. For an order of this court, as prayed, that the road should be suffered to remain closed, and that the defendant should be discharged from the attachment, most manifestly could stand upon no other foundation than a complete affirmance of the proceedings of the levy court, and an entire disregard of all the previous proceedings of this court. I never before heard of such an indirect mode of obtaining a virtual dissolution of an injunction, by bringing to bear upon it a judicial decision of another and totally different tribunal, not exercising or having any appellate jurisdiction over the court whence the injunction issued. An injunction emanating from a competent authority is a command of the law; and the citizen is, as I have always understood, bound to yield implicit obedience until the restriction has been removed by the authority which imposed it. But, if the position assumed by this defendant be correct, then, instead of obeying or moving to dissolve an injunction, a party may avail himself of various modes of getting around or under or over it, without being chargeable with the slightest contempt of the law. The judgment of this court, continuing the injunction, was founded upon the proof or admission of certain facts, after hearing both parties, as to the very point whether it ought to be continued or not. But, if it could be indirectly and virtually dissolved by a judgment of the levy court, upon a different case, then it might be evaded by one party without hearing the opposite party as to the former or any new facts or equity which he might be able to show as a most solid ground for its further continuance. The court commanding obedience to an injunction might thus be brought into collision with another court alleged to have sanctioned, or, as this defendant has said, ratified, the acts in disobedience of it, in which conflict of jurisdiction the rights of persons and of property, it is evident, must suffer, while he who produced the scuffle might escape with the spoil. Surely, such principles, which, to say the least of them, lead so directly to disorder and confusion, ought not to be tolerated for a moment."

In *Muller v. Henry*, 5 Sawy. 464, Fed. Cas. No. 9,916, the late Judge Sawyer followed the rule established in the case just cited, where the subject of controversy related to the filling up of streets in Napa City, in this state, in such a manner as to dam up water coming from high ground beyond, upon complainant's lot, creating a nuisance. Upon the hearing of the application for a temporary injunction upon the bill, answer, and affidavits, the court held that the proceedings of the board of trustees under which the defendants were doing the work were void, by reason of not having been taken in accordance with the city charter. After the issuing of the injunction, the board of trustees passed another ordinance, authorizing the doing of the same work, which for the purpose of the decision of the court, was assumed to be in accordance with the requirements of the charter. Under the authority of these proceedings, without bringing them to the attention of the court, and while the injunction was still in force, the defendants again commenced to fill in the streets as they were doing before they were stopped by the injunction. Upon the proceeding instituted by the complainant to punish the defendants for contempt in violating the injunction, they set up the said subsequent proceedings of the board of trustees as a justification. The court held that they were guilty of contempt, and that a party can only be relieved from the operation of an injunction abso-

lutely prohibiting the performance of a specific act by the court granting the injunction. Apply this rule to the present case, we have here no order of another court having jurisdiction, we will say, over the sale of the property, but what is claimed to be the implied consent of the patentee. This is clearly not sufficient, under the circumstances of this case. If Von Schmidt believed he had the consent of the patentee to make the sale, he should have come to this court, and obtained an order modifying the interlocutory decree in that particular. There is therefore nothing for this court to do but to adjudge that Von Schmidt is guilty of contempt of court. The only question remaining is as to the punishment.

Mr. Kalloch: Will counsel be heard upon the matter of mitigation of punishment?

The Court: I think I fully understand all of the facts, so far as that is concerned. I am about to read the matter that I think is pertinent upon that question.

Mr. Miller: If your honor please, I simply desire to say, on behalf of the complainant in the case, that we have no desire that Col. Von Schmidt shall be punished in any excessive amount. We are willing that the court should impose a minimum penalty.

The Court: I desire to read the matter which I deem to be in mitigation of the punishment to be inflicted upon Col. Von Schmidt.

It seems that Bowers entered into this contract with the bridge company:

"Memorandum of agreement between San Francisco Bridge Company, a corporation, party of the first part, and Bowers California Dredging Company, a corporation, party of the second part, both created under the laws of California, made this 21st day of July, 1897: Whereas, the party of the first part is engaged in the dredging business; and whereas, the party of the second part is the owner of the right to use in the state of California certain patents granted to A. B. Bowers, A. W. Von Schmidt, and others, and is also owner of a one-half ( $\frac{1}{2}$ ) interest in a certain dredging machine, and its appurtenances, known as the 'Von Schmidt Dredger,' the 'Oakland'; and whereas, the United States government has appropriated the sum of \$170,000 for dredging at Mare Island, California; and whereas, the party of the first part intends to bid for the contract for said dredging [this contract is by the Bowers California Dredging Company, but Bowers had transferred his interest to that company, and was president of the company]: Now, therefore, if said party of the first part secures said contract, either by public letting or private contract, or if the dredging machine of the party of the first part is used or employed on said work by itself, or by any other party, the party of the first part agrees to pay to the party of the second part the sum of seven per cent. on the total gross price the government pays for said work on said contract; said payment to be made monthly, within five days of the time the party of the first part receives its monthly estimates on account of said contract. In consideration of said agreement to pay the amount, and in the manner, above specified, and the further consideration to it in hand paid, the receipt of which is hereby acknowledged, the party of the second part hereby grants an exclusive license to the party of the first part to use the aforementioned patents, or any or all of them, on said dredging, and further agrees to give it the free use on said contract of its one-half interest in the certain Von Schmidt dredging machine hereinbefore mentioned, until the completion of said contract, provided the other half can be obtained from A. W. Von Schmidt; it being understood that the party of the first part, if it desires to use said Von Schmidt machine, must, at its own expense, arrange for the use of the other one-half interest of said dredger with A. W. Von Schmidt."

What did they do? The San Francisco Bridge Company, under this agreement, understanding that it had the right to obtain the use of the Von Schmidt dredge, purchased it, although they only had the right to use it. And these affidavits are to the effect that the Bowers Company only intended that they should have the right to use the Bowers half interest, and procure the use of the other half. But the bridge company show that they thought they had permission, under this agreement, to obtain the Von Schmidt interest the best way they could; if they could not rent it, they might buy it. That agreement did give to the bridge company the apparent consent to acquire the Von Schmidt machine, and Von Schmidt undoubtedly considered that he was entitled to sell it to the company. And he says so in his affidavit. He says he supposed he had a right to sell it to them under that permission of Bowers, and therefore they did not come into court and get the permission of the court upon that proposition, or to secure a modification or dissolution of the injunction. But, under the rule I have stated, the defendant is guilty of a technical violation of the order of court. The judgment of the court is that the respondent pay a fine of \$50; and, if he does not pay the fine within 10 days, he will be imprisoned until the fine is paid, not to exceed 30 days.

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McNAMEE v. HUNT.

(Circuit Court of Appeals, Fourth Circuit. May 3, 1898.)

No. 248.

1. CONTRACTOR'S NEGLIGENCE—LIABILITY OF EMPLOYER.

An employer is liable for injuries to third parties when they result directly from acts of a contractor which he had expressly authorized, or which were necessary to the performance of the contract, but not when they result from acts purely collateral to the contract, and arising indirectly in the course of performance.

2. CONSTRUCTION OF WRITTEN INSTRUMENTS—PROVINCE OF JURY.

In general, the construction of written instruments is for the court; but where the effect of papers collaterally introduced in evidence depends, not only upon the construction of the instruments, but also upon external circumstances, the inferences of fact to be drawn from such papers should be left to the jury.

3. SAME—WITHDRAWAL OF ISSUE FROM JURY.

It is reversible error for the court to take from the jury the issue as to whether or not the circumstances surrounding a contract were such that the employer must have known that blasting would be necessary in order to carry it into effect, and to find that he had such knowledge, where he expressly denies it, and there is some evidence corroborating his denial.

In Error to the Circuit Court of the United States for the Western District of North Carolina.

James H. Merrimon, for plaintiff in error.

Charles A. Moore, for defendant in error.

Before GOFF and SIMONTON, Circuit Judges, and PAUL, District Judge.

**SIMONTON, Circuit Judge.** This case comes up by writ of error to the circuit court of the United States for the Western district of North Carolina. The action was brought against the owner of a lot of land in the city of Asheville, N. C., for whom an excavation was being made for the foundation of a building in that city. This excavation was effected by blasting; and the plaintiff below (defendant in error here) alleges that a piece of rock thrown out by the blasting broke his leg, and inflicted serious injuries on him. The case was tried before a jury, on complaint, answer, and testimony; and a verdict was found for the plaintiff below in the sum of \$8,500. After making a motion for a new trial, without avail, the plaintiff in error obtained his writ of error; and the case is before us on 24 assignments of error.

The defendant below was the legal owner of the lot in Asheville. He desired to erect a brick building thereon for the use of a Young Men's Institute, and to that end obtained the consent of the city authorities to excavate a foundation and erect the building. He advertised for bids for the excavating work, and finally agreed with one Britt, a contractor, for the completion of the work for a lump sum of \$645. It is important to know the precise terms of the contract, and it is inserted here:

"Biltmore, N. C., April 19th, 1892.

"Bids will be received by the undersigned, up to and including the 23d April, for excavation of lot southeast corner of Eagle and Market streets. Lot is to be excavated entire length, 50 feet wide, from the line of Market street, and an average depth of 9 feet. Particulars can be obtained from the undersigned. Bids of stated sum for the entire work are preferred to those for cubic yard.  
Charles McNamee."

"Asheville, N. C., April 21st, 1892.

"A bid for excavation of lot southeast corner of Eagle and Market street. Lot is to be excavated the entire 50 feet wide from line of Market street, and average depth of 9 feet, for the sum of nineteen cents (19c.) per cubic yard for earth; loose rock and hardpan, for the sum of twenty-five cents (25c) per cubic yard; hard rock, for the sum of sixty cents per cubic yard; or \$645.00 (six hundred and forty-five), lump job.

"Yours, truly,

E. H. Britt & Co.

"To Charles McNamee, Biltmore, N. C."

Upon the receipt of which answer the said defendant, McNamee, wrote the said Britt as follows:

"Biltmore, N. C., April 30th, 1892.

"Mr. Elihu H. Britt, Asheville, N. C.—Dear Sir: Your offer to excavate for \$645.90 lot at the southeast corner of Eagle and Market streets, in accordance with the plans of the building, which you have seen, which show an excavation generally of about nine feet in depth the whole length of the lot, and fifty wide, is accepted, upon the following conditions: First. The work is to be fully completed by the 21st day of May, 1892, under penalty of \$5.00 for each day's delay after that date. Second. The excavation is to be done absolutely in accordance with the drawings; and your bid includes the digging of a trench around the exterior lines of the excavation, as shown on the plans, of the depth required by the architect. Third. The work to be neatly done, to the full satisfaction of the architect, Mr. R. S. Smith, and is to be paid for only upon his certificate that the work has been properly completed. Fourth. The lines of the excavation and all the trenches are to be given by the engineer,—probably, Mr. Olney. Please let me know if the terms of this letter are agreed to. If they are, you may begin work Monday morning.

"Yours, truly,

Charles McNamee."

The gist of this action is that Britt was a negligent and careless man, within the knowledge, or means of knowledge, of McNamee; that no provision was made in the contract for the observance of proper precautions in doing a piece of work which necessarily required blasting with explosive substances in the heart of a city; that in fact the contractor did this work without taking such precautions, and so negligently that a piece of rock was thrown out by the blast, and struck the leg of the plaintiff below, who was at the door of an hotel on a public street, out of sight of the blasting. The suit proceeded upon the principle of the exception to the rule that employers are not generally liable for the acts of contractors. It rests on the exception, which is that:

"When a person is engaged in a work, in the ordinary doing of which a nuisance necessarily occurs, the person is liable for any injury which may occur to third persons from carelessness or negligence, though the work may be done by a contractor." *Ware v. St. Paul Water Co.*, Fed. Cas. No. 17,172.

In affirming this case, the supreme court says:

"Where the obstruction or defect caused or created in the street is purely collateral to the work contracted to be done and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is that the employer is not responsible. But where the obstruction or defect which occasioned the injury results directly from the acts which the contractor agreed and was authorized to do, the person who employs the contractor, and authorizes him to do those acts, is equally liable to the injured party." *Water Co. v. Ware*, 16 Wall. 576.

The court adopts the language in *City of Chicago v. Robbins*, 2 Black, 428:

"If the nuisance occurs necessarily in the ordinary mode of doing the work, the occupant or owner is liable. But, if it is from the negligence of the contractor or his servants, then he alone should be responsible."

And adds:

"Common justice requires the enforcement of that rule, as, if the contractor does the thing which he is employed to do, the employer is as responsible for the thing as if he had done it himself; but if the act complained of is purely collateral to the matter contracted to be done, and arises indirectly in the course of the performance of the work, the employer is not liable, because he never authorized the work to be done."

This being so, a decisive question in the case is whether, when McNamee made this contract, he authorized blasting to be done in order to complete it; or, in other words, whether, in order to fulfil his contract, the contractor necessarily had to blast, and McNamee knew this. If blasting was not in terms authorized, or if blasting was not necessary to be used in performing the contract of excavating the foundation, or if McNamee did not contemplate blasting, then blasting which injured the plaintiff below was purely collateral to the work contracted to be done, and McNamee would not be liable, because he never authorized blasting to be done. Examining the contract, we see that blasting is not provided for in express terms. The advertisement called for bids at a stated sum, and not for bids by cubic yard. The bid does refer to excavating hard rock at so much per cubic yard. But, following the advertisement, the lump sum offered is accepted, and nothing is said about blasting in the

acceptance. The general rule unquestionably is that it is the duty of the court to construe all written instruments. But where the effect of a written instrument collaterally introduced in evidence, as these papers are introduced here, depends, not merely upon the construction and meaning of the instrument, but upon extrinsic facts and circumstances, the inferences of fact to be drawn from it must be left to the jury. In *Etting v. Bank*, 11 Wheat. 59, Chief Justice Marshall, for the court, declares the law thus:

"Although it is the province of the court to construe written instruments, yet when the effect of such instruments depends, not merely on the construction and meaning of the instruments, but upon collateral facts in pais, and extrinsic circumstances, the inferences of fact to be drawn from them are to be left to the jury."

The same principle is affirmed and applied in *Barreda v. Silsbee*, 21 How. 168. In *Richardson v. City of Boston*, 19 How. 270, it is expressed in this way:

"It is the duty of the court to construe written instruments, but their application to external objects described therein is the peculiar province of the jury."

In *West v. Smith*, 101 U. S. 270, we find the doctrine expressed in these words:

"Doubtless the general rule is that it is the province of the court to construe written instruments. But it is equally well settled that when the effect of the instrument depends, not merely on its construction and meaning, but upon collateral facts and circumstances, the inference of fact to be drawn from the paper must be left to the jury; or, in other words, when the effect of a written instrument collaterally introduced in evidence depends, not merely on its construction and meaning, but also on extrinsic facts and circumstances, the inferences to be drawn from it are inferences of fact, and not of law, and, of course, are open to explanation."

When the construction does not depend in any degree on oral testimony or extrinsic facts, but wholly on the writing, a pure question of law is presented, which must be decided by the court. *Hamilton v. Insurance Co.*, 136 U. S. 255, 10 Sup. Ct. 945; *Hughes v. Mortgage Co.*, 140 U. S. 104, 11 Sup. Ct. 727.

The evidence tends to show that there was nothing in the surface appearance of this lot to indicate that blasting was necessary. McNamee, in his evidence, without objection, swore that there was not, that in fact he did not think there was any, and that in point of fact he did not suppose that there was any necessity for the use of blasting. There may have been an inference from Britt's bid that blasting was necessary, as he included in his bid a charge for removing "hard rock." But this was only an inference, and the offer was neither accepted nor noticed by McNamee. It therefore becomes a question of fact whether the condition of the soil where the foundation was to be dug was such that McNamee must have known that blasting was necessary, and also whether he did not acquire this knowledge during the performance of the contract. He denies any such knowledge. These questions of fact were for the jury to answer, but his honor, the presiding judge, in submitting the issues to the jury, took from them the seventh issue. It is in these words:

"(7) Was the said Britt so employed with the knowledge, or in contemplation, on his [defendant's] part, that blasting with gunpowder, dynamite, or other dangerous agency, would be necessary, or would be used, in making the excavation?"

His honor took this issue away from the jury, and it is marked, "Yes (by court)." In this we are of opinion that there was reversible error. This renders unnecessary any discussion of the other points raised on this writ. The judgment of the circuit court is reversed, and the cause is remanded to that court, with instructions to grant a new trial. Reversed and remanded.

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### GAYNON v. DURKEE.

(Circuit Court of Appeals, Fifth Circuit. March 1, 1898.)

No. 621.

#### FELLOW SERVANTS—WHO ARE.

The foreman of a railway machine shop, with authority to give orders to the men working in his department, is the fellow servant of one of the men, there being a master mechanic over both, with authority to hire and discharge.<sup>1</sup>

#### In Error to the Circuit Court of the United States for the Southern District of Florida.

The plaintiff in error brought this suit against the defendant in error to recover damages for personal injuries received while in the employ of the defendant. The plaintiff in his declaration alleges, substantially, that on the 14th day of July, 1893, plaintiff was in the employ of the defendant, and was ordered, instructed, and required by one Kern, who was an employé of the defendant, and who was the general foreman of the defendant's shops in Palatka, and under whom the plaintiff worked, and whose orders and instructions the plaintiff was required to obey, to mark a leak in the boiler or tubes of a certain locomotive in the control and use of the defendant, said locomotive having steam generated therein, and the plaintiff entered the smoke box of said locomotive for the purpose of marking said leak; that said Kern was aware that the plaintiff had entered said smoke box, and that it was the duty of the defendant to provide a reasonably safe place for the plaintiff to work, and keep the same reasonably safe while the plaintiff was working; that defendant knew it was necessary while plaintiff was in said smoke box to keep the throttles and valves of said locomotive closed, so as to prevent the steam from entering the smoke box, but the defendant recklessly, negligently, and carelessly omitted and neglected to keep said smoke box reasonably safe, and that while plaintiff was in said smoke box the said Kern, or some other person to plaintiff unknown, recklessly, carelessly, and negligently opened the throttles and valves of said locomotive, whereby the steam in said locomotive entered the smoke box, inflicting great injury upon the plaintiff. To this declaration defendant interposed a demurrer, which was overruled by the court; whereupon defendant filed the general issue plea of not guilty, and a further plea of contributory negligence. A trial of the cause was had upon issue joined on these pleas.

The facts in this case, as shown by the testimony, briefly stated, are as follows: The plaintiff in error was employed by the defendant in error as a boiler maker in the railway shops situated in Palatka, Fla. These shops were the general repair shops of the railway company, and such work was

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<sup>1</sup> As to who are fellow servants, see an elaborate note to *Railroad Co. v. Smith*, 8 C. C. A. 668, and supplementary note to *Railway Co. v. Johnston*, 9 C. C. A. 596.

done in them as is usually done in the railway shops of like character. The shops were under the direct supervision and control of a master mechanic, whose office was at these shops. Mr. Rutherford, the master mechanic, employed the plaintiff and set him to work in the shops. The plaintiff was working under a foreman, also employed by defendant,—a Mr. Kern,—whose orders plaintiff was required to obey. The plaintiff in his testimony styles this man a “general foreman,” but the testimony does not disclose the significance of the term “general.” The testimony does show that there were other foremen employed in these shops,—a foreman of the carpenter shop and a foreman of the paint shop. The plaintiff was injured on July 14, 1893, while in the employ of the defendant. For about two weeks prior to his injury the plaintiff had been working upon a certain engine, No. 23, which was in the shops being extensively repaired. The plaintiff had put a new set of tubes in this engine, and had done considerable other work upon her. The plaintiff tested these tubes the day before with a cold-water test. On the morning of his injury this engine was fired up for the purpose of making a further test of these tubes, and one was found to be leaking. The plaintiff was sent for, and told by the foreman, Kern, that the tube was leaking, and that he had better mark it; whereupon the plaintiff entered the smoke box of the engine to mark the leaking tube. While the plaintiff was in the smoke box, Kern, the foreman, negligently opened, or caused to be opened, the valves and throttle of the engine, which allowed the steam to rush into the smoke box, whereby the plaintiff was badly scalded. The engine was hot, and had steam on, when the plaintiff entered the smoke box, but it was perfectly safe for plaintiff to enter, and would have remained safe but for the negligent act of Kern.

When the plaintiff closed his case the defendant demurred to the evidence, and the court sustained the demurrer in the following language: “I think the law upon this point is this: It is the duty of the employer, the principal, to furnish a safe place for his employes,—safe tools and appliances and surroundings,—and, if there is any presumption or good reasons to believe that there is any deficiency in those appliances or in the safety of that place, it is the duty of the principal to see that that is guarded or is watched and kept safe; but unless there is some good reason to believe that there is an innate danger, that there is a necessary presumption of danger, attending the condition of the place or the condition of the appliances, and if that danger only arises from the positive acts of some one else which cannot be anticipated and cannot be guarded against, I cannot see nor consider that it is the duty of the principal to have a plant watched or a supervision of such condition or appliances. Unless there is some good ground to believe that a watch or a general supervision is necessary for the preservation and protection of the employé, I do not consider that the employer can be held liable for any act of a fellow servant which cannot be anticipated nor which could not be presumed. That is what I consider to be the generally accepted principle of law. I consider that to be the principle of the law laid down in all of the cases which have been cited here and referred to. In the case where the party was injured by the raising or lowering of the cargo of a vessel through the hatchway, there was the constant anticipation of more or less danger that was not provided against. In the case of fire damp (Gowen v. Bush, 22 C. C. A. 196, 76 Fed. 349), there was such a constant apprehension of accumulation of fire damp, it is true, that a party was appointed for that purpose. In this case the testimony does not satisfy me that there was any reasonable presumption of danger arising from the party going into that locomotive, unless by some positive affirmative action of some party, and that the party in charge at that time, or the principal had he been present, could have had any good reason to have appointed a person whose special duty it was to see that that place was kept perfectly safe. In the case of *Railway Co. v. Pool*, 160 U. S. 438, 16 Sup. Ct. 333, where a party was at work under a car, which was certainly a dangerous position, he was injured by the negligence of a fellow servant in making that place dangerous; and yet the supreme court reversed the case which permitted it to go to a jury, and the jury to pass upon it, and held that the case should not have been submitted to the jury. The case was reversed and sent back.

I would be very glad, indeed, if I could see any question of fact in this case, to submit the case to the jury; but the evidence, in my opinion, shows that the injury was caused by the positive affirmative action of a fellow servant. The question of whether or not Kern was a fellow servant is one of the difficult questions in this case; but I do not think the testimony shows that he had charge or supervision of any particular department of the operations of the road; but there was immediately over him a master mechanic, who employed and discharged employes, who supervised generally the repairing division of the road of the company. Looking at the case as I do, and as the facts I think have been determined by the testimony, I do not consider it is my privilege to submit the case, but to withdraw the case from the jury, and to direct a judgment for the defendant; which is so ordered."

Alex. St. Clair-Abrams, for plaintiff in error.

E. P. Axtell, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

PER CURIAM. The judgment of the circuit court is affirmed on the authority of *Railroad Co. v. Charless*, 162 U. S. 329, 16 Sup. Ct. 848, and *Mining Co. v. Whelan*, 168 U. S. 86, 18 Sup. Ct. 40.

**TOWNSHIP OF NINETY-SIX, ABBEVILLE COUNTY, S. C., v. FOLSOM.**

(Circuit Court of Appeals, Fourth Circuit. May 3, 1898.)

No. 217.

**RECITALS IN MUNICIPAL BONDS—ACTION BY BONA FIDE HOLDER—ESTOPPEL.**

Where the recitals contained in bonds issued by a township in payment of its subscription to the stock of a railroad company show a full and complete compliance with the law in pursuance of which they were issued, such township is estopped from setting up a defense inconsistent with such recitals, when sued on such bonds by a bona fide holder for value, who purchased without notice of defect or irregularity in their issue, and in reliance upon such recitals and the validity of the bonds.

Appeal from the Circuit Court of the United States for the District of South Carolina.

This action was brought by George W. Folsom against the township of Ninety-Six, in Abbeville county, S. C., to recover upon past-due coupons from bonds issued by the township. The court directed a verdict in favor of plaintiff, and defendant appeals.

Geo. M. Trenholm, for plaintiff in error.

H. J. Haynsworth and Lewis W. Parker, for defendant in error.

Before GOFF, Circuit Judge, and JACKSON and PAUL, District Judges.

JACKSON, District Judge. This is an action brought to recover certain past-due coupons from bonds issued by the township of Ninety-Six, in the county of Abbeville, state of South Carolina, in payment of a subscription to the Greenville & Port Royal Railroad Company, the charter of which, by subsequent legislation, was amended, and the name changed to the Atlantic, Greenville & West-

ern Railway Company. Authority was conferred by the act of the general assembly of the state of South Carolina entitled "An act to charter the Greenville & Port Royal Railroad," approved December 23, 1882, upon any city, town, county, or township interested in the construction of the road, to subscribe to its capital stock such sum as the majority of the voters voting at an election held for that purpose may authorize the county commissioners or proper authorities of such city, town, county, or township to subscribe, which subscription shall be made in 7 per cent. coupon bonds, payable in such installments as the county commissioners or proper authorities of such city, town, county, or township shall determine, and to be received by said company at par. Coupled with this power to subscribe was a provision that no election shall be held in any of the towns, cities, or townships in said counties unless one-half of the owners of the real estate situate in such town or city, who live therein, shall first petition for an election on the subject of subscribing to the capital stock as hereinbefore provided, and no subscription shall be made by any of the towns and cities until the conditions of this proviso have been complied with. There were other provisions in the act, which we deem it at this time unnecessary to notice. The act amending this act was passed by the general assembly on December 24, 1885.

It is alleged in the complaint, by the plaintiff in the action: That in pursuance of said acts the board of county commissioners of Abbeville county on March 25, 1886, duly executed and issued the bonds of said township, with attached interest coupons at the rate of 7 per cent. per annum, aggregating \$20,800, as authorized by said acts, and in the denomination provided therein. Said bonds were numbered on their face, and they and the coupons attached were made payable at the First National Bank of Charleston, S. C., and after the obligatory part thereof they recite and conclude as follows:

"Whereas the township of Ninety-Six, in the county of Abbeville, of the state of South Carolina, by virtue of an act of the general assembly of the said state, approved on the 23rd day of December, A. D. 1882, amended Dec., A. D. 1885, and entitled 'An act to charter the Greenville & Port Royal Railroad Company,' amended to 'Atlantic, Greenville & Western Railway Company,' and empower certain counties and townships to issue bonds in subscription for the common stock of the said railroad company, has subscribed for twenty thousand and eight hundred dollars of the common stock of said railroad company: Now, in consideration thereof, and in conformity with the provisions of said act, this bond, being one of the others, aggregating twenty thousand and eight hundred dollars, is issued by the board of county commissioners for Abbeville county, state of South Carolina, who, in testimony whereof and by authority of said act, have officially executed this bond, and caused the same to be countersigned by their clerk, and the seal of the said county of Abbeville to be hereunto affixed, at Abbeville, in said county, on this, the 25th day of March, A. D. 1886."

That the plaintiff, relying upon the recitals contained in said bonds, and upon their being legal and valid obligations of said township, in the year 1886 became the purchaser of bonds, with coupons attached, being a portion of said issue, numbering 1 to 37, inclusive. That the plaintiff is the owner and holder of 119 coupons, since detached from said bonds, made and issued by the defendant

and purchased by the plaintiff; all being alike. The following is the form of one of the coupons:

"3	The Township of Ninety-Six In the County of Abbeville, State of South Carolina,	\$70
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will pay the bearer, at the office of the First National Bank of Charleston, S. C., seventy dollars on the first day of January, 1889, being the annual interest on bond No. 28."

The defendant filed an answer to plaintiff's demand, and denied generally all knowledge or information in reference to the issue of these bonds, and required strict proof thereof, and especially denied that the bonds and coupons described in plaintiff's declaration were duly executed and issued by the county commissioners of Abbeville county, pursuant to said act, for the reason that there was "no petition by one-half of the owners of real estate situate and living in said township for an election on the subject of subscribing to the capital stock of said company, as required by said acts; nor was there any written application by one-half of the qualified voters of the defendant township who were freeholders therein, specifying the amount to be subscribed by said township, as required by said acts; nor was there notice of a resolution of the board of county commissioners fixing the amount proposed to be subscribed by the chairman of said board, in a newspaper published in the county of Abbeville for forty days next previous to the election, as required by said acts; nor were the said county commissioners authorized to subscribe for stock in said railroad, nor to issue bonds in payment therefor, by a majority of the voters of said township, voting at an election held for that purpose." It is alleged as a third defense that the bonds are not the bonds of the defendant; that they are not under the seal of the defendant or its authorized officers; and that the coupons sued on and alleged to have been cut from bonds issued by the defendant were never executed by the county commissioners of Abbeville county, but were executed by a person having no power or authority to do so under said acts. Upon this state of the pleadings issue was joined, and the case was heard before a jury, and a verdict was found for the plaintiff by the direction of the court. To the rulings of the court upon the trial of the cause the defendant took several exceptions, and has assigned 10 different grounds of error on the part of the trial judge. In the view we take of this case, we deem it unnecessary to discuss and consider the first 9 of these assignments, for the reason that we have reached the conclusion that there is really but one ground to be considered in this case, which is embraced in assignment 10, and that is, "Did the court err in directing a verdict for the plaintiff?" It is not denied that the bonds in controversy were issued under an act of the general assembly of South Carolina passed in 1882 and amended in 1885, as a subscription to the common stock of the Greenville & Port Royal Railroad Company and the Atlantic, Greenville & Western Railway Company. The fact is disclosed that the bonds in question were acquired by the defendant

in error for a valuable consideration, and without any notice of any irregularity or fraud in regard to their issue.

This brings us to the consideration of the real question in the case, and that is whether the township of Ninety-Six is not estopped by the recital upon the face of the bonds. It is recited upon their face that the county commissioners issued the bonds in pursuance of an act of the general assembly of South Carolina passed in 1882 and amended in 1885, which act and the amendment to it did "empower certain counties and townships to issue bonds in subscription to the common stock of the Greenville & Port Royal Railroad Company, and that said township has subscribed for twenty thousand eight hundred dollars of the common stock of said company. In consideration thereof, and in conformity with the provision of said act, this bond, being one with others aggregating twenty thousand eight hundred dollars, is issued by the board of county commissioners for Abbeville county, state of South Carolina, who, in testimony whereof, and by authority of said act, have officially executed this bond, and caused the same to be countersigned by their clerk, and the seal of the said county of Abbeville to be hereunto affixed," etc. It appears further from the evidence that the plaintiff became the purchaser of 37 bonds, numbering from 1 to 37, both inclusive, and that he paid full value for them, without notice of any defect or irregularity in their issue, and that he was, at the commencement of this action and at the date of the judgment, the legal holder and owner thereof. It will be observed from the inspection of these bonds that their recitals show upon the face of the bond a compliance with the law under which they were issued. The purchaser had a right to assume that all the conditions of the law were complied with authorizing the issue of the bonds. The question whether they were issued in compliance with the law was a question that properly belonged to the authorities, who were authorized by the acts of the legislature to issue the bonds. There is no evidence in this case that at the time of the sale of these bonds to the holder he had any notice whatever of any irregularity concerning them, and, such being the case, and being a purchaser without notice of irregularity, and for a valuable consideration, we hold that the township of Ninety-Six was estopped from setting up a defense of the character set out in its pleadings.

This same question has been the subject of review in the supreme court of the United States in many cases, commencing with the case of Commissioners of Knox Co. v. Aspinwall, 21 How. 539, a case very similar to the one under consideration, in which the great contention was that a majority of the qualified voters of said county had not had an opportunity to vote for the subscription to the railroad stock, which the statute required. In that case it was insisted that this irregularity or omission to give the notices required by the statute, in order that a vote might be taken upon the question of subscription to the stock of a railroad, had the effect to deprive the board of its authority; but the court held that, while this fact might exist, it was a fact that should have addressed itself to the consideration of the board that issued the bonds; yet, inasmuch as

they had issued the bonds, and certified that the law had in every respect been complied with, that the issue of the bonds could not be attacked in any collateral way, and that it was for the board alone to determine whether or not the election had been properly held, or whether there had been a majority of the votes of the county cast in favor of the subscription. This principle, from that date down to the present, has been affirmed in numerous cases cited in the brief of the appellee in this cause; and as late as the case of *Evansville v. Dennett*, 161 U. S. 434, 16 Sup. Ct. 613, the court held that a recital in a series of bonds issued by a municipal corporation in payment of its subscription to the stock of a railroad company, if they were issued in pursuance of an act of the legislature and ordinances of the city council passed in pursuance thereof, does not put a purchaser upon inquiry as to the terms or conditions under which the bonds were issued. This question has been so repeatedly settled by the supreme court of the United States, and the doctrine announced in this opinion so frequently affirmed, that we see no reason for entering into an extended discussion of it. It is apparent from the direction given to the jury by the learned judge who presided at the trial of the cause that he considered that the question of estoppel was the vital one in it, in which we concur, and therefore we find no fault in his direction. Judgment affirmed.

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SCAIFE v. WESTERN NORTH CAROLINA LAND CO. et al.

SAME v. PURNELL.

(Circuit Court of Appeals, Fourth Circuit. May 3, 1898.)

No. 259.

1. BILL OF EXCEPTIONS—MANDAMUS TO COMPEL SETTLEMENT.

A bill of exceptions was presented to the circuit judge within the time limited, which he refused to sign for the reason that part of the exceptions did not fairly state what occurred at the trial; but neither he nor the opposing counsel suggested in what manner the bill might be amended so as to be acceptable. *Held*, that mandamus should be allowed requiring him to settle the bill according to the facts as he should find them.

2. SAME—PRACTICE.

Rules stated governing the preparation, settlement, and signing of bills of exception.

Petition for Writ of Mandamus to Settle Bill of Exceptions.

M. Silver and J. H. Merrimon, for petitioner.

C. A. Moore, for respondent.

Heard before GOFF and SIMONTON, Circuit Judges, and JACKSON, District Judge. Subsequently further argument was heard before SIMONTON, Circuit Judge, and JACKSON and PAUL, District Judges.

SIMONTON, Circuit Judge. The case of Scaife against the Western North Carolina Land Company et al. was tried at Asheville before the Honorable Thomas R. Purnell, who was holding the circuit court for the Western district of North Carolina. The jury, after

the charge was delivered by the trial judge, and after consideration of the case, found the issues in favor of the defendant. The plaintiff, desiring to sue out a writ of error to this court, having taken exceptions during the trial of the cause, prepared a bill of exceptions. For this purpose time was given to his counsel by the courtesy of the court. At the time fixed for settling the bill, for some reason that could not be done, and still further time was allowed by order of the court; the plaintiff, at the same time, being instructed to serve a copy of his proposed bill of exceptions on the opposite party. The matter finally came up before the learned judge at Raleigh. It seems that the plaintiff, in serving a copy of his bill of exceptions upon the counsel for the adverse party, had omitted to serve with it one or more copies of exhibits used at the trial. This does not affect our conclusion. When counsel appeared before the judge, he gave a protracted hearing. Examining the bill of exceptions, he was of the opinion that, although some of the exceptions were properly stated, the large majority of them did not state fairly and truthfully what occurred at the trial. He therefore refused to sign the bill, but, as far as we can see, did not indicate or direct or make any suggestion or amendment or form in which the exceptions could be made acceptable to him. The counsel for defendant were present, making objections to the bill; and the plaintiff's counsel, seemingly at a loss what to do, did not press, or amend, or reform the same, but came to this court praying a mandamus to the judge to settle the bill of exceptions. A rule was thereupon issued, to which his honor, Judge Purnell, has made return. Counsel for plaintiff and defendant were heard upon the petition and the return, none of the affidavits offered having been read.

It is very clear that this court has no right to require the trial judge in this case to sign the bill of exceptions prepared for and presented to him by the counsel for the plaintiff. The duty of the judge is to settle the bill of exceptions according to what he thinks the truth of the case, the points to which exception were taken, the facts in the testimony bearing upon these points, and the manner in which they are stated, so that the appellate tribunal can see clearly in what respect error is charged. It appears, however, that there were among the exceptions some which his honor, the trial judge, felt that he could sign; and that with regard to the others he expressed his disapprobation of them, but did not indicate, either in voice or in writing, how they could be made acceptable or amended, so as to appear in proper form.

The right of seeking a review of causes heard *at nisi prius* is valuable. Some judges speak of it as a constitutional right. It is important both to the suitor and the court. The judge, being without bias, having in view only the attainment of justice, gladly seeks the assistance of his brethren, and values their opinion in reaching that end. An appeal from his ruling, and the submission of it to an appellate court, is not an act of hostility to him. If he entertains no doubt as to the correctness of his ruling, still, if desired by counsel, he should aid them in presenting it for the judgment of the court above. If he recognizes that there may be reasonable doubt with

regard to it, he welcomes its review. It is important also that every facility, with proper limitations, be given to the exercise of the right of appeal. Courts depend for their influence—perhaps for their existence—upon the confidence of the community in which they administer the law. This confidence depends upon the conviction that not only will causes be heard without fear, favor, or passion, but also upon the certainty that, if any errors have been committed in the pleadings, or have occurred during the progress of the trial, an opportunity to examine into and correct the same will not only be given, but generously aided. We are of the opinion, therefore, that the trial judge should settle a bill—some bill of exceptions—containing at least the parts of the bill as presented to him to which he does not object, and such other portions as amended as he shall direct counsel to alter or correct in order to conform to the facts.

Perhaps there is no practice in which the bar have so little experience as in the preparation and settling of bills of exception. The text-books are either silent or obscure upon the subject, and the decided cases give only general rules as to what constitute proper subjects of exception, and none as to the form and preparation of bills of exception. We therefore embrace this opportunity of stating some of the rules governing exceptions, and also the rule to be observed in all cases in the preparation and presentation of bills of exception when resort to an appellate tribunal is intended. An exception must show that it was taken and reserved at the trial, and this must appear affirmatively on the record. But it may be drawn out in form, and signed or sealed afterwards by the judge. *U. S. v. Carey*, 110 U. S. 51, 3 Sup. Ct. 424. Each bill of exception must be considered as presenting a substantial case, and it is the evidence stated in it alone on which the court will decide. *Jones v. Buckell*, 104 U. S. 554. The bill of exceptions must be prepared and settled during the term at which the case was tried, unless there be an express order made by the judge during the term, extending the time beyond the term, or full consent of parties, express, or implied from stringent circumstances. *Muller v. Ehlers*, 91 U. S. 251; *U. S. v. Breitling*, 20 How. 253; *U. S. v. Jones*, 149 U. S. 262, 13 Sup. Ct. 840; *Railroad Co. v. McGee*, 8 U. S. App. 86, 2 C. C. A. 81, and 50 Fed. 906; *Lumber Co. v. Chapman*, 20 C. C. A. 503, 74 Fed. 444. A bill of exceptions ought to be upon some point of law, either in admitting or denying evidence, or a challenge on some matter of law arising on facts not denied, in which either party is overruled by the court. *Ex parte Crain*, 5 Pet. 190. It should contain only the rulings of the court upon matters of law, with so much of the testimony as may be necessary to explain the bearing of the rulings upon the issues involved. *Duncan v. The Francis Wright*, 105 U. S. 381; *Improvement Co. v. Frari*, 8 U. S. App. 444, 7 C. C. A. 149, and 58 Fed. 171. Every bill of exceptions should point out distinctly the errors of which complaint is made. It ought also to show the grounds relied upon to sustain the objection presented, so that it may appear that the court below was informed as to the point to be decided. *Duncan v. The Francis Wright*, *supra*. It should not contain all the evidence (*Hickman v. Jones*, 9 Wall. 197), even if counsel consent to it (*Gra-*

ham v. Bayne, 18 How. 60), nor set forth the charge of the court below in full,—only those parts to which exceptions are taken (U. S. v. Rindskopf, 105 U. S. 418). The parties can try their case upon an agreed statement of facts (Graham v. Bayne, 18 How. 60), which must be signed by counsel, and made a part of record (Burr v. Railroad Co., 1 Wall. 99), and submitted to the court below for its judgment (Curtis v. Petitpain, 18 How. 109), before it can be carried by exception to the appellate court (Kearney v. Case, 12 Wall. 275). An exception to a prayer for instructions, which are presented as a whole, will not avail if one of the instructions prayed for is erroneous. U. S. v. Hough, 103 U. S. 71; Thom v. Pittard, 8 U. S. App. 597, 10 C. C. A. 352, and 62 Fed. 232. All the alleged errors on a trial may be incorporated into one bill of exceptions (Lees v. U. S., 150 U. S. 476, 14 Sup. Ct. 163), and signed and sealed at the close (Pomeroy v. Bank, 1 Wall. 592). The seal of the judge need not be attached to his signature. 17 Stat. 197; Stanton v. Embrey, 93 U. S. 555. The judge must sign his name, and cannot use his initials merely. Origet v. U. S., 125 U. S. 240, 8 Sup. Ct. 846. No bill of exceptions is necessary when the error alleged is apparent on the record. Suydam v. Williamson, 20 How. 428; Young v. Martin, 8 Wall. 354. Exceptions will not lie to the granting or refusal of a new trial (Railroad Co. v. Winter, 143 U. S. 75, 12 Sup. Ct. 356; Railway Co. v. Dick, 8 U. S. App. 102, 3 C. C. A. 149, and 52 Fed. 379), nor to the granting of a new trial nisi (Railroad Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590).

The formal bill of exceptions will be drawn up, amended, and settled under the following regulations: The bill of exceptions shall be prepared, and a copy thereof served upon the opposite party. The opposite party may, within 10 days after the date of such service, propose amendments to the bill, and shall serve a copy thereof upon the party who prepared it. If the party cannot agree in regard to the amendments, either party may give to the other notice to appear within a convenient time, and not more than 10 days after the service of such notice, before the judge who heard the cause, to have the bill and the amendments settled. The judge shall thereupon correct and finally settle the same in such manner as to truthfully set forth the facts, indicating himself what must be omitted or changed, and instructing counsel then and there to make the omission, amendment, or change which he may find to be proper. If the parties shall omit, within the several times above mentioned,—unless the same be enlarged by the judge,—the one to propose amendments, and the other to notify an appearance before the judge, they shall respectively be deemed, the former to have agreed to the bill as prepared, the latter to have agreed to the amendments as proposed, and, if the party omit to make a bill within the time above limited, unless the same be enlarged as aforesaid, he shall be deemed to have waived his right thereto. In the case before us the writ will issue, commanding the judge to settle a bill of exceptions according to the facts as they took place before him on the trial of this action, as he may find them, and when so settled to sign it. They will be treated as settled on 12th of January, 1898.

## UNITED STATES v. CHU CHEE et al.

(District Court, D. Oregon. May 6, 1898.)

No. 4,304.

## 1. RIGHTS OF CHINESE TO REMAIN IN THIS COUNTRY—CERTIFICATE AS EVIDENCE.

While, in all cases of entering the United States, and in the case of laborers within the country when the act requiring registration was passed, the official certificate is indispensable, and the sole evidence of the right to enter or remain, in all other cases the status of the person at the time the inquiry is made may be shown by any affirmative proof satisfactory to the judge, justice, or commissioner before whom he is taken.

## 2. SAME—CHILDREN OF LABORER ADMITTED AS STUDENTS—ACQUIRING STATUS.

Where children of a Chinese laborer are lawfully permitted to enter this country as students, and thereafter remain continually in the public and private English schools of the country, they thereby acquire the status of students, and the occupation of the father is not imputable to them.

John H. Hall, U. S. Atty., and Charles J. Schnabel, Asst. U. S. Atty.

BELLINGER, District Judge. This is a proceeding for the deportation of two Chinese boys, aged, respectively, 13 and 15 years. The father of the boys is a laundryman, residing at Eugene City, in this state, where he has followed his vocation for several years. The boys were landed in this country on May 11, 1896, at Port Townsend, in the district of Washington, as students entitled to land under the Chinese immigration laws. Upon being landed, they went at once to Eugene City, where they have since resided, engaged in "attending school continually in the public and private schools" of that city. They have made rapid progress in their studies, speak good English, and appear to be very intelligent.

The act of May 6, 1882, as amended, provides that Chinese persons other than laborers, who may be entitled to come within the United States, shall obtain the permission of and be identified as so entitled by the Chinese government or such other foreign government of which at the time such Chinese person shall be a subject, in each case to be evidenced by a certificate in the English language, issued by such government, showing such permission, with the name and signature of the permitted person, and stating the individual, family, and tribal name in full, title or official rank, if any, the age, height, and all physical peculiarities, former and present occupation or profession, place of residence, etc. This certificate is required to be viséed by the consular agent of the United States at the port of embarkation. So far as appears, there was in this case no certificate by the Chinese government, as required by this law. The only certificate now in defendants' possession is that of the American consul at Hong Kong, by which it is assumed they were enabled to embark at that port, and to effect their landing on arrival in the district of Washington.

It is contended on the part of the United States that the certificate required by the act of 1882 is the sole evidence permissible, not only to establish a right of entry into the United States, but to

establish a lawful right to remain here; and, furthermore, that the status of the father as a laborer attaches to his sons under age. Section 6 of the act referred to provides with reference to the certificate referred to that it "shall be prima facie evidence of the facts set forth therein, and shall be produced to the collector of customs of the port in the district in the United States at which the person named therein shall arrive," and afterwards produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate may be controverted and the facts therein stated disproved by the United States authorities. Section 12 of the same act provides as follows:

"That no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel. And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, and at the cost of the United States, after being brought before some justice, judge, or commissioner of a court of the United States and found to be one not lawfully entitled to be or to remain in the United States."

The act of May 5, 1892, continued in force for a period of 10 years the prior acts regulating the entry of Chinese persons in this country, and it provided further, among other things, "that any Chinese person or person of Chinese descent arrested under the provisions of that or the extended acts shall be adjudged to be unlawfully within the United States, unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge, or commissioner his lawful right to remain in the United States."

It will be noticed that, in all cases of landing here provided for, a certificate is indispensable as evidence of the right; and in the case of laborers within the country at the date of the passage of the act requiring registration, as evidence of the fact that they were within the country when the act was passed, they are required to procure a certificate of registration; and, when a laborer is arrested for deportation, the failure to have such a certificate, unless within some of the excuses allowed by the act, is conclusive against his right to remain and compels his deportation. Now, it is significant that while these statutes in express terms make a certificate the sole evidence permissible of the right to land, and in the case of laborers the sole evidence of the right to remain in the country, yet in all other cases of deportation it is permissible for the person arrested to establish, by affirmative proof, to the satisfaction of the justice, judge, or commissioner his lawful right to remain in the United States. These different provisions of the statute cannot be construed to mean the same thing. If it was intended that the certificates provided for are to be the sole evidence of the right to remain in the United States, it must be presumed that the statute would not have restricted their conclusive effect as evidence to the right to land, much less would it have permitted the person arrested for deportation, by a special provision, to establish by affirmative proof, to the satisfaction of the justice, judge, or commissioner, his

lawful right to remain in the United States. It is evident that these different provisions are intended to require such evidence as the circumstances of the different cases permit. For instance, the status of a Chinese person entitling him to land must be antecedent to his arrival in the country, and therefore a certificate of the government from which such person comes is required to prove such status. The status of the defendants as students must be determined with reference to the time when the inquiry is made, and, when an opportunity has been afforded to acquire such a status within the country, there is no reason why it may not be shown by any competent evidence. If the right of a Chinese person to remain within the United States is made to depend upon the production of evidence entitling him to land, such person, subsequently becoming a laborer, would be able to resist deportation successfully by showing that he was a student at the time he landed in the country, although such a result would defeat the object of the statute.

The undisputed facts in this case are that these two boys are now, and for nearly two years and since their arrival within the country have been, students in the English schools of Eugene City, and that this has been their sole vocation. Under these circumstances, they are entitled to be classed as students. The occupation of the father cannot be imputed to the children, against a status thus acquired. Such a status does not depend upon ancestry or family relation. The application to remand is denied, and the defendants are ordered discharged.

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In re KORNMEHL.

(Circuit Court, S. D. New York. May 23, 1898.)

1. EXCLUSION AND RETURN OF IMMIGRANTS—DEPARTMENT RULES AND REGULATIONS.

The treasury department may make rules and regulations to carry out the statutes and facilitate the exclusion and return of persons whose immigration congress has forbidden, but no mere rule can operate to exclude a person not excluded by the statutes.

2. SAME—FINALITY OF DECISION OF COMMISSIONERS—HABEAS CORPUS.

A return of the commissioner of immigration, to a writ of habeas corpus that, upon arrival, relator was detained, and upon special inquiry the inspectors decided that she belonged to a class of aliens excluded by law, "in accordance with department circular," etc., indicates that the inspectors felt themselves constrained to render such decision because of some instructions from the treasury department; and hence it is not a bar to inquiry into the facts, in such proceeding.

This is a habeas corpus, brought to inquire into the cause of detention of relator, an alien, who has recently come to this country to join her husband, who has been here several years. Relator is accompanied by a child under five years of age.

Maurice H. Gotlieb, for the motion.  
Lorenzo Ullo, opposed.

LACOMBE, Circuit Judge. The return of the immigration commissioner shows that, upon arrival and after inspection, relator was

detained for a special inquiry in conformity to the provisions of law; that such inquiry was had; and that at least three of the inspectors "found and decided that the said Regina Kornmehl was an alien, intending to land in the United States, and was a person likely to become a public charge, and, as such, was of a class of aliens excluded by law, *in accordance with department circular No. 172, dated October 19, 1897.*" Had this return stopped short of the italicized portion, it would have been in the usual form, and in strict conformity to the statute. The concluding clause, however, would seem to indicate that the inspectors rendered their decision, not because examination of the facts led their minds to such conclusion, but because they felt themselves constrained to render such decision because of some instructions from the treasury department. The suspicion excited by the phraseology of the return is confirmed upon reference to the circular referred to. It calls attention to the prevalence of favus, a loathsome, contagious disease, and instructs the immigration officers to make careful examinations in order to detect it, and to return immediately to the country whence they came all persons affected with such disease. Such instructions are in accordance with the provisions of the statutes regulating immigration. Then follows this clause:

"If any minor alien, suffering with said loathsome disease is accompanied by its parents, one parent should be returned with such alien as its natural guardian or protector."

This instruction seems to be wholly unwarranted by any provision of the statutes. At least, such examination of them as this court has been able to give fails to disclose any phraseology which can be construed as leaving the exclusion of immigrants to the mere arbitrary discretion of the secretary of the treasury or of the commissioner general of immigration. Rules and regulations may be made to carry out the statutes and facilitate the exclusion and return of persons belonging to the classes whose immigration congress has forbidden; but no mere rule of the department can operate to exclude persons not belonging to one or other of the classes named in the statutes. Congress has not forbidden the immigration of "parents of minor aliens, when such minor aliens are affected with a loathsome, contagious disease." The immigration authorities therefore cannot lawfully exclude such parents for such cause; nor should they be excluded under the pretense that they are liable to become a public charge, when the board of special inquiry is not of the opinion that there is any such liability. The alien is entitled to the honest decision of the inspecting officers, wholly untrammelled by any instructions not authorized by the statutes. The return in this case indicates that there has been no such decision in this case. Therefore the finality which the statute accords to a proper decision of the inspection officers is not a bar to inquiry here into the facts. The matter is referred to the clerk of the court, with instructions to give relator an opportunity to show, if she can, that she is not within any of the classes of immigrants whom congress has excluded, and to report the evidence to the court.

## NEEDLES et al. v. SMITH et al

(Circuit Court of Appeals, Fifth Circuit. April 26, 1898.)

No. 667.

## 1. ATTORNEY'S LIEN—SECURITIES PLEDGED TO SECURE LOAN—PRIORITY.

Attorneys employed by a railroad reorganization committee to advise and assist them in the conduct of the business intrusted to them have a lien for their services on the securities deposited with the committee by the parties to the reorganization agreement, superior to the claim of one to whom such securities are afterwards pledged to secure a loan.

## 2. SAME—REORGANIZATION SCHEME—PURCHASE OF BONDS AND CONTRACT TO PAY VENDOR'S ATTORNEYS.

A railroad reorganization committee obtained a large block of bonds, and, as part of the consideration therefor, agreed to pay the owner's attorneys for their services in opposing the plan of reorganization. These bonds and the other securities deposited with the committee were then deposited as collateral security for a loan previously negotiated with a party to the reorganization agreement. The reorganization scheme failed, and the amount of the distribution to such bonds and securities was not sufficient to pay the claims of the attorneys and the pledgee. *Held*, that the claim of the attorneys was prior to that of the pledgee.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

H. B. Tompkins, for appellants.

Alex. C. King, Jack J. Spalding, John T. Glenn, Hoke Smith, John M. Slaton, and Benj. Z. Phillips, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

McCORMICK, Circuit Judge. Pending proceedings for the foreclosure of the mortgages on the property of the Marietta & North Georgia Railway Company, certain holders of the bonds of that company and of the constituent companies out of which it was formed entered into an agreement by which they constituted certain persons a reorganization committee, with ample powers specified in the agreement, and deposited in their hands the securities held by the parties to the reorganization agreement. Among the powers of the reorganization committee was that to employ counsel. The committee employed Hoke Smith and John T. Glenn to represent them as counsel. After this employment of counsel, the committee negotiated a loan with the Penn Mutual Life Insurance Company, of Philadelphia, to secure which loan they pledged the securities which had been deposited with them by the parties to the reorganization agreement. Subsequently to the negotiation of this loan, the Penn Mutual Life Insurance Company, of Philadelphia, became a party with the reorganization committee and others to another agreement looking to a reorganization of the railroad properties involved in the foreclosure proceedings. This last agreement purported to be made by named parties of the first, second, third, fourth, and fifth parts. Newman Erb was one of the parties of the second part. He was also one of the parties of the fifth part, and in the fifth part was associated with John W. Hamer. As one of the parties of the second

part, Newman Erb duly executed the agreement; John W. Hamer, one of the parties of the fifth part, did not execute it at all; and Newman Erb did not sign it as one of the parties of the fifth part. These parties of the fifth part were to have been the purchasing trustees at the judicial sale of the railroad property, for which purchase the agreement provided, and for the subsequent disposition of the property thus to be acquired. In this agreement it was specified that:

"The party of the third part hereto [the Penn Mutual Life Insurance Company, of Philadelphia] shall immediately upon the conveyance to the new company being made, and simultaneously with said conveyance, receive new first mortgage bonds issued under the plan of reorganization, to the amount of \$600,000, together with such junior securities as may attach to the said first mortgage bonds under the underwriting agreement before referred to; said bonds to be held as collateral security for its loan [\$200,000]. And the parties of the first part hereto [the reorganization committee], acting on behalf of the new company, covenant and agree to deliver the said bonds to the said insurance company, party of the third part, for the purpose aforesaid."

Pursuant to the original reorganization agreement, and apparently pursuant to the agreement last above named (to which the Penn Mutual Life Insurance Company was party of the third part), and about six months after the day on which the latter bears date, the reorganization committee concluded an agreement with G. E. Kissel, the holder of a large block of bonds which had not been deposited with the reorganization committee, and which he had made the basis of his opposition to the plan of reorganization adopted by the committee, by which agreement the committee obtained the Kissel bonds for a consideration, a part of which was that they should pay Kissel's attorneys, Patrick Calhoun, Alexander C. King, and Jack J. Spalding, who had represented him in his opposition to the plans of the committee; the agreement providing that the amount of this fee should be fixed by William T. Newman, one of the judges of the court in which the foreclosure proceedings were being conducted, and who subsequently fixed the same at the sum of \$5,000. The railroad properties were sold, but were not purchased by or on behalf of the reorganization committee. As a result of this sale, the securities deposited with the reorganization committee became entitled to certain distribution, the amount of which is not sufficient to satisfy the claims of the Penn Mutual Life Insurance Company, of Philadelphia, and the claims of the appellees Hoke Smith, John T. Glenn, Patrick Calhoun, Alexander C. King, and Jack J. Spalding.

The circuit court (Hon. William T. Newman presiding) passed its decree adjudging that the attorneys' claims on the fund were prior in right to the claim of the appellants, and, a few days thereafter, passed another decree directing that their claims be paid out of the fund in the court. The assignments of error, in four several forms, suggest that the court erred in passing these decrees. It seems to us, after a careful examination and consideration of the matter, that there cannot be any serious question as to the priority of the claim of the attorneys Hoke Smith and John T. Glenn. The reorganization agreement contemplated, as of course it must have contemplated, not only the propriety, but the necessity, of employing counsel

to advise and assist the committee in the conduct of the negotiations and business which their trust imposed. The adequate compensation of such counsel is not only a proper charge against the estate committed to their trust, but such estate in their hands was charged with a lien in favor of the counsel thus employed, to the extent of adequate remuneration for their service. The extent and value of their service is not disputed. It is conceded to amount to the sum which they claim, namely, \$8,800. The claim of the other attorneys does not rest on a rule so well settled, or at least so clear in its application, and is somewhat complicated by the fact that the agreement above referred to, which purported to be made by parties of five different parts, was not signed by the parties of the fifth part as such, and was never fully acted on, and which the appellants claim cannot be considered as binding upon them, or in any way affecting the claim they are asking to have enforced here. Taking into consideration the fact that this agreement was executed by the Penn Mutual Life Insurance Company, of Philadelphia, and by all of the parties except the parties of the fifth part, who were to have been the purchasing trustees; that negotiations proceeded for some time, and transactions were had, consistent with its terms by the other parties thereto; and that, subsequent to its execution by the parties who did execute it, the agreement was made with Kissel by which the fee of his attorneys was allowed as a charge on the property of the railroad company, and was to be paid by the committee as a part of the expenses of reorganization, and to be fixed by the judge of the court before whom the foreclosure proceedings were being conducted, and were to be concluded; and it being conceded that the bonds surrendered by Kissel were delivered to Needles, trustee, who now holds the same,—it seems to us, as it did to the judge of the circuit court, that these acts should bind and conclude the appellants, and give to this charge, as a part of the expenses of reorganization, equal rank with the fee of the counsel employed by the committee. Without undertaking to distinguish the numerous authorities cited by the learned counsel for the appellants, or making special application of any of the authorities relied upon by the counsel for the appellees, we express our concurrence in the views of the learned judge of the circuit court who passed the decrees appealed from. Therefore those decrees are affirmed.

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SOLOMON, Sheriff, v. DAVENPORT.

(Circuit Court of Appeals, Fourth Circuit. May 17, 1898.)

No. 264.

1. BILL OF EXCEPTIONS—NECESSITY IN HABEAS CORPUS CASES.

On appeal from the order of a district judge in a habeas corpus case, no bill of exceptions is necessary.

2. ARMY AND NAVY—ENLISTMENT OF MINORS.

Rev. St. § 1117, requiring the consent of the parents or guardian of a minor, to validate his enlistment into the army, is for the benefit of the parent or guardian, and gives no privilege to the minor.

**B. SAME—DESERTION BY MINOR.**

A minor who enlists in the army without the consent of his parents or guardian, and subsequently deserts, is amenable to a court-martial, as a deserter.

Appeal from the District Court of the United States for the Eastern District of Virginia.

W. R. Davenport was being held under a warrant for desertion from the army, and was ordered released on habeas corpus, from which order the United States appeals.

B. Rand Welford, Asst. U. S. Atty.  
Minetree Folkes, for appellee.

Before SIMONTON, Circuit Judge, and MORRIS and BRAWLEY, District Judges.

SIMONTON, Circuit Judge. This case comes up on appeal from decision of the Honorable Robert W. Hughes, district judge of the United States for the Eastern district of Virginia. W. R. Davenport, the appellee, a minor of the age of 20 years, enlisted in the army of the United States. He is a native of the state of Virginia, and a resident of Henrico county, in said state. He enlisted in the month of August, 1896, and deserted the army on the 12th of January, 1897. He was arrested by the sheriff of Henrico county, as such deserter, under a warrant of a United States commissioner, and was lodged in jail. Thereupon he sued out a writ of habeas corpus before the Honorable Robert W. Hughes, district judge for the Eastern district of Virginia, praying his discharge. The ground of his prayer is that he enlisted, a minor, without the consent of his parent or guardian. His petition admits both his enlistment and his desertion. The return of the sheriff to the rule sets forth the commitment under the authority of a commissioner of the district court on the charge of desertion. The cause was heard by the district judge on the petition, return, and the evidence adduced. The prisoner was discharged on the ground that he was not lawfully and properly enlisted in the army of the United States, and his imprisonment therefore is unlawful. An appeal was taken and allowed to this court, and the case is here on assignments of error.

At the hearing before this court, counsel for the petitioner entered a motion to dismiss the appeal because no exceptions were taken at the trial, and because no bill of exceptions appears in the record disclosing the evidence then heard. Section 763 of the Revised Statutes of the United States, provides that an appeal shall lie from a decree of the district court in cases of habeas corpus. And the act establishing this court makes provision, also, for an appeal in like cases. No bill of exceptions is required in cases brought up on appeal. Besides this, the errors assigned are for matters appearing in the record, and in such cases no bill of exceptions is necessary. *Young v. Martin*, 8 Wall. 354. The motion is overruled.

The petition in this case is by the minor himself, not by his parent or guardian. Section 1116 of the Revised Statutes authorizes the enlistment of recruits into the army with men between the ages of

16 and 35. Section 1117 requires, in the case of enlistment of men under 21 years of age, the written consent of his parent or guardian, provided such minor is under the control and in the custody of his parent or guardian. The supreme court of the United States, in *Morissey's Case*, 137 U. S. 157, 11 Sup. Ct. 57, construing this last-named section, says:

"But this provision is for the benefit of the parent or guardian. It means simply that the government will not disturb the control of parent or guardian over his or her child without consent. It gives the right to such parent or guardian to invoke the aid of the court, and secure the restoration of a minor to his or her control, but it gives no privilege to the minor. The age at which an infant shall be competent to do any acts or perform any duties, military or civil, depends wholly upon the legislature. *U. S. v. Bainbridge*, 1 Mason, 71, Fed. Cas. No. 14,497; *Wassum v. Feeney*, 121 Mass. 93, 95. Congress has declared that minors over the age of sixteen are capable of entering the military service, and undertaking and performing its duties."

See, also, *In re Spencer*, 40 Fed. 149; *In re Kaufman*, 41 Fed. 876; *U. S. v. Blakeney*, 3 Grat. 405.

These cases settle the merits of this case. The enlistment of Davenport was not void. It was, at the most, voidable. *In re Spencer*, *supra*. Being in the army, his desertion was a crime, punishable as such. As is said by Judge Bond in *Re Kaufman*, *supra*:

"Kaufman was a soldier in the army, though improperly there. But he was not authorized to determine for himself the legality or illegality of his service, by deserting it. If he is in the service, and takes pay as a soldier, whether he be improperly enlisted or not, if he deserts he is liable to be held and punished by court-martial."

The district judge erred in his conclusion. It is ordered that the decision of the district judge be overruled, and that the petitioner be returned to the custody of the sheriff of Henrico county.

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#### TINGLE v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. April 12, 1898.)

No. 630.

#### 1. CRIMINAL LAW — CROSS-EXAMINATION OF ACCUSED — PROOF OF INDICTMENT OF FORMER PARTNER.

Defendant, who was on trial for fraudulent use of the mails, testified on his own behalf, and on cross-examination was asked if his former partner was not under indictment for fraudulent use of the mails. Over his objection, he was compelled to answer, and answered in the affirmative. *Held* reversible error.

#### 2. FRAUDULENT USE OF MAILS—FICTITIOUS NAME—REAL PERSON.

Under an indictment under Rev. St. § 5480, as amended by Act March 2, 1889, § 2, for using a false, fictitious, or assumed name in carrying out a scheme to defraud by the use of the mails, defendant could not be convicted of aiding a real person of that name in carrying out such a scheme.

#### 3. SAME — PARTICULAR ACT CHARGED — INSTRUCTIONS ASKED — WAIVER OF ERROR.

An indictment for the fraudulent use of the mails charged that defendant deposited in the post office a large number of letters addressed to J. and various other unknown persons. The court refused his request to instruct the jury that the particular act charged against defendant was the mailing of the letters addressed to J., that they should acquit him if he did not mail

it, and that they could only consider evidence of the writing and mailing similar letters to other persons in determining the intent of defendant Held, that the error, if any, was not available; no motion to quash, to elect, or in arrest having been made, or bill of particulars asked for.

In Error to the District Court of the United States for the Northern District of Texas.

This was an indictment against Stonewall Tingle for using the mails to defraud.

The indictment is as follows:

The United States of America, Northern District of Texas. to Wit:  
In the District Court of the United States within and for the Northern District of Texas.

In the name and by the authority of the United States of America: The grand jurors of the United States within and for the district aforesaid, at Dallas, in said district, duly selected, impaneled, sworn, and charged to inquire into, and true presentment make of, all crimes and offenses cognizable under the authority of the United States, committed within the said Northern district of Texas, upon their oaths present in open court that on the 15th day of January, A. D. 1897, in Dallas county, Texas, in the Northern district of Texas, and within the jurisdiction of this court, one Stonewall Tingle did then and there unlawfully, knowingly, and fraudulently devise a scheme and artifice to defraud J. W. Jenkins' Sons, the individual names of which firm are unknown to the grand jurors, and various other persons, whose names are also unknown to the grand jurors; said scheme and artifice to be effected by intending to open and by opening correspondence and communication with the said J. W. Jenkins' Sons and the other unknown persons, and inciting the said J. W. Jenkins' Sons and other unknown persons to open communication with him, the said Stonewall Tingle, but who was doing business and pretending to do business under the fictitious and false name of Otho Aronson, by means of the post-office establishment of the United States, and which said use and misuse of said post-office establishment was then and there a part of said scheme to defraud; and which said scheme to defraud was intended to be effected by falsely pretending to be in the business of teaching vocal and instrumental music, of selling sheet music and musical instruments, under the said fictitious name of Otho Aronson, and by falsely pretending, in and through certain letters and advertisements, which are too lengthy and voluminous to be set forth in this instrument, and to be desirous of selling musical instruments and sheet music, for the said J. W. Jenkins' Sons, and for various other persons unknown, to his pretended musical pupils; falsely pretending to have a music school of thirty pupils, and an acquaintance of a large number of music teachers, to whom he could sell sheet music and musical instruments, and falsely representing that he, the said Stonewall Tingle, under the fictitious name of Otho Aronson, had already made arrangements whereby a large amount of said goods could be sold, and that he already had a considerable business of this character, whereas, in truth and in fact, he, the said Stonewall Tingle, was not in the business of teaching instrumental and vocal music, and was not in the business of selling musical instruments and sheet music, and did not have a school of thirty or any other number of music pupils, and had not made arrangements for the sale of musical instruments and sheet music, and did not have a considerable business of that character; but he, the said Stonewall Tingle, under the name of Otho Aronson, and by the use of the United States post-office establishment in the letters and circulars aforesaid, made these false representations in order to procure possession of such musical instruments and sheet music, and by thus deceiving the said J. W. Jenkins' Sons, and various other unknown persons, for the purpose of selling the same, and with the fraudulent intention of appropriating the proceeds thereof to his own use and benefit; and the said Stonewall Tingle did then and there, unlawfully and fraudulently, on the 15th day of January, 1897, in the execution of said artifice and scheme to defraud, deposit in the post office of Dallas, Texas, a large number of letters and circulars, as mentioned above, which are too voluminous to be

inserted in this instrument, and directed the same to J. W. Jenkins' Sons, and to various other unknown persons, a more particular description of which said letters is unknown to the grand jurors; and by means of which said scheme and artifice to defraud, thus misusing the United States post-office establishment, the said Stonewall Tingle came into possession of a large number of musical instruments, and fraudulently appropriated the same to his own use and benefit, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

The assignment of errors is as follows:

(1) The court erred in permitting the government to prove by the defendant, and over his objection, that S. W. Hicks, a former partner of defendant, was under indictment for fraudulently using the mails, as shown by bill of exceptions No. 1. (2) The court erred in the following paragraph of its charge to the jury, to wit: "It is the theory of the government that this defendant impersonated the Professor Otho Aronson, and that the letters purporting to have been written by him were written by the defendant, or at his instigation or suggestion. The government also suggests that if there was such a person as Professor Aronson, and that he devised the scheme to defraud by the use of the mails of the United States, that the evidence so connects this defendant with the knowledge of that scheme, and participation in it, that he is guilty of the charge. I need not say to you that, if you find either one of these theories to be correct, you will be compelled to convict the defendant." (3) The court erred in the following paragraph of its charge to the jury: "You will ask yourselves whether there was any such person as Otho Aronson. If there was not, you will determine, if you can, whether this defendant had anything to do with this scheme, whether it was a scheme to defraud by the use of the mails, and whether the mails were used or not. If you find that there was such a person as Otho Aronson, you will determine from the evidence whether or not he formulated a scheme to defraud by the use of the mails, and used the mails in that particular, and whether or not the defendant acted with him, and with such knowledge of that purpose as to render him guilty." (4) The court erred in refusing to give to the jury the special instruction asked by the defendant, and in not instructing the jury, as therein requested, that the particular act charged against the defendant was the mailing of the letter dated January 15, 1897, signed, "Otho Aronson," and addressed to J. W. Jenkins' Sons, Kansas City. (5) The court should have instructed the jury that they must acquit the defendant unless they believed that he mailed or caused to be mailed the said letter dated January 15, 1897, and that proof of the writing and mailing by the defendant of other letters of similar character to other persons could only be considered by the jury in determining the intent of the defendant.

M. L. Crawford, for plaintiff in error.

J. Ward Gurley, for the United States.

Before McCORMICK, Circuit Judge, and NEWMAN and PARLANGE, District Judges.

PARLANGE, District Judge, as the organ of the court, said:

The first specification of error is that proof was allowed to the effect that one Hicks, a former partner of the defendant, was under indictment for fraudulently using the mails. The defendant, having testified in his own behalf, was asked by the district attorney, on cross-examination, whether his partner was not under indictment for fraudulent use of the mails. The defendant's counsel objected to the question, but the defendant was required to answer, and he thereupon answered the question in the affirmative. The defendant was being tried for an offense of the same kind as that for which his former partner was under indictment. There was no proof of any connection

between the defendant and his former partner as to the matter for which the defendant was being tried. We have no doubt that the effect of this evidence was prejudicial to the defendant, and that it was inadmissible. The counsel for the government argued that:

"Great latitude is allowed upon such cross-examination, and it was manifestly proper to examine the defendant relative to all his associations, habits, and the influences and circumstances surrounding his life, in order to test, not only his accuracy, but the worth of his evidence, and to enable the jury to correctly determine what credit they should give to his statements. This evidence was perfectly proper for that purpose. \* \* \*"

While it is true that latitude should be allowed on cross-examination, we cannot agree with the counsel for the government in his contention. We do not believe that, for the purpose of testing the accuracy or veracity of the defendant, or for any other purpose, he could be compelled to make answer to the question propounded to him concerning his former partner; and the fact that his former partner was under indictment for a matter with which the defendant had no connection whatever, could not be thus used against the defendant. The admission of this evidence enabled the jury to draw against the defendant a prejudicial and unlawful inference.

The second and third specifications of error may be considered together. Section 5480, Rev. St., was amended by Act March 2, 1889. Among other matters, the amendment, by section 2, provides for the punishment of persons who use a fictitious, false, or assumed name in carrying out schemes to defraud by the use of the mails. This is made a new and substantive offense under section 5480, Rev. St., as amended. The indictment in this case contains but one count. It is perfectly clear that it was drawn under section 2 (section 5480, Rev. St., as amended). The only charge is that the defendant, under the fictitious and false name of one Otho Aronson, made a fraudulent use of the mail. This is the only charge to which the defendant was called upon to respond. The district attorney could, by adding a count, have also laid a charge under the first part of the act of March 2, 1889, to provide against the contingency of Otho Aronson being a real person. But no such alternative count is contained in the indictment, and, doubtless, the court's attention not being called to the matter, the jury were charged that they could convict the defendant, whether or not Aronson was a real person. In our opinion, the jury could not do so, under the indictment as framed. The prosecution had chosen to stand upon the one charge (laid under section 2 of the act of March 2, 1889) that Aronson was a fictitious person. Furthermore, even had the indictment set out that Aronson was a real person, we are of the opinion that it was not made sufficiently clear to the jury that mere knowledge on the part of the defendant that Aronson had devised the fraudulent scheme, and had used the mails in carrying it out, was not sufficient to convict the defendant.

As to the fourth and fifth specifications of error, we incline to the opinion that, even if there is any validity in these contentions of the defendant, he cannot be heard to urge them now; and, besides, we do not believe that he was injured by surprise or otherwise. No motion

to quash was ever made, no motion to elect, no motion in arrest of judgment. No bill of particulars was ever asked for. *Connors v. U. S.*, 158 U. S. 411, 15 Sup. Ct. 951. In *Durland v. U. S.*, 161 U. S. 309, 16 Sup. Ct. 508,—a case in which the indictment was based on section 5480, Rev. St.,—it was charged in one count that 20 letters and circulars, the names and addresses upon them being unknown to the grand jurors, were deposited in the mail, in the carrying out of the fraudulent scheme. These letters and circulars were not recited in the indictment. Their substance was not stated, and, as already said, there was no mention of the names and addresses of the persons to whom they were mailed. Furthermore, a motion to quash was seasonably made in the trial court, and the same was overruled. The supreme court held, as to the defendant's contention that the letters were insufficiently described, that the refusal of a motion to quash is ordinarily in the discretion of the court, and, further, that the allegation that the names and addresses on the letters were unknown to the grand jurors, if true, cured the defect. The court also said that, if the defendant desired further specifications, he should have asked for a bill of particulars. As to the plea of multifariousness, the supreme court affirmed the doctrine of *Connors v. U. S.*, supra. It was held in *Re Henry*, 123 U. S. 372, 8 Sup. Ct. 142, that while but three offenses committed in violation of section 5480, Rev. St., within the same six calendar months, can be charged in the indictment, this does not prevent other indictments for other and distinct offenses committed in violation of that statute within the same six calendar months. In *Howard v. U. S.*, 21 C. C. A. 586, 75 Fed. 996, the defendant had committed, within the same six calendar months, twenty-four offenses in violation of section 5480, Rev. St. Eight indictments were found, each charging three of the offenses. The eight indictments were consolidated, and tried at the same time. The defendant was convicted on all the charges, and the trial court imposed cumulative punishment on each indictment. The circuit court of appeals for the Sixth circuit maintained the action of the lower court. For the reasons stated the judgment herein is reversed, the sentence is annulled, and the cause is remanded to the lower court for a new trial.

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MACDANIEL v. UNITED STATES.<sup>1</sup>

(Circuit Court of Appeals, Fourth Circuit. May 3, 1898.)

No. 232.

1. UNLAWFUL USE OF MAILS—INDICTMENT—LOTTERY.

An indictment which, in plain language, charges the defendant with using the mails to carry on the lottery business, causing letters concerning the lottery business to be addressed to him under a false, fictitious, and assumed name, and receiving such letters from the post office, is sufficient.

2. SAME—CONSTRUCTION OF STATUTES.

Act March 2, 1889, c. 393, § 2, making it a criminal offense to use the United States mails in carrying on or promoting any unlawful business

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<sup>1</sup> As to sufficiency of indictment for mailing lottery matter, see note to *Timmons v. U. S.*, 30 C. C. A. 74.

under a false, fictitious, or assumed name, and Rev. St. § 3894, as amended by Act Sept. 19, 1890, forbidding the use of the mails in carrying on or promoting the lottery business, construed in *pari materia*, plainly show the intent of congress to make the use of the mails to carry on or promote the lottery business under an assumed name a criminal offense.

Goff, Circuit Judge, dissenting.

### Appeal from the District Court of the United States for the District of Maryland.

The grand jury for the district of Maryland returned as "a true bill" an indictment against the plaintiff in error, charging "that Jesse L. MacDaniel, late of said district, yeoman, heretofore, to wit, on the thirteenth of December, in the year of our Lord one thousand eight hundred and ninety-six, at Baltimore, in the district aforesaid, was then and there engaged in conducting, promoting, and carrying on, by means of the post-office establishment of the United States, a certain unlawful business; that is to say, the said Jesse L. MacDaniel, acting then and there under the false, fictitious, and assumed name of George W. Baird & Company, was then and there engaged in conducting, promoting, and carrying on the business of general agent for the Royal Havana Lottery of Havana, Cuba, which said business was then and there conducted, promoted, and carried on by the said Jesse L. MacDaniel, acting, as aforesaid, under the false, fictitious, and assumed name of George W. Baird & Company, by means of the post-office establishment of the United States; and that said business, so then and there conducted, promoted, and carried on, by the said Jesse L. MacDaniel, under said false, fictitious, and assumed name, was then and there, by virtue of the act of congress approved September 19, 1890, an unlawful business, within the meaning of section 2, c. 393, act of congress approved March 2, 1889."

The second paragraph sets out the unlawful business more specifically, and a letter mailed at Summit, N. J., to George W. Baird & Co., New York, thence remailed to the same address, at Baltimore, and by the said Jesse L. MacDaniel received from the post-office establishment in Baltimore. The letter was of and concerning the lottery business. The third paragraph is the conclusion that plaintiff was carrying on an unlawful business, within the meaning of the statute quoted, by means of the post-office establishment and the use of a false, fictitious, and assumed name. The second count in the bill of indictment charges the same offense on a different day, and sets out another letter of like import.

Plaintiff in error demurred to the bill of indictment "because the matters therein contained are not sufficient in law, and he is not bound to answer the same." There was no objection to the form of the demurrer. It was overruled, and plaintiff in error required to answer as provided by statute. Rev. St. § 1026. On the trial subsequently had there was a conviction and sentence. To the action of the court in overruling the demurrer plaintiff in error excepted, and this was the exception relied on in the argument.

The demurrer was general, but in the exceptions found in the record and the argument it is insisted that the business set out in the bill must be *per se* an unlawful business, and the prosecution cannot rely on the words, "or any other unlawful business whatsoever," to bring the conduct of the plaintiff in error within the purview of the statute.

Charles F. Harley, for appellant.

Wm. L. Marbury, U. S. Atty.

Before GOFF, Circuit Judge, and BRAWLEY and PURNELL, District Judges.

PURNELL, District Judge (after stating case as above). There is and has been for many years a tendency to liberality in pleading, both civil and criminal. Many of the states have adopted the code system, supposed to be the simplest known to the profession, bidden

farewell to John Doe and Richard Roe, myths familiar to the older members of the profession, and many technicalities of pleading. Other states adhere to the old forms, and the courts continue to draw distinctions with refined nicety. The citation of state authorities in the argument, therefore, tends more to confuse than to elucidate, and can have no weight, especially when the tendency to substantial justice without too much form has invaded the halls of congress, and a rule has been prescribed for the federal courts. Rev. St. § 1025, provides:

"No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

There are other provisions applying to specified offenses, such as perjury, showing the same tendency to liberality in criminal pleadings in the courts of the United States. The section quoted has been often invoked, and almost universally construed to mean mere matters of form should not avail a criminal if the bill charges the offense in such a way as to fully inform him of the violation of law with which he is charged, and protect him, in the event of acquittal or conviction, against a second trial for the same offense. *U. S. v. Jackson*, 2 Fed. 502; *U. S. v. Molloy*, 31 Fed. 19.

For the purpose of the demurrer, the facts alleged in the bill are admitted. The first paragraph of the bill alleges that the plaintiff in error was engaged in carrying on an unlawful business by means of the post-office establishment of the United States and the use of a false and fictitious name, and then proceeds to describe the business, —a lottery. The second paragraph, in even more specific terms, sets out that, being engaged in carrying on an unlawful business by means of the post-office establishment of the United States and the use of a false and fictitious name, he received from the post office a letter addressed to the false and fictitious name, and sets out the letter; and the third paragraph is the conclusion that he was violating the statute. Language could hardly state the charge plainer. Congress has not made carrying on a lottery business unlawful per se, and could not do so; but congress has made carrying on, promoting, and conducting a lottery business, by means of the post-office establishment, not only unlawful, but criminal. Rev. St. § 3894; Act Sept. 19, 1890. The act is constitutional, and the power to regulate what shall or shall not be carried in the mails is vested in congress. *In re Rapier*, 143 U. S. 110, 12 Sup. Ct. 374; *Horner v. U. S.*, 143 U. S. 207, 12 Sup. Ct. 407. "Unlawful" does not necessarily mean contrary to law. "Un" is a preposition used indiscriminately, and may mean simply "not," and "unlawful" may mean simply "not authorized by law." Congress has not only not authorized matter concerning a lottery business to be sent through the mails, but has prohibited and excluded it from the mails. So, it is not only unlawful, but criminal, to conduct, promote, or carry on the lottery business by using the United States mails for this purpose; it is the modus, not the business per se. The statute (Rev. St. § 3894), as amended,

creates the offenses of carrying on the lottery business by depositing or causing to be deposited in the mails, sending or causing to be sent or delivered, such matter by the use of the post-office establishment. *U. S. v. Conrad*, 59 Fed. 458, and cases cited. All matter concerning lotteries has been excluded from the United States mails. And the taking of such matter from the mails or post office is forbidden, especially when addressed to one under a false, fictitious, and assumed name. The acts of plaintiff, if the facts alleged be true, show that he knew this, and, if he did not, ignorance would not be a valid defense. The words in the statute, "or any other unlawful business whatsoever," include a scheme or device made unlawful, prohibited by act of congress. The indictment charges plaintiff in error with using the United States mails to carry on the lottery business, causing letters concerning the lottery business to be addressed to him under a false, fictitious, and assumed name, and receiving such letters so addressed from the post office. This was an unlawful business, within the meaning of the statute. The words refer to what has been made unlawful by act of congress. Plaintiff in error was well advised by the indictment of the nature and cause of the accusation against him, and was able to make his defense with all reasonable certainty and knowledge. This was sufficient. *U. S. v. Conrad*, 59 Fed. 458; 2 Story, Const. 1785; *U. S. v. Cruikshank*, 92 U. S. 542; *U. S. v. Simmons*, 96 U. S. 360. The indictment, if defective at all, is only defective in form, and does not tend to prejudice plaintiff in error. This brings it within the provisions of section 1025, Rev. St.

The rule that penal statutes must be strictly construed is still in force, but has been much relaxed and given a more liberal application than in days when there were a great many more offenses punishable with death. The rule is laid down by the chief justice, delivering the opinion for the court, in *U. S. v. Lacher*, 134 U. S. 628, 10 Sup. Ct. 625, the case upon which *U. S. v. Brewer*, 139 U. S. 278, 11 Sup. Ct. 538, cited and relied on by plaintiff in error, is based. The chief justice says: "But though penal laws are to be construed strictly, yet the intention of the legislature must govern in the construction of penal as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the legislature." Many authorities are cited for this rule. The same rule now contended for by plaintiff in error was contended for in that case. In construing a statute, all existing statutes should be taken into consideration in *pari materia*, whether referred to or not, and by this rule the true intent of the legislature or lawmaking department of the government is arrived at, for it is that department which makes the law. "It appears to me," said Mr. Justice Story, in *U. S. v. Winn*, 3 Sumn. 209, 211, Fed. Cas. No. 16,740, "that the proper course, in all of these cases, is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature." To the same effect is the statement of Mr. Sedgwick, in his work on Statutory and Constitutional Law (2d Ed., p. 282):

"The rule that statutes of this class are to be construed strictly is far from being a rigid or unbending one; or, rather, it has in modern times been so modified and explained away as to mean little more than penal provisions, like all others, are to be fairly construed according to the legislative intent, as expressed in the enactment,—the courts refusing, on the one hand, to extend the punishment to cases which are not clearly embraced in them; and, on the other hand, equally refusing, by any mere verbal nicety, forced construction or equitable interpretation to exonerate parties plainly within their scope."

And the reason for the less rigorous application of the rule is well given in Maxwell on the Interpretation of Statutes.

Applying the rule to the case under consideration, what was the legislative intention in the act of 1889? The first section of that act was not intended (as a casual reading will show) to make dealing in counterfeit goods, or the devices therein mentioned, penal offenses,—there was legislation sufficient on that subject,—but to make the use of the mails for the purpose of promoting or carrying on the devices enumerated unlawful and criminal. The gravamen of the offense was the use of the mails. Then section 2 provides:

"That any person who, in and for conducting, promoting or carrying on, in any manner by means of the post-office establishment of the United States, any scheme or device mentioned in the preceding section, or any other unlawful business whatsoever, shall use, assume or request to be addressed by any fictitious, false or assumed title, name or address, or name other than his own proper name, or shall take or receive from any post office of the United States any letter, postal card, or packet addressed to any such fictitious, false or assumed title, name or address, or name other than his own lawful and proper name, shall, upon conviction, be punishable as provided in the first section of this act."

Section 3894, Rev. St., amended by the act of September 19, 1890, provided that no letter, etc., concerning a lottery, shall be carried in the mail. In short, the legislative intention seems to have been to punish by fine and imprisonment the use of the mails for just such acts as plaintiff in error is charged with. The crimes are in *pari materia*, and the use of the mails for the promotion of a lottery scheme, and in an assumed name, as charged in the bill of indictment, is clearly within the meaning of the words, "or any other unlawful business whatsoever."

The exceptions to the refusal of the trial judge to give the special instructions asked for were not pressed in the argument. The charge was fair, full, and in accord with the law. A trial judge is not required to give special instructions in the exact language of counsel, often formulated with the purpose to mislead, or calculated, if not intended, to confuse, but to state the law in a way to be understood by the jury, and by them applied to the testimony, so as to intelligently find the facts. This seems, from the charge set out in the record, to have been done in an eminently proper and full manner.

The exceptions are overruled, the appeal dismissed, and the judgment of the district court affirmed. Affirmed.

BRAWLEY, District Judge. I concur in the result.

GOFF, Circuit Judge (dissenting). I am unable to concur in either the reasoning or the judgment of the court in this case. In my opin-

ion, the court below erred in not sustaining the demurrer to the indictment, which does not, in my judgment, charge the plaintiff in error with the commission of any crime,—with the doing of anything made unlawful by the statutes of the United States.

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SAFTER v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. May 9, 1898.)

No. 993.

1. CRIMINAL LAW—EVIDENCE—SUBSEQUENT CRIMES—RELEVANCY.

On a trial for mailing lewd and lascivious letters, in which the only issue for the jury is whether they were sent through the mails or in some other way, evidence of subsequent illicit relations between the writer and the addressee of the letters is irrelevant.

2. WITNESS—CROSS-EXAMINATION.

A witness may not be cross-examined upon a subject concerning which he has not testified in chief, unless such cross-examination is in the form which lays a proper foundation for impeachment.

3. SAME—IMPEACHMENT.

When a witness is cross-examined on a matter collateral to the issue, his answer cannot be subsequently contradicted by the party who put the questions.

In Error to the District Court of the United States for the Western District of Arkansas.

Wm. M. Cravens, for plaintiff in error.

F. A. Youmans, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

SANBORN, Circuit Judge. The plaintiff in error, L. A. Safter, pleaded not guilty to an indictment for mailing two lewd and lascivious letters on July 15, 1895, and on August 6, 1895, respectively, and after a trial by a jury was convicted, and sentenced to imprisonment at hard labor in the penitentiary at Ft. Leavenworth for two years. The trial court declared the letters to be lewd and lascivious as a matter of law, and the only question submitted to the jury was whether or not they were mailed. Upon this issue the testimony was conflicting. After the plaintiff in error had testified that they never were transmitted through the mails, but that one of them was handed by him personally to the woman to whom it was addressed, and that the other was sent to her by a special messenger, the district attorney was permitted, over the objection of counsel for the accused, to ask him whether or not, in January, 1896, he and the addressee of the letters registered at an hotel in Ft. Smith, in the state of Arkansas, and occupied the same room, as John Jones and wife. After he had answered that they did not, the district attorney was allowed to introduce evidence, over like objections, that they did, and that at another time and place, months after the letters were delivered, they were seen in a water-closet together. These and many other rulings of the court below are assigned as error. What relevancy this testimony had to

the question whether or not these letters were sent through the mails, or to the question whether the letters were lewd and lascivious or not, or to the question whether the testimony of the defendant was credible or not, it is difficult to perceive. The fact, if it was a fact, that the accused committed adultery with the addressee of the letters, or that he frequented a closet with her, is certainly not evidence that he mailed a lewd and lascivious letter to her six months before. It is too well settled for consideration or discussion that proof of the subsequent commission of another crime is no evidence of the earlier commission of a like or a different crime. *People v. O'Brien*, 96 Cal. 171, 31 Pac. 45; *Clapp v. State*, 94 Tenn. 186, 30 S. W. 214; *People v. Fowler*, 104 Mich. 449, 453, 454, 62 N. W. 572, 574. There was nothing in the direct examination of the plaintiff in error bearing upon his relations with the addressee of these letters, and no foundation there for the question propounded to him on cross-examination, and neither that question nor any answer that might be made to it could have any tendency to impeach his character for truth and veracity. Moreover, if that question and its answer had been competent, the rebutting evidence which contradicted the answer was clearly incompetent. The matter in issue was whether or not the lewd letters were mailed. The question whether or not the accused and the addressee of the letters registered as man and wife and occupied the same room six months later was entirely collateral to this issue. "When a witness is cross-examined on a matter collateral to the issue, his answer cannot be subsequently contradicted by the party putting the question." *Whart. Cr. Ev.* § 484, and cases cited in note 6. There is no ground on which the introduction of this evidence can be sustained, and the questions it presents are too elementary to warrant discussion. The judgment below is reversed, and the case is remanded to the district court, with directions to grant a new trial.

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MORRISON v. PETTIBONE et al.

(Circuit Court, N. D. Illinois. May 13, 1897.)

1. INFRINGEMENT OF COPYRIGHT—PHOTOGRAPH—FORFEITURE OF SHEETS, ETC.—  
REPLEVIN.

Replevin is a proper remedy to enforce a forfeiture, under Rev. St. § 4965, of infringing plates and sheets found in the possession of defendant.

2. SAME.

Sheets seized in defendant's possession, after the first or outline impression only of the photograph had been taken, are not forfeitable, under Rev. St. § 4965, though it was defendant's intention to complete the copies. The copies must be so far perfected as to constitute an imitation of a substantial part, and so far perfected as to establish identity.

This was an action in replevin by William M. Morrison against P. F. Pettibone & Co. to recover certain sheets and plates alleged to be infringements of plaintiff's copyright of a photograph, under section 4965, Rev. St. The case was heard on motion to set aside verdict rendered in favor of the plaintiff.

Felsenthal & D'Ancona, for plaintiff.  
Osborne Bros., for defendants.

SEAMAN, District Judge. On the pleadings and matters conceded at the trial, it appeared to me that two questions only were presented in this case, both involving the construction to be placed upon the statute: (1) Whether replevin is the proper remedy to enforce the forfeiture of infringing plates and sheets found in the possession of the defendants, as declared by section 4965 relating to copyrights; and (2) whether sheets containing the first or outline impression only, and not completed as a copy, were within the provision that "he shall forfeit to the proprietor all the plates on which the same shall be copied and every sheet thereof either copied or printed." 26 Stat. 1109; 23 Stat. 965.

At the trial no precedent was called to my attention for or against either of the above propositions, aside from the statement in a textbook that replevin or trover was the proper remedy; for which, according to my recollection, English cases were cited. Upon first impressions, that the sheets in controversy were within the terms of the statute, which forfeits copies of the production "either in whole or in part," notwithstanding the fact that the work was only partially completed, it seemed to me advisable to direct a verdict in favor of the plaintiff, the facts being undisputed. On this motion for a new trial counsel for the defendants urges other objections as well, but, as I am of opinion that the answer to at least one of the questions above stated must be fatal to the direction of verdict, the further suggestions of counsel have not been considered.

1. I was inclined to the view at the outset of this inquiry that the action could not be maintained within the doctrine applicable to replevin, for the reason that the sole foundation was a statutory forfeiture. Section 4965 distinctly provides that the offender "shall forfeit to the proprietor all the plates" and sheets constituting the infringement, and it would seem to require direct adjudication of forfeiture before the property right is perfected, under the general rule respecting forfeitures, that they do not operate ipso facto to vest property in the beneficiary. *Bac. Abr. "Forfeiture," D; Fire Department v. Kip*, 10 Wend. 266. And the intimation that the statute intends a "remedy by condemnation and forfeiture" clearly appears in the opinion of Judge Wallace, speaking for the circuit court of appeals for the Second circuit, in *Bolles v. Outing Co.*, 23 C. C. A. 594, 77 Fed. 966, 968. It is questionable, however, whether the peculiar language of the English act (referred to in *Stevens v. Gladding*, 17 How. 447, and *Stevens v. Cady*, 2 Curt. 200, Fed. Cas. No. 13,395) furnishes ground for any distinction of its provisions in this regard from the effect of the congressional enactment. On the other hand, it is expressly stated in *Stevens v. Cady*, *supra*, in reference to the statute in question, that "the proprietor of the copyright is left by the act to his remedies at law, by trover or replevin," and, as the opinion is by Mr. Justice Curtis, it is entitled to great weight. Remark is made in *Thornton v. Schreiber*, 124 U. S. 612, 620, 8 Sup. Ct. 618, which may intend the same view, although stated *arguendo*, and so qualified that it may not be applicable. Therefore I conclude, for the purposes of this motion, at least, that any doubt as to the proper remedy may well be resolved in favor of this form of action, and that such ruling

may be based upon the hypothesis that the term "forfeit," as used in the statute, is not to be taken in its strict ordinary sense; that the act of congress, clearly intending to give to the proprietor an exclusive right of property in that which has been produced by his mind and skill, confers as well an ownership in all copies which are made by infringers; that through the act of piracy the title to the imitation vests in the proprietor of the copyright, in that sense only being forfeited; and, so regarded, replevin would lie to obtain possession.

2. The claim, however, that the bare outline printed upon the sheets in evidence constitutes a copy, within the purview of the statute, is, in my opinion, untenable. It is well settled that the provisions of this statute must be strictly construed. *Backus v. Gould*, 7 How. 798; *Falk v. Heffron*, 56 Fed. 299; *Sarony v. Ehrich*, 28 Fed. 79. The reference therein to copies, "either in whole or in part," is intended to reach every imitation which preserves the substance of the copyrighted production, or any vital and severable portion, although variations are made in design or detail; in other words, to prevent evasion by colorable deviation. *Lithographing Co. v. Falk*, 20 U. S. App. 296, 8 C. C. A. 224, and 59 Fed. 707; *Richardson v. Miller*, Fed. Cas. No. 11,791; *Falk v. Howell Co.*, 37 Fed. 202; *Drury v. Ewing*, 1 Bond, 540, Fed. Cas. No. 4,095; *Fishel v. Lueckel*, 53 Fed. 499. To infringe the copyright, "a substantial copy of the whole or of a material part must be produced." *Perris v. Hixamer*, 99 U. S. 674, 676. It is probably true, as remarked in *Fishel v. Lueckel*, *supra*, that substantial imitation, and not marketable value or quality, is the test of infringement; but the imitation must be of a substantial part, must have essence, and be so far perfected as to establish the identity. In other words, infringement, for the purposes of forfeiture, must be an accomplished fact,—must appear from the face of the production, and not be inferred from what was intended if it has been completed. *Drury v. Ewing*, *supra*; *Fishel v. Lueckel*, *supra*; *Falk v. Donaldson*, 57 Fed. 332. The authorities are clear that the question of knowledge or intent does not enter into consideration upon the issue of infringement, and, as the absence of these elements will not save from forfeiture in case of actual piracy, so the fact that infringement was manifestly intended at any incomplete stage, but was not carried out, cannot operate to turn the mere embryo into a copy subject to forfeiture. In this case the sheets were seized in the defendant's possession when the first impression only had been taken, presenting merely the initial color and exterior lines of the intended lithograph, without the features or any substantial embodiment of the copyrighted photograph. Several plates or stones were required to make the copy, being in actual readiness for the purpose, but one only had been used, making this outline color. I am satisfied that no copy was produced, within the meaning of the statute. These preparations would have been sufficient, probably, for equitable relief, but establish no case for forfeiture of the incomplete sheets, for which recovery was directed. Therefore the verdict must be set aside, and the motion for a new trial is granted. So ordered.

## REGINA MUSIC-BOX CO. v. GUENDET.

(Circuit Court, S. D. New York. May 13, 1898.)

## No. 7.

**PATENTS—IMPROVEMENTS IN MUSIC BOXES.**

The Brachhausen & Riessner patent, No. 500,372, for an improved fly fan or governor for music boxes, *held valid and infringing*.

This was a suit in equity by the Regina Music-Box Company against Emile L. Guendet for alleged infringement of a patent for an invention.

Antonio Knauth, for complainant.

SHIPMAN, Circuit Judge. The bill in equity in this case was based upon the infringement by the defendant of the three claims of letters patent No. 500,372, dated June 27, 1893, and issued to Gustav A. Brachhausen and Paul Riessner, for an improved fly fan or governor for music boxes. The patent is, and was at the commencement of the suit, owned by the complainant. The defendant appeared in the case, and filed an answer, to which the complainant filed a replication. *Prima facie*, answering, and rebuttal proofs were taken by the respective parties, in the taking of which the defendant participated. In the answering proofs, the defendant called no witness, but introduced eight prior letters patent. Upon the hearing before this court, the complainant appeared, and was heard by his counsel, Antonio Knauth, Esq.; and the defendant did not appear. The validity of the patent has been sustained in this district by Judge Townsend, in *Music-Box Co. v. Paillard*, 85 Fed. 644. Infringement in this case is proved. I perceive no reason why the usual interlocutory decree for an injunction against the infringement of the three claims of the patent, and for an accounting, should not be entered.

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## CAPITAL SHEET-METAL CO. v. KINNEAR &amp; GAGER CO.

(Circuit Court of Appeals, Sixth Circuit. April 5, 1898.)

## No. 547.

**1. PATENTS—INVENTION—ANALOGOUS USE.**

The substitution of rounded corners in the panels of metallic ceilings for the sharp angles previously used in like panels involves no invention, it appearing that the advantage of making rounded corners in other articles constructed from sheet metals than ceiling panels was well understood by artisans.

**2. SAME—METALLIC CEILING PANELS.**

The Kinnear patent, No. 388,285, for improvements in metallic ceilings, is void for want of invention as to claim 2, in which the only feature of novelty is the making of the panels with round corners. 81 Fed. 491, reversed.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

This was a suit in equity by the Kinnear & Gager Company against the Capital Sheet-Metal Company for alleged infringement of a patent for improvements in metallic ceilings. The circuit court rendered a decree for complainant (81 Fed. 491), and the defendant has appealed.

C. C. Shepard, for appellant.

D. F. Patterson, for appellee.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

SEVERENS, District Judge. This is a suit in equity, brought by the Kinnear & Gager Company, the appellee here, against the Capital Sheet-Metal Company, the appellant, complaining of the infringement of the rights secured by letters patent No. 388,285 to William R. Kinnear, issued August 21, 1888, which were subsequently assigned to the appellee. The patent was for improvements in metallic ceilings, and relates specifically to the form of panels used for that purpose. The second claim of this patent, which is the only one in controversy here, is this:

"(2) In a ceiling such as described, panels thereof constructed from continuous sheets, and having margins raised above the body, and the connecting portion between the body of the panels and the margins having rounded corners, substantially as described."

The defendant in the court below, by its answer, did not deny that it was constructing metallic panels in substantially the same form as those described in the patent, and covered by the second claim thereof. Thus the question of infringement is not involved. But the answer denied that the patentee was the true, original, and first inventor of the device covered by the letters patent mentioned in the bill, and averred that the device was not an invention when produced by the said William R. Kinnear, and that it was not novel at the time of said invention; and this averment constitutes the substance of the controversy. The case was heard in the circuit court upon the pleadings and proof. The court sustained the validity of the patent, and entered a decree for the complainant; the court being of opinion that, although there had been previous constructions of substantially the same form, yet that their transfer to and employment in the construction of ceilings was an application to a new use so remotely allied to any previous use as to indicate the presence of invention. To this conclusion we cannot agree. The invention professes to be one of improvements in metallic ceilings, and relates to the formation of the panels of which such ceilings are composed so constructed as to obviate the liability to breakage in the corners incident to the panels of the ordinary construction. In the specification the patentee says:

"In panels of this nature having the edges raised above the body as constructed heretofore, the connecting moldings, C, of the adjoining sides meet at a sudden angle. Under this plan, when the sheets are stamped the metal is liable to be torn at the outer edges, where the strain is greatest, by offering to the strain the metal partly broken by forming the angle. This, by dragging the edge open, presented an unsightly appearance, which has to be relieved by soldering in the corner an additional piece of metal in which the

angle is already formed. It is to obviate this difficulty that I now stamp my sheets with the rounded corner shown in the drawings."

By comparing the panels of the Kinnear patent with the panels described in former patents and those which had been in previous use, it is seen that the only advance made by the invention embodied in claim 2 is in giving rounded corners to the connecting portion between the body or large central portion of the panel and the margins of the panel. One Henry Adler, of Pittsburg, Pa., had some time prior to May 20, 1874, devised a plan for making metallic ceilings in thin panels which showed a depressed body with flanges turned up at the edges to be secured to the ribs which framed the spaces into which the ceiling was divided, and made application for a patent thereon May 20, 1874. Upon this application letters patent No. 158,881 were issued January 19, 1875. On November 24, 1885, letters patent were issued to Albert Northrop, also of Pittsburg, for improvements in metallic ceilings composed of panels, the main portion or body of which was flat and the margins raised with a connecting portion extending from the body upward to the margin. In the panels of the Northrop patent the margin and the portion connecting it with the body were cut out at the corners of the panel down to the body thereof. The only difference material to be noticed between the Northrop patent and the patent in suit consists in the fact that in the Northrop patent the corners were cut away, as just stated, while in Kinnear's patent the corners of the margin and connecting portion were made full and round.

This claim 2 in Kinnear's patent makes no reference to the ornamentation of the panel, nor to any peculiarity in its form which has special reference to any mode of connecting one panel with another in the ceiling. Forms of thin metal swaged or struck up with dies corresponding to the form of the panel described in the claim in question had been in common use for various familiar purposes long previous to the date of Kinnear's application for a patent. Examples of these are found in the instances referred to in the proofs in the present case, such as tea trays, lids of coal vases, and baking pans. Others, like the wrought-iron sink in the Kilbourne patent which was in suit in the case of Kilbourne v. W. Bingham Co., 1 C. C. A. 617, 50 Fed. 697, and the instances mentioned in the opinion in that case, may be referred to as illustrations. The prior existence of such constructions is not, as we understand, disputed by counsel for the appellees, but the contention is that such a form had not before been thought of in the use of panels for ceilings. That the making of the angles in a circular form with dies appropriately shaped would render them stronger and more useful in keeping them clean and for appearance sake, was well known; indeed, the fact dwelt upon in the specification that they would be less liable to fracture in constructing them, and less liable to breakage in use, was well known to every one at all acquainted with the art of making them, or their subsequent use. The question, therefore, comes to this: whether, in view of the facts that panels of metallic sheets had been made in such forms as were shown by the Adler and Northrop patents, that the forms of the identical construction called for by this

second claim had been so long in common use in other articles as to be familiar to everybody, and that the advantages of making the corners round were well understood by every artisan, the adoption of that form into the construction of thin metallic plates for panels in ceilings involved invention. It is earnestly insisted that there is evidence that it did in the fact that no one else appears to have thought of it before Kinnear, but this is a suggestion which is applicable to every step in the progress of the arts and to the production of every new thing. Long practice and observation naturally lead those familiar with the arts to the perception of new adaptations. Mechanical education and skill, fostered and promoted by the public, are rapidly advancing in every direction, and there is a constant and universal endeavor in handicraft to utilize that which is known, and press it into service in the practical arts. But the steps of this normal progress and improvement are not invention, nor the subject of monopoly to one who, in the exercise of the "skill of his calling," has put an old thing to a new use. It does not seem to us possible that the substitution of rounded corners in these panel plates for the sharp angles of the old construction referred to by Kinnear in the extract above quoted from his specification is indicative of anything more than the exercise of the common skill and judgment of those trained in the art to which the subject relates. Kinnear, in his specification, after stating the objects of his invention, says: "It consists in constructing the panels so that the sharp angles at the corners, which weaken the metal, and render it liable to breakage at those points, both in the manufacture and by the change of temperature, are avoided." And this, so far as it is involved in the second claim, is all that there is of his invention, for it was not new to make the panels of continuous sheets, with margins raised above the body by a connecting portion. It is suggested in the opinion of the court below that the continuous sheets of the Kinnear patent are not the same as the continuous sheets of the Northrop patent, but the "continuous sheets" are not more particularly described and mean no more than that they are one sheet, and not made up of parts. The panels of the Northrop patent, as well as those of Adler, conform to this description. For the reasons we have given, we think the improvement embodied in the second claim does not constitute a patentable invention. The decree below must be reversed, and the case remanded, with directions to dismiss the bill, with the costs of both courts.

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WESTINGHOUSE ELECTRIC & MANUFACTURING CO. v. MUSTARD.

(Circuit Court, E. D. Pennsylvania. April 7, 1898.)

No. 23.

PATENTS—ESTOPPEL—CROSS BILL AND INJUNCTION.

In an infringement suit, defendant asked leave to amend his answer so as to set up that plaintiff was then engaged in prosecuting applications and interferences in the patent office, wherein it sought to procure patents covering the same subject-matter as the patent sued on, and was as-

setting dates of invention earlier than that of the latter patent, whereby, it claimed, plaintiff was estopped from further prosecuting the suit. It therefore asked that proceedings be immediately stayed, that defendant have leave to file a cross bill founded on these averments, and praying an injunction against the further prosecution of the suit pending the interference referred to. *Held* that, while an amendment of the answer might be allowed, the court had no power to stay the proceedings or award an injunction on such a cross bill.

This was a suit in equity by the Westinghouse Electric & Manufacturing Company against John Mustard for alleged infringement of a patent. The cause was heard upon an application by defendant for leave to amend his answer, and for a stay of proceedings, and leave to file a cross bill praying an injunction against the further prosecution of the suit.

Kerr, Curtis & Page, A. Parkes Smith, and Charles A. Terry, for complainant.

W. H. Staake, A. C. Fowler, and Jos. C. Fraley, for defendant.

DALLAS, Circuit Judge. The defendant has moved for leave to amend his answer by adding thereto a paragraph as follows:

"(13) Further answering upon information and belief, this defendant alleges that this complainant, the Westinghouse Electric & Manufacturing Company, or persons or corporations who own or control it, and to whose acts in the premises this complainant is privy, was at the time of the institution of this suit, and is now, the assignee and sole owner of, and as such was and is actively prosecuting, an application or applications for letters patent of the United States filed by applicants other than the said Rankin Kennedy, which application contains claims covering substantially the same subject-matter as is claimed in the reissued letters patent, No. 11,031, in said bill mentioned, and that the said application or applications, if allowed, will result in the grant of letters patent of the United States to the complainant, patenting and monopolizing substantially the same subject-matter as that which is patented in said reissued letters patent. And this defendant further avers that, in the matter of said applications, interferences have been declared in the United States patent office between said claims thereof and other pending applications, and that in said interferences the complainant has been and is asserting dates of invention on the part of applicant or applicants by whom said applications were respectively filed long prior to the alleged date of invention by the said Rankin Kennedy of the subject-matter patented in said reissued letters patent; and, by the assertion of such prior date or dates of invention on behalf of such applicant or applicants, the complainant is endeavoring to induce a grant of letters patent in derogation of, and absolutely contradictory to, the assertion of title under the said reissued letters patent, for the purpose, and, if successful, with the result, of establishing a new monopoly of such subject-matter, for the benefit of the complainant, for a further period of seventeen years from the date at which said patent or patents may hereafter be granted. And, further, this defendant avers that the complainant has entered into a combination with persons or corporations owning or controlling certain of the other applications, which have been placed in interference with the applications so as aforesaid owned and controlled by it, the general intent and purpose of which agreement is that, to whatsoever person or persons priority shall be awarded in said interference proceedings, the patent or patents which shall be granted thereon shall be jointly enjoyed and owned by the parties to said agreement, including the complainant. And this defendant appears in a schedule annexed hereto, marked 'Exhibit Interference Schedule,' a statement of the issues in said interferences, and of the parties thereto, and of the persons or corporations in whom the title to the said interference applications is vested; and it avers that the said persons or corporations designated

in said schedule as the 'complainant or its privies,' and 'General Electric Company,' are the parties to the aforesaid agreement whereby the patents, when granted, are to be enjoyed in common. And, further answering, this defendant avers that the aforesaid acts of the complainant are collusive, and that whether, as the result of the said interference proceedings, patents shall be granted to the applicants whose applications are directly vested in the complainant, or whether the patents for said subject-matter shall be granted to the other applicants mentioned in said schedule, and owned and controlled by the General Electric Company, the said complainant will become clothed with the benefits of title thereunder, and is privy to the assertion of title, not only on behalf of applicants, the title to whose applications appears of record to be vested in complainant, but also on behalf of the said other applicants; and this defendant therefore avers that by endeavoring to induce such grant or grants, and by its other acts in the premises, the complainant is estopped from asserting priority of claims on behalf of Rankin Kennedy to the subject-matter claimed in said reissued letters patent, and ought not to be permitted to assert the title of said Rankin Kennedy in the premises. And, further answering, this defendant avers that, for the purpose of obtaining the grant of letters patent for such subject-matter to some one or more of the applicants in said interference proceedings, said complainant has knowingly and intentionally withheld any assertion of title or any claim of priority on behalf of the said Rankin Kennedy to such subject-matter in the aforesaid interference proceedings; and this defendant avers that by so withholding said claims of priority on behalf of the said Rankin Kennedy, which, if well founded, would defeat the said applications, and the grant of patents thereon for the said subject-matter, the complainant has admitted that the said Rankin Kennedy was not the original and first inventor of the subject-matter patented in said reissued letters patent; and this defendant avers that, by reason of the aforesaid admission that the said Rankin Kennedy is not the original and first inventor of the subject-matter, it is inequitable for the complainant to assert against this defendant any claim or title under the said reissued letters patent, as the assignee of the said Rankin Kennedy."

This proposed amendment avers that the plaintiff, by reason of the matters therein alleged, is estopped from asserting priority of claim on behalf of Rankin Kennedy to the subject-matter claimed in the reissued letters patent sued on, and has admitted that the said Rankin Kennedy was not the original and first inventor of the subject-matter patented in said reissued letters patent. With respect to these averments of estoppel and admission, I at present perceive no reason for doubting that any relevant and competent evidence may be given under the answer as it stands; but, if the defendant shall be advised that it requires amendment to this end, the order now to be made will not preclude him from moving the court with that object. The purpose now avowed and sought to be attained, however, is quite different. It is not only asked that the amendment shall be allowed, but also that, upon the filing thereof, all proceedings in the case shall be stayed, and that the defendant shall have leave to file a cross bill founded upon the averments contained in the proposed amendment, and praying for an injunction to restrain the complainant from further prosecuting this suit during the pendency of the interference referred to, and thereafter until such time as the question of priority between the alleged invention of Rankin Kennedy and of the inventor to whom priority shall be awarded in the said interference proceedings shall have been determined. No authority has been cited, and I believe none can be found, which would support such an order. If, as I have said, the defendant can prove any relevant admission or any state of facts to

establish an estoppel, this may be done by way of defense; but the stay of proceedings, which is the gist of the present application, could not, in my opinion, be now ordered, or be awarded upon a cross bill, without an unwarranted exercise of power by the court, and an undue extension of the office of such a bill. *Stonemetz Printers' Mach. Co. v. Brown Folding Mach. Co.*, 46 Fed. 851.

The amendments proposed to be made to paragraph 11 have not been objected to. They are allowed. The motion for leave to add an additional paragraph, to be marked "13," and for an order to stay proceedings, and for leave to file a cross bill, is denied.

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UNITED STATES REPAIR & GUARANTY CO. et al. v. STANDARD PAVING CO.

(Circuit Court, N. D. New York. May 5, 1898.)

1. PATENTS—ANTICIPATION—METHOD OF REPAIRING ASPHALT PAVEMENTS.

The Perkins patent, No. 501,537, for an improvement in the method of repairing asphalt pavements, consisting in subjecting the spot to be repaired to heat until the material is softened, then adding new material, and smoothing and burnishing it, was anticipated by the Crochet French patent of June 11, 1880, which describes substantially the same method.

2. SAME—INVENTION.

It being known that heat may be used to soften a Trinidad asphalt pavement at a spot to be repaired, and that rock asphalt and bitumen pavements could be mended by heating the top layer, removing the material with a notched hoe, then adding new material, and tamping in the ordinary way, there was no invention in applying this method to the repair of Trinidad asphalt pavements.

This was a suit in equity by the United States Repair & Guaranty Company and others against the Standard Paving Company for alleged infringement of a patent.

E. N. Dickerson, for complainants.

William Macomber and Tracy C. Becker, for defendant.

COXE, District Judge. This is an equity action for the infringement of letters patent No. 501,537, granted July 18, 1893, to Amos H. Perkins for an improvement in the method of repairing asphalt pavements. The specification states that prior to March 8, 1893, the date of the application, it was customary to dig out with a pick the surface material around the spot to be repaired, sometimes applying heat to soften the material. The depression thus made was thoroughly cleaned and given a coat of tar. New material in a heated state was placed in this depression and was ironed and smoothed in the usual manner, the tar acting as a solder to hold the new material in place. The joint between the old material and the new was plainly visible and sometimes formed a ridge. By reason of frost or other causes the new block of material was frequently torn loose from its soldered connection. After stating the objections to the old method the patentee proceeds:

"In practicing my invention, however, I subject the spot to be repaired and the surrounding edges to such a degree of heat that the surface asphalt, not only the exact spot to be repaired but the surrounding portion to a greater or less degree, is reduced to the soft pliable state in which it is originally laid. With a rake or other suitable instrument it is then agitated and mixed with enough new material to fill up the spot to be repaired. It is then subjected to the usual finishing operation of ironing and burnishing."

Although the patentee does not limit himself to any particular form of apparatus, he illustrates his method in connection with an ingenious gasoline heater which is the subject of another patent of even date. Any heating device, no matter how crude or ancient, is, however, within the claims, which are as follows:

"(1) The method of repairing asphalt pavements which consists in subjecting the spot to be repaired to heat adding new material and smoothing and burnishing it, substantially as described. (2) The method of repairing asphalt pavements which consists in subjecting the spot to be repaired to heat until the material is softened, agitating it and mixing with it new material and finally smoothing and burnishing it, substantially as described."

The method of the first claim consists of the following steps: First. Subjecting the spot to be repaired to heat. Second. Adding new material. Third. Smoothing and burnishing.

The second claim is substantially the same as the first but somewhat more specific in that it states distinctly what is implied in the first claim that the heat must be continued "until the material is softened," and it further provides that the softened material must be agitated and mixed with the new material. One of the methods of repair adopted by the defendant was to wheel a coke heater to the spot to be repaired and when the asphalt was softened to the depth of about half an inch to scrape it off with notched hoes. The edge of the portion scraped off was made even and smooth, the surface sprinkled with asphalt cement and the edges daubed with the same material. New asphalt was then thrown on, leveled, tamped and rolled. The binder of liquid asphalt was sometimes omitted, probably from carelessness. It is apparent that a construction of the claims broad enough to cover this method is necessary. Indeed a much broader construction is asserted. It is argued that the process being a series of operations upon certain materials can be practiced by the use of any apparatus or without an apparatus, as for instance by building a fire of wood or charcoal over the spot to be repaired. Manifestly then the process of the defendant, or one analogous thereto, if found in the prior art, will anticipate the complainants' patent.

Various defenses are interposed, but it will be necessary to consider but one. On the 11th of June, 1880, Paul Crochet, a Parisian, was granted a patent by the French republic "for a process for the repair and renewal of asphalt pavement." Crochet describes the prior method of repair substantially as Perkins describes it. The part to be renewed is dug out with a pick and the asphalt is removed. He then proceeds to describe his own process as follows:

"It consists in heating the part to be repaired by means of a movable furnace which is carried over the surface of the pavement until this disintegrates and becomes friable. The upper part of the layer of asphalt, and that which has been damaged are removed by means of an iron hoe having an arm of little teeth which performs the function of a rake. This hoe while removing

the material, forms on the remaining part numerous striations which render the surface rough, and increase the adherence of the portion added above, which will perform the renewal. \* \* \* After this preparatory operation one spreads a suitable thickness of asphalt in powder and tamps it by the ordinary methods. In consequence of the softening of the (subjacent) layer this unites perfectly with the new layer and forms with it a thickness without solution of continuity, this repairing and renewal having in no way altered the neighboring parts."

Although the patent like the patent in suit is for a process and, therefore, not limited, necessarily, to any particular mechanism, the heating machine described and shown in the drawings is, apparently, the exact counterpart of the one used by the defendant. Crochet states that his system is especially applicable to pavements of compressed asphalt, "but can be used to repair and renew pavements of bitumen." The claim is divided as follows:

"First. The softening of the upper surface of the layer of asphalt in the part to be repaired and the removal of this surface by means of the hoe furnished with teeth which striate the remaining part. Second. The renewal by the addition upon the surface thus softened of a layer of asphalt of suitable thickness, which is tamped by ordinary methods. Third. The movable furnace which I have devised for this purpose, according to the conditions described and represented."

The first thought which strikes the reader after studying this patent is its remarkable similarity to the patent in suit. If two men of the same nationality should witness this process to-day as practiced by the complainants and the defendant and should write out statements of what they observed it is doubtful if these statements would correspond as closely as those of Perkins and Crochet. When the difference in time, language and patent-office procedure is considered the resemblance is remarkable and has seldom been paralleled in reported cases.

The complainants argue that the defendant's process is the patented process, and yet in 1880, 13 years before the Perkins patent and when the art was in its infancy, we find this Frenchman describing the defendant's process almost in *hæc verba*. Crochet used a movable coke or coal heater. So does the defendant. The former heated the spot to be repaired and removed the upper part by means of a notched hoe which left small channels in the part which remained. The defendant does the same. Into this depression Crochet placed new asphalt and tamped it by the ordinary methods. The defendant does the same. In both cases the pavement is repaired without joint or ridge, or, as the Frenchman phrases it, "*sans solution de continuité*." The Crochet process is obviously the defendant's process and it is, of course, the Perkins process as well, unless the Perkins patent is limited to the apparatus invented by him. The principal differences, capable of practical statement, are that Perkins uses a gasoline heater and a rake and Crochet uses a coke heater and a hoe "having an arm of little teeth which performs the function of a rake." When it is remembered that Crochet preceded Perkins by 13 years, that he wrote in a different language and under a different system of rules, and that, during the interval, the art of paving advanced in all directions with a rapidity commensurate with the inventive spirit of the age, the wonder is not that the two

patents are dissimilar in some particulars but that the differences are not more numerous and striking.

Various ingenious arguments are advanced in support of the proposition that the Crochet patent related to a totally different process. In order to accept these theories the court must resort to the heroic treatment of reconstructing both patents, and having done so must proceed a step further and reject the meaning which Crochet's language plainly implies. For instance, it is said that Crochet's patent refers to rock asphalt found principally at Neufchatel and Seyssel and that the Perkins patent refers to Trinidad asphalt imported from the Island of Trinidad. Both patents speak of "asphalt pavements." Neither uses any qualifying word and neither can be confined on this proof to any particular kind of asphalt pavement. It is urged that Crochet's process related to country roads as distinguished from city pavements and that these roads were, in many instances, constructed of rock asphalt upon principles similar to the Macadam roads of this country. The contention of the complainants' expert is that the words "asphalt pavement" must be read "rock asphalt pavement" and the words "pavements of bitumen" indicate "another class of rock asphalt pavements." Various words and phrases are pointed out as supporting this theory. For instance, Crochet says, that the use of the pick causes the neighboring portions to be "puffed up"; that after heat is applied the surface of the pavement "disintegrates and becomes friable"; and that "asphalt in powder" is spread upon the part to be repaired. Wrested from the context these expressions might indicate that Crochet had in mind a different material from that described in the patent at bar, but considering the Crochet patent as a whole it cannot be limited to a method of mending country roads. Imprimis, Crochet resided in Paris, a city long pre-eminent for the excellence of its pavements. In the absence of positive proof by witnesses qualified to testify of the progress of the art in France the court would hardly be justified in assuming that Parisians were ignorant of a pavement which has been in use for a quarter of a century and in 1880 was well known even in the interior cities of this country. The patent makes no allusion to country roads but again and again refers to "asphalt pavement." It speaks of the "layer of asphalt," and the drawings, though crude, show a layer of asphalt upon a bed of concrete similar to the pavement as it exists to-day and as it has existed in this country since 1870. The heat "softens" the upper surface, the teeth make grooves in it and the new asphalt adheres to the old without joint or seam. Finally the patent says that the system "though especially applicable to pavements of compressed asphalt, can be used to repair and renew pavements of bitumen." All this is incompatible with the theory that Crochet was dealing with a substance which had been reduced to a dry powder and indicates, beyond a fair doubt, that if he had not in mind the same material that Perkins describes in identical language it was at least an equivalent material having the same attributes and properties and producing the same result when subjected to heat. The language used by Crochet may be infelicitous in some particulars, but that

he describes a process for mending asphalt pavements by heating, raking and compacting, there can be no doubt.

The complainants' expert speaks of the asphalt of the Perkins patent as being "compressed." Obviously, then, a Trinidad asphalt pavement is a "pavement of compressed asphalt," but when Crochet uses this expression it is insisted that he means a pavement of rock asphalt. Again, the expert says of the Perkins process:

"The removal of a certain portion of the old material is in most instances essential, because generally when repairs are required there has been a certain amount of disintegration of the old material leaving on the surface what is termed 'dead material.' \* \* \* It is further almost impossible to heat the surface of an asphalt pavement by a heating apparatus without burning some portion of the upper surface. \* \* \* This burnt crust, and any dead portion, therefore, would naturally be scraped away."

This is what happens to a pavement of Trinidad asphalt, but when Crochet says that he carries his furnace over the pavement until the surface "disintegrates and becomes friable" and then removes "the upper part of the layer of asphalt," it "shows beyond a doubt" to the mind of the expert that Crochet's pavement is one of rock asphalt although the claims speak of the softening of the layer of asphalt. One process requires the removal of disintegrated old material and burnt crust, the other the removal of disintegrated and friable old material. And yet upon this distinction, such as it is, rests the complainants' principal argument to prove dissimilarity.

The assertion that the "numerous striations" of which Crochet speaks cannot be formed in Trinidad asphalt would be more persuasive if the complainants had not proved by several witnesses that these striations cannot be formed in rock asphalt either. For instance, Mr. Kasson says: "When I raked off the disintegrated portion the surface beneath was so hard and dry it would not scratch to any material extent." It surely would not be stretching the rules of construction unduly to assume that Crochet meant when he said that his striations "render the surface rough and increase adherence," precisely what Perkins meant when he speaks of agitating and stirring up the material. The expression "asphalt in powder" while not one which an American would use is not inaccurate as applied to the new material added in repairing a Trinidad pavement and especially so when it is also denominated "a layer of asphalt of suitable thickness" in the second subdivision of the claim of the Crochet patent. In short, the court cannot resist the conclusion that one rule of interpretation has been applied to the Perkins patent and a wholly different rule to the Crochet patent. Both patentees have left something to be supplied by the common sense of the operator. But one has been treated with wide liberality while the other has been held to the strict, literal and most technical meaning of his translated words. When both are subjected to the same treatment there is little difficulty in understanding what each has contributed to the art. The record shows that asphalt pavements substantially as they exist to-day have been known for 28 years. In these circumstances it surely is but just that the same words, appearing in the two patents, should be given the same meaning. If the French pat-

ent means what Crochet says it means it is perfectly plain and simple. If it means what the complainants' expert says it means it is quite possible that it may be inoperative. But in order to reach this conclusion a substance not mentioned and which does not yield to treatment by heat is substituted for a substance which is mentioned and which does so yield. It is not remarkable that the attempt to repair "a Seyssel pavement" proved a failure. Having assumed that the process relates to an impossibility the expert had little difficulty in proving it impossible. Few patents could resist such drastic treatment.

But assume that the complainants are correct in their construction of the Crochet patent, how then stands the case? Before the Perkins patent it was known that heat could be used to soften a Trinidad asphalt pavement at the spot to be repaired. The Perkins patent so says. It was also known that rock asphalt and bitumen pavements could be mended by heating the top layer, removing the material with a notched hoe, adding new material and tamping in the ordinary way, so that the part repaired could not be distinguished from the adjacent parts. Did it involve invention to do this to a pavement made of Trinidad asphalt? Would not a mere tyro in paving, with Crochet's furnace, rake and description before him, know enough to practice his method on any pavement of asphalt or equivalent material? If not, then it must follow that should a new variety of asphalt be discovered, or should the constituents of the present surface material be changed the person who is first to use the patented method in connection with the new material can secure a patent even though the patents of Perkins and Crochet on their face cover asphalt pavements of all kinds. In *Manufacturing Co. v. Cary*, 147 U. S. 623, 13 Sup. Ct. 472, it was argued that the patent, which covered a process of tempering coiled springs, could be sustained because the patentee discovered that the application of heat would restore the lost strength and elasticity of the wire; that he was the first to apply heat to springs which had been weakened by use and that his discovery was the new application of an old process and the production of a new result thereby. The supreme court rejected this argument and voided the patent, observing:

"But we are of opinion that the same principle set forth in the patent was developed in the manufacture of the wire bells for clocks and of the hair-balance spring; that there was no patentable invention in applying that principle to the springs mentioned in the specification, and that the case is merely one of a double use."

See, also, *Ansonia Brass & Copper Co. v. Electrical Supply Co.*, 144 U. S. 11, 12 Sup. Ct. 601; *Phillips v. City of Detroit*, 111 U. S. 604, 4 Sup. Ct. 580; *Frederick R. Stearns & Co. v. Russell*, 29 C. C. A. 121, 85 Fed. 218.

The court is convinced, in view of what this record discloses, that it would be inequitable to place the entire art of repairing asphalt pavements by heat under tribute to the Perkins patent in suit. He should be satisfied with the rewards which flow from his contribution to the art which are secured by another patent. The bill is dismissed.

## SWIFT &amp; CO. V. FURNESS, WITHY &amp; CO., Limited.

(District Court, D. Massachusetts. May 10, 1898.)

No. 773.

1. **BILLS OF LADING—CONSTRUCTION.**

When perishable goods are shipped, and the carrier is to receive adequate pay, no construction of the contract is admissible which will permit the carrier, arbitrarily, and without reason or necessity, to deprive the shipper of the benefit resulting from such shipment.

2. **MARITIME LAW—BILL OF LADING—"DEVIATION."**

The words "with liberty \* \* \* to make deviation," in a bill of lading, give the carrier the right to make only such departures from the voyage as are necessary and reasonable.

3. **SAME—RESPONSIBILITY OF CARRIER.**

A provision in a bill of lading that meat "is to be shipped wholly at the risk of the shipper, and that the owners assume no responsibility therefor during the voyage," refers only to the voyage contemplated by the parties, and not to an additional voyage arbitrarily made by order of the owner of the ship.

This was a libel in personam by Swift & Co. against Furness, Withy & Co., Limited, owner of a steamship, for delay in delivering certain beef shipped by such steamship.

Henry M. Rogers, for libellant.

Thomas H. Russell, for respondent.

BROWN, District Judge. Swift & Co., exporters of fresh beef, bring this libel in personam against Furness, Withy & Co., Limited, a British corporation having a place of business in Boston, in this district, owner of the steamship Durham City, for damages arising from delay in delivering at London, 1,229 quarters of beef, causing deterioration of the beef and loss of market. The beef was shipped at Boston in good condition, was properly cared for on the voyage by the men in charge, and the refrigerators were provided with a proper and usual supply of ice and salt for the ordinary voyage, of 14 to 16 days, and for 4 or 5 days in addition. The ship sailed for London October 6, 1894, making an ordinary voyage, and arrived off Dover October 21st, with a London pilot on board. There she received orders from the owners to go to Havre to land cattle, a part of her cargo. The ship went to Havre, and remained there until October 28th, when she sailed for Flushing, in Holland, where she landed sheep; sailing thence October 29th, and arriving at London October 30th. While at Havre the weather was muggy, and a compost heap over the refrigerators added to the heat. Additional salt and ice were purchased at Havre, and all proper exertions were made to prevent deterioration. Nevertheless there was damage to the beef, attributable to the prolongation of the voyage. Upon the evidence it appears that a delay of seven days resulted from the change of course. Though the bill of lading recites that the vessel "is lying at the port of Boston, and bound for London," the respondent contends that the vessel was

not obliged to pursue a direct voyage, and that, by express contract, there is no liability for damage to the beef. The clauses of the bill of lading relied on in defense are the following:

"With liberty to sail with or without pilots, to make deviation, and to call at any intermediate port or ports for any purpose, and to tow and assist vessels in all situations. \* \* \* It is hereby understood and agreed that meat and other cargo to be carried in the refrigerator is to be shipped wholly at the risk of the shipper, and that the steamship owners assume no responsibility whatever therefor during the voyage; and steamships are not to be held liable for any loss or damage to meat or other cargo in the refrigerator, however arising, unless refrigerators are interfered with by the steamship's officers or crew."

It is not contended that Havre and Flushing are "intermediate ports." Reliance is had solely upon the word "deviation," to justify the return of the vessel from off Dover to Havre, the detention there, and the trip to Flushing. Citing *Hostetter v. Park*, 137 U. S. 40, 11 Sup. Ct. 1, the respondent claims that deviation is "a voluntary departure, without necessity or reasonable cause, from the regular and usual course" of a voyage, and that the use of the word "deviation" in the bill of lading is an express stipulation "permitting such deviations, though they be unnecessary and unreasonable." This contention disregards, however, a most important part of the context in the opinion in *Hostetter v. Park*. "Deviation," in that opinion, is defined "in reference to the terms of a policy of marine insurance." This limitation of the definition to the special subject-matter under consideration is significant, and in accordance with a well-known rule of interpretation. In its primary signification, the word "deviation" would include a departure from the direct course of the voyage, whether reasonable or unreasonable, with or without necessity. As, however, from necessity, or in the exercise of a reasonable judgment, departures are made that present no substantial reason for invalidating the contract of insurance, and as known usages are presumed to be in the contemplation of the parties, in construing a contract of insurance the word is not given its broadest meaning, but a meaning consistent with the subject-matter in hand. It then includes only such departures as are unreasonable, unnecessary, or not contemplated. It may then be said that a departure which is of such character is a deviation, but that one which is reasonable, necessary, or according to usage is not a deviation. Accuracy, however, would require the foregoing sentence to be supplemented by the words, "in reference to the terms of a policy of marine insurance." The definition is thus limited by the supreme court. The case of *Hostetter v. Park* is therefore seen to be a direct authority in support of the rule that construction must be guided by reasons pertaining to the subject-matter. The confusion of thought arising from isolating particular words of a contract is, with clear discrimination, pointed out in *O'Brien v. Miller*, 168 U. S. 287-297, 18 Sup. Ct. 140. Such confusion is increased when we not only separate particular words from the whole contract and from the special subject, but seek to give to a word thus isolated, not its ordinary signification, but a meaning specially limited by the context of a

distinct contract upon a distinct subject. The argument of the respondent may be thus analyzed: First, it disregards the context of the word "deviation" when used in this bill of lading; secondly, it employs the context of a policy of marine insurance to place a limited meaning upon the word "deviation"; and, finally, it seeks to substitute the limited meaning thus obtained for the term employed in the bill of lading. Following out this method to its necessary conclusion, the contract would be as follows: First, an agreement to transport perishable fresh beef from Boston to London; second, reservation of a right to make "voluntary departure, without necessity or reasonable cause, from the regular and usual course" of a voyage. If, under the latter clause, an owner may do as he pleases, without reference to necessity or reasonable cause, it is difficult to frame a statement of obligations to the shipper which will concede to the owner these rights, and prevent him from going first to Australia or Hong Kong, and thence to London. If he has one clause in his contract that permits him to go on such a voyage as he pleases, and a second that holds him harmless for the damage to the beef, then the argument based on these clauses must preclude a recovery. The unsoundness of the construction for which the respondent contends sufficiently appears by tracing it to its legitimate conclusion. In attempting a proper construction of the contract, we may consider the fact that the libellants, Swift & Co., have for many years been the largest shippers of dressed beef from the United States to Great Britain, and that they had for a long time, and on many voyages, shipped their beef by the Durham City and by the Furness Line, so that the defendant was thoroughly familiar with the business. "The elementary canon of interpretation is, not that particular words may be isolatedly considered, but that the whole contract must be brought into view, and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them." *O'Brien v. Miller*, 168 U. S. 287-297, 18 Sup. Ct. 140. From the important fact that perishable beef, requiring ice and salt, was to be transported, and as the defendant was to receive adequate pay therefor, we are forced to preclude any construction that permits the defendant, arbitrarily, and without reason or necessity, to deprive the shipper of the benefits resulting therefrom. "The law does not allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions which are unreasonable and improper, amounting to an abnegation of the essential duties of his employment." *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469. If rules of construction forced us to adopt the view of the contract urged by the defendant, and to hold that it provided that the owner might delay the delivery of goods at his pleasure, this would not avail the defendant; for we should then be compelled to hold the provision void, under the act of February 13, 1893, c. 105 (27 Stat. 445).

Adopting the rules of construction to which we have referred, the word "deviation," in the bill of lading, must be held to give to

the owner only a limited right of departure from the voyage; and the limits must be those of necessity, and reasonable regard for the rights of both the shipper and carrier, growing out of the nature of the principal contract. It may appear paradoxical to say that in a contract of marine insurance the word "deviation" includes only unnecessary and unreasonable departures from the voyage, and that in a bill of lading it means only necessary and reasonable departures from the voyage. The paradox exists, however, only to the superficial view, and disappears when we observe that in neither case is the meaning derived from the word "deviation," simpliciter, but that in each case the meaning results from a term plus its context, and that in the two cases the context is different. Isolated, the word means a departure, reasonable or unreasonable, with or without necessity. If in one case we may limit it to mean unreasonable departures only, in another we may limit it to mean reasonable departures only. The apparent inconsistency arises because the approach to the question is from opposite sides. When we use the word in a sentence of prohibition, necessary or reasonable deviations are not prohibited. When it is used in a sentence of permission, it permits only necessary, reasonable, or contemplated deviations. Under both bill of lading and marine insurance policy, reasonable, necessary, and contemplated deviations are permitted. Unreasonable, unnecessary, and arbitrary deviations are held breaches of contract. The clause providing that meat "is to be shipped wholly at the risk of the shipper, and that the owners assume no responsibility therefor during the voyage," etc., does not afford the carrier protection for damage arising after the vessel was diverted from her voyage, and sent upon what must be regarded as an additional and independent voyage to Havre and Flushing. This clause refers to the voyage contemplated by the parties, and to deviations reasonably incident thereto, not to an additional voyage arbitrarily made by the order of the owner. It satisfactorily appears that the change of course did not arise from any necessity of the ship, or from any causes connected with her navigation. On October 22d the owners of the steamship in London notified the consignees named in the bill of lading that the ship would arrive at London docks on Monday night, October 22d, in time to discharge the beef on the 23d. On October 22d the libelants, upon this announcement, called on the owners, and paid the freight, £236. 10s., receiving the assurance that the ship would be at the docks on that day. The change of course was made for the benefit of another shipper, Nelson, Morris & Co., of Chicago, who, as admitted by the answer, had shipped upon said vessel, on said voyage, certain live cattle and sheep. Having thus deliberately turned the vessel back upon an additional voyage, the owners must be held liable for a breach of contract with the libelants, and for all damages resulting therefrom.

I find as facts that, but for the return to Havre, the beef would have been delivered on October 23d, and that the libelants used due diligence to reduce the damages, and to care for the beef during the detention. The libelants are entitled to decrees for the de-

terioration, and for any fall in the market price after October 23d, and a reference may be taken to determine the amount of the damages. *Railroad Co. v. Estill*, 147 U. S. 591-616, 13 Sup. Ct. 444; *Schwarzchild v. Steamship Co.*, 74 Fed. 257. See, also, *The Wells City*, 57 Fed. 317, 318; *Id.*, 10 C. C. A. 123, 61 Fed. 857-859.

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## THE SARATOGA.

### CRAIG v. THE SARATOGA.

(District Court, E. D. New York. April 29, 1898.)

#### 1. MASTER AND SERVANT—ASSUMPTION OF RISKS OF EMPLOYMENT—PERSONAL INJURIES ON SHIPBOARD.

One of the two ways furnished servants, employed in the nighttime to coal a vessel, was down a ladder from the hatch of the main deck. A hatch in the lower deck at the foot of the ladder was left open, and through this opening a servant, seeking to go out of the ship, fell, and was injured. The master resisted payment of damages for such injury upon the ground that the servant, for several years employed in coaling ships, was chargeable with notice of a custom to leave the hatches open while in port, and therefore assumed the risk arising from such custom. *Held*, that it was incumbent upon the master to show not only that it was its custom to leave the hatches open, but also unlighted, under similar circumstances.

#### 2. SAME—NEGLIGENCE—FAILURE TO LIGHT DANGEROUS PLACE.

A steamship company is guilty of negligence if it fails to use ordinary care in lighting, on a dark night, an open hatch forming part of a passageway used by workmen to board the ship.

#### 3. CONTRIBUTORY NEGLIGENCE.

It is contributory negligence on the part of a workman on board a ship to attempt to pass, on a dark night, a hatch which he has reason to suppose to be open, when the place is insufficiently lighted, and it is in his power to obtain additional light.

#### 4. SHIPPING—INJURY TO WORKMAN—NEGLIGENCE—HALF DAMAGES.

When a workman employed by the shipowner is injured by the combined negligence of himself and those in charge of the ship, he may recover half damages.

This was a libel in admiralty by William Craig to recover damages for a personal injury sustained on board the steamship *Saratoga*.

Edwin G. Davis, for libellant.  
Charles C. Nadal, for claimant.

THOMAS, District Judge. The libellant was a longshoreman, and had been in the employ of the claimant, the New York & Cuba Mail Steamship Company, for about one year previous to September 7, 1894, coaling vessels, and during that time had coaled two, and sometimes three, vessels per week. The vessels were all similar in plan and arrangement. On the day named, he was sent, with others, to coal the steamship *Saratoga*, lying with her starboard side abreast a dock, in the city of Brooklyn. The coal was received from a vessel lying on the port side of the steamer, through the port entrance

on the lower deck, and was wheeled to the bunkers, which were situated some 20 feet aft of the port entrance, and about 4 feet aft the dead hatch, which was about 8 feet square, and whose front was some 8 feet from the port entrance of the ship. In front of the dead hatch was the forward hatch, which was 13 feet square, with four subdivisions, running fore and aft, of about equal dimensions. There was a space of about 8 feet on each side of the forward hatch. Athwart the hatch, and in proximity to the upper edge thereof was a skid, evidently intended to be used as a footway for persons desiring to reach the ladder. Two exits and entrances were provided for the workmen,—one by the port on the inshore side, and one down a ladder extending from the edge of the fore hatch on the main deck to the forward edge of the forward hatch on the lower deck. On the afternoon of the accident the libelant, while it was yet daylight, went upon the ship by way of the port entrance. His special duty was trimming the coal after it had been emptied into one of the bunkers, to which it was carried by barrows, which were filled at the port entrance on the port side of the ship. There were two bunkers, one on each side of the ship. To reach the one on the starboard side, the barrow was wheeled in front of the dead hatch, and along the starboard side thereof to the bunker door; while, to reach the bunker on the port side, the barrows were wheeled along the port side of the dead hatch. The bunkers and the deck around the dead hatch were lighted as follows: Some fourteen hand lanterns were provided by the company. The men working in the bunkers took such lanterns as were necessary, and lit the same. As the bunkers filled up, and the men receded towards the bunker doors, the lanterns were brought back towards the doors. This process, repeated, finally resulted in all the lamps being placed outside the doors of the bunkers. Such of the fourteen lamps as were not used in the bunkers were placed at various points at the ports, and in such positions on or about the dead hatch as would best enable the men to go with their barrows to and from the bunkers. Some six or eight of the lanterns seem to have been distributed in this way on the evening in question. While the lighting of the lanterns used in the bunkers devolved on the men using them, the lighting of the lanterns outside was the duty of two men specially designated therefor by the foreman, who received some special consideration for the care of the lamps. It was stated by two or more of the claimant's witnesses that two lighted lanterns were placed within some five or six feet of the forward hatch, and there is some evidence that at least one of these lanterns was in such position at the time of the accident. In general, the distribution and location of the lanterns on the deck was with sole reference to the convenience of the men in taking and delivering coal at the bunkers. Between 8 and 9 o'clock the foreman ordered the men to stop work, and report at New York in the morning. The libelant and his witnesses state that the foreman also directed the lights to be put out, and that this command resulted in the extinguishment of most of the lights before the men got away. It is probable that the extinguishment of the lights was effected in this way: If a workman happened to have a light in

his hand, he extinguished it upon quitting work, but the duty of putting out lanterns placed upon the deck devolved upon the two designated men. At least, it was their care to see that all lights were extinguished, if this had not been done by others. Upon receiving the order to quit work, the libelant went to the place where he had left his coat, got the same, and went to the port on the starboard side. The foreman, or one of his men, was closing this entrance, and told the libelant to go out the other way. The libelant then went towards the forward hatch, to go up the ladder to the main deck. In doing so, he fell into the hatch, and received the injuries which are the subject of this action. The libelant claims that most of the lanterns had at this time been extinguished, although one or two were still burning. In this he is confirmed by two of his fellow workmen. In any case, he and his witnesses state that it was entirely dark around the hatch, so that they could see nothing. He indicates that this darkness was so intense that he could only grope for the hatch. The claimant's witnesses state that the lanterns were still burning,—at least, to a considerable extent; and there is evidence from a witness that a bright light from the main deck fell through the hatch thereof, and lighted and revealed the open hatch in the lower deck. The fact probably is that while the lower hatch was not in total darkness, as the libelant claims, yet its condition was somewhat obscured by the scantiness or remoteness of the light, and that the place was not sufficiently lighted to make it reasonably safe for persons desiring to reach the ladder.

The decision in this case should turn upon the solution of this question: In what state of security could the libelant justly expect to find the forward hatch? Certain features of the evidence are very pronounced: (1) The libelant had complete knowledge of these hatches, their location, and the spaces about them. It was a knowledge resulting from actual use of the deck two or three times each week for a year. (2) The hatch coverings were customarily left off when the vessel was in port. The evidence in this regard is full, uncontradicted, and satisfactory. The libelant does not contradict, nor by himself, or his fellow workmen called in his behalf, give a single syllable of evidence tending to negative, such custom, so amply asserted by the evidence of several other witnesses. The libelant by not so much as a word of evidence declares himself ignorant that such was the customary condition of the hatches while the vessel was in port, or that on any occasion or at any time he ever found the hatches closed; nor does he state any fact or circumstance which to any degree whatever suggests that he had a right to expect that the hatch would be closed, from anything said or done at the time, or at any past time, or from any condition existing at this time, or in the past. There is no evidence in the case that this custom was limited to times when the ships were receiving cargo, or to the daytime, or to any particular conditions. The state of the evidence is one broad, general declaration that the custom was to leave the hatch covers off, except at such times as they were kept down to enable cargo to be passed over them.

The claimant calls attention to several decisions to the alleged

effect that such open condition of the hatches is recognized by the law as one which a person working upon a ship must or may expect to find; and the proctor for the libelant does not refer to any holding whatsoever on the direct subject of open or closed hatches. A brief review of the authorities may be useful:

In *The Gladiolus*, 21 Fed. 417, it was held that where a stevedore, engaged in his usual occupation, falls through an ordinary coal-bunker hatch, used for stowing cargo, the presumption is of his negligence, rather than that of the officers of the vessel. Locke, J., in the course of his opinion, states:

"The leaving open of a common between-deck hatchway when the vessel is lying in port, under ordinary circumstances, is not presumptive evidence of negligence on the part of the ship. This is not only shown to be the custom by the testimony in this case, but it has been so frequently commented upon in decisions as to be too well settled to be questioned. *The Victoria*, 13 Fed. 43; *Dwyer v. Steamship Co.*, 4 Fed. 493; *The Carl*, 18 Fed. 655; *The Germania*, 9 Ben. 356, Fed. Cas. No. 5,360; *The Helios*, 12 Fed. 732. While the falling through an open hatchway by a stranger, a landsman, visitor, or passenger, on board a vessel, might not be presumptive of negligence on his part, where such accident occurs to a seaman or stevedore, who is accustomed to hatches, their presence, necessity, uses, character, and location, the case is different; and, unless the circumstances of the particular case are such as to rebut it, the first presumption is of his negligence."

This case was affirmed by the circuit court. 22 Fed. 454. It is observable, however, that it was not affirmed upon the ground that it was the custom of vessels to leave the hatches open, but the decision of the appellate court is rather that the steamship company owed no duty to the stevedore who was injured "to look to the hatches and preparations to receive the cargo," but that the ship, for preparations to receive cargo, and in receiving cargo, was under the control of the stevedore and his respective gangs of men. In other words, the stevedore, the employer of the injured man, had received control of the ship for the purpose of stowing the cargo, and it was his duty, if it was anybody's, to put the hatchways in a condition of safety, and to furnish light therefor.

In the *Victoria*, 13 Fed. 43, it was held that where a workman upon a vessel was injured by falling through an open hatchway negligently left open by the stevedore having charge of the discharging and loading of the vessel, and the actual negligence that caused the accident was the removal of a lamp by a fellow workman employed on the same job with the libelant, the common employer is not liable for the injury. In his opinion, Lowell, C. J., says:

"Whether it is usual to close the hatches on the third deck after the day's work is done, is a disputed question in the case. The preponderance of the evidence is that it is not usual; and see *Dwyer v. Steamship Co.*, 17 Blatchf. 472, 4 Fed. 493."

The opinion then states that, if the hatch was negligently left open, the negligence was that of the stevedore having charge of the discharging and loading of the ship, and such negligence could not be attributed to the owners, and that the actual negligence was in removing and not replacing a lamp which had hung near the foot of

a ladder, and that this was a fault of a fellow workman, for which the common employer was not liable.

In *The City of Alexandria*, 17 Fed. 390, it was held by Judge Brown (Southern district of New York) that the libel should be dismissed, where the libelant, the cook, went down the fore hatch in the morning, before light, by the direction of the steward, and was not sufficiently notified of the half-open hatch below, and in consequence fell through and was injured, and was subsequently treated and cared for at the ship's expense, and received his wages to the end of the voyage, and thereafter filed his libel to recover for permanent injuries. It appears that the libelant was not accustomed to use the fore hatch, through which he fell, as the same at sea was usually closed, but was open at the time of his injury, as the steamer had on the previous day touched at an intermediate port, and landed some cargo, and on the following day she was expected to arrive at her port of discharge; that the cook, who had ordinarily nothing to do with the hatches, was not aware that the hatch below was partly uncovered; that some men had previously descended by the same way with a light. There was also some evidence that the steward had warned the libelant of the condition of the hatch, which evidence was not accepted by the court. The learned judge held that, if there was any negligence in leaving the hatch open, it was such negligence of a co-employé as precluded recovery. The decision passes off upon grounds quite distinct from any justified by the facts in the present case, and not at all upon a question of a legal recognition of the custom of leaving hatches open, so that a person employed upon a ship should be deemed to have knowledge of such custom, and to assume the risk therefor.

In *The Carl*, 18 Fed. 655, it appears that the libelant was employed, with other men, by the owner of a cargo, to assist in unloading goods between decks. Three hatches above and three immediately beneath were all open. While the libelant was at work six feet forward of the fore hatch, the deckhands above, while washing the main deck, put on the cover of the fore hatch above, darkening the space below, where the libelant was at work. The latter, thinking that the hatches were about to be closed, turned suddenly, and, forgetting the open hatch by him, stepped into it, fell, and was injured. There was plenty of room to go on either side of the open hatch, and the libelant was familiar with the circumstances. It was held that the proximate cause of the accident was the libelant's inattention and negligence, and the libel was dismissed without considering the question of the liability of the ship or her owners for the acts of the deck hands. It will be perceived that there is in this case no legal recognition of a custom on shipboard to keep hatches open. The hatch was open, the libelant knew it, he assumed the risk of it, and the accident happened by his inattention to a well-known fact.

In *The Germania*, 9 Ben. 356, Fed. Cas. No. 5,360, it was held that a person not in the employment of a vessel or her owners, nor acting in their service or for their benefit, and sustaining no relation to them by contract, has no right of action in rem in admiralty, against

the vessel; for an injury received by him, on board of her, by falling through an open hatchway. In other words, the owner of the vessel owed the libelant no duty to protect him from the accident that befell him. The only reference to the question under consideration is the following statement in the opinion:

"I have preferred to put the decision of the case on the views above stated, but I am not satisfied that there was any negligence on the part of the master, officers, or crew of the vessel. The opening was a usual one, in a usual place; and, if an obligation rested upon any person to warn the libelant in regard to it, it was one which, under the circumstances, did not rest on the ship's company."

The libelant in the above case was a sewer of bags, and was proceeding to his designated place for work, when he fell through the hatchway, and seems to have been on the ship in behalf of the shippers of grain to be carried by the ship; the grain being received in bags from the spout of the elevator. It was the duty of the shippers, as between them and the owners of the bark, to thus bag the grain, and the libelant was on board under an employment for that purpose.

In *The Helios*, 12 Fed. 732, the claim was for personal injuries sustained by a stevedore, engaged in storing cargo, falling through a hatch in the between-decks of a vessel. It was held that it was negligence in those having charge of the vessel to leave the chain-locker hatch open and unprotected, in a dark place, after the first officer had notified the stevedore that the vessel was ready for stowing the cargo. It appears that, when about to stow the cargo in the between-decks, the foreman of the stevedores asked the first officer of the steamship if they could proceed so to do. Such officer replied that everything was ready. The foreman then instructed a gang of men, among whom was the libelant, to go below and close the hatches in the between-decks, and then stow the cargo, consisting of oil cake, in the between-decks. The *Helios* was a steamer fitted for carrying grain, and had a number of small hatches in her between-decks, in addition to the fore main hatches. Although it was on the morning of a bright and clear day, there was no light forward, except down the fore hatch. About 16 feet from the forward hatch was a small hatch, without coamings, leading to the chain lockers. This hatch was not used for cargoes and was open. The oil cake was to be stowed some five or six feet beyond this small hatch. The libelant did not know of it, and, as he went forward with the first bag of oil cake, he fell down it, receiving the injuries. The libelant asked for no artificial light to work by, nor was any furnished. There was some evidence that lights were supplied to stow cargo by, in the port of New York, only if demanded by the workmen. Judge Brown (Southern district of New York) said:

"I cannot entertain any doubt that it was negligence in those having charge of the *Helios* to leave the chain-locker hatch open and unprotected, as the evidence shows in this case. It was not a hatch for the usual stowage of cargo, such as stevedores must at their peril look out for, and are presumed to know about. It had no reference to the cargo, and the stevedores had no business with it, as the evidence shows. When the first mate told the stevedore

that the vessel was ready for him to proceed to stow the cargo, that was a virtual warranty against all such traps in the darker parts of the vessel, which could not be, or would not be, perceived in the ordinary course of stowage."

In *The Guillermo*, 26 Fed. 921, it was held, where libellant, who was acting as a roundsman to see that the night inspectors were at their post, went aboard the ship, and fell across an open hatch of the ship, which led to the coal bunkers, and which was in a comparatively narrow passageway, where it was perfectly dark, that such leaving of the hatchway open was negligence on the part of the ship, in respect to the libellant, whose duties called him there. It was also held that the negligence was of a minor character, not warranting the allowance to the libellant of more than his actual loss. The learned judge, in his opinion, stated as follows:

"The libellant went upon the ship lawfully, and in the discharge of his duties. The open hatch was not in the situation of the ordinary open hatches for a discharge of cargo, such as may be expected to remain open in port, and which persons going upon the ship must avoid at their peril. This hatch was in a comparatively narrow passageway along the side of the ship. To leave it open, in an uncovered passageway, which was perfectly dark, I must hold negligence in respect to the libellant, whose duties called him there."

In *The Jersey City*, 46 Fed. 134, the following facts appear: The libellant was a stevedore employed by charterers of part of the steamship *Jersey City* to put up a refrigerator in the hold. On leaving work at midnight, he fell down the hatchway; and libeled the vessel for injuries thereby received, claiming fault in that the hatch was not covered, and lights maintained about the opening. The evidence showed that it was not customary to cover the hatchways until the cargo was in. The open hatch was known to the libellant, and was the customary opening. The charterers supplied lights to the workmen. When libellant fell, one was burning within six feet of the hatch. It was held that the ship was not under any duty to supply lights or to cover the hatches for the charterers' men, nor was the libellant's fall due to the lack of light, but to his own negligence. The libel was dismissed. The case, in some of its general features, is similar to the one at bar. It appeared, however, that there had been no covers to the hatch at the foot of the ladder at any time during the day, and that the libellant, when he went down at noon, when he went up at 6 o'clock for supper, and when he came down again to work at 7 p. m., must have seen and known that there were no covers there. Although the learned judge states that the open hatch was fully known to the libellant, that it was the customary opening, and that the only care necessary to avoid it was such ordinary care as all who work on shipboard are expected to exercise, yet the decision is based upon the finding that the fall was owing to the libellant's negligence alone, inasmuch as he knew perfectly the proper means of access to the ladder, and that the covers were off the hatch at the foot of the ladder. It is also stated that the libellant was in the employment of the charterers, who were erecting a refrigerator on their own account in the ship, and that they supplied their workmen with all necessary lights, and that the

ship was not under any duty to supply lights, or to cover the hatches, merely for the use of the charterers' men, and that the libelant's fall was not in fact owing to any lack of light.

In *The Sir Garnet Wolseley*, 41 Fed. 896, the facts were as follows: The libelant, a night watchman on a steamer, undertook to sit down upon a bunker hatch, without looking to see whether the cover was on. The proof showed that the hatch was covered, or not, as the necessity of the ship required. On this occasion it was uncovered, and libelant fell through to the hold. It was held that the accident was due to libelant's negligence, and the libel was dismissed. It seems that the libelant assumed that the hatch cover was on, and did not look to see whether it was or not.

In *The Louisiana*, 21 C. C. A. 60, 74 Fed. 748, the facts were as follows: A stevedore, going into the between-decks, in the daytime, pursuant to the orders of the foreman in charge, fell down an unguarded hatchway, which was lighted by a port six feet square, a hatch eight feet square, and four deadlights. It was not customary, on that vessel, or any other vessel coming into the port, to keep any railing about the hatch, and the preponderance of the evidence showed that it was usual to leave the hatchway uncovered until the hold was fully stowed. It was held that the accident was due to the stevedore's own negligence, and the vessel was not liable. It was also held that, where a stevedore engaged in discharging cargo fell through an unguarded hatchway in the between-decks, if there was any obligation to have the hatchway closed, the duty of opening and closing it, when necessary, rested upon the squad of laborers working in the between-decks, who were the stevedore's fellow servants, and that an underforeman, in charge of a squad of stevedore's laborers, is their fellow servant in regard to any injury occurring to one of them through his negligence. The decision seems to be based upon the finding that the preponderance of testimony indicated that it was usual to leave the hatchway uncovered until the hold to which it gave access had been fully stowed, that the libelant was aware of the conditions, and that the fault, if any, was that of a fellow servant.

In *Anderson v. Steamship Co.*, 13 App. Div. 218, 43 N. Y. Supp. 213, the facts were as follows: A seaman, employed on a steamship, who was directed to assist the carpenter in closing the ports between-decks, went to the lower deck for that purpose. He there noticed a couple of boilers lying forward of the hatch, on the deck. He walked alongside one of the boilers to the port on the port side of the vessel, and closed it, and then went across the hatch in question, and closed the port on the starboard side. After closing these ports, which made it absolutely dark upon the deck, he started to go forward to reach the hatch through which he had descended to the lower deck, and in striving, as he testified, to avoid the boilers, attempted to walk (although there was no necessity for so doing) upon the hatch, which was partially uncovered, and fell through it, and was injured. The libelant had a full opportunity of seeing the condition of the hatch. It was held that he did not show himself free from contributory negligence. Upon the trial of the cause the defendant offered to show that it was customary, while the vessel

was lying in port, and had not fully discharged her cargo, to allow such hatches to be left uncovered at night. It was held that the evidence was improperly excluded, and that as the libelant had been employed upon the vessel for eight months, and had made frequent voyages in it, it was competent for the defendant to show a custom of leaving the hatches open under such circumstances, as the question whether the plaintiff had used due diligence depended upon that condition of things which he had a right to expect when he went down upon the lower deck to close the ports.

In *Dwyer v. Steamship Co.*, 17 Blatchf. 472, 4 Fed. 493, the facts are as follows: Dwyer, while on the deck of a steamship belonging to the defendant, arranging in the hatch the pipe of a grain elevator, stepped upon a section of the grating of the hatch, which, not being properly placed in the groove in which it was intended to fit, tilted under his weight; and he fell through the hatchway, and was killed. Dwyer was in the employ of the owner of the elevator, who had a contract with the defendant to put the grain into the hold of the steamer. A stevedore had a contract with the defendant to load the steamer. It did not appear when, or by whom, the grating was negligently placed. It was held that it was not the defendant's duty to maintain a safe covering on the hatchway for the stevedore, and that, if the stevedore's men improperly placed or displaced the grating, the defendant was not responsible for their acts. In the opinion, Judge Benedict says:

"The cause of the accident is clearly proved to have been the unsafe manner in which the section of the grating upon which the deceased stepped was placed upon the hatchway. The actual wrongdoer was the person who placed the grating upon the hatchway during the night, or some person who changed the position of the grating after it had been so placed; but there is no evidence from which it can be determined whether the negligence occurred at the time the grating was placed upon the hatchway, or at a subsequent time, or by whom the negligent act was done. \* \* \* If I were convinced that the condition of the hatchway at the time of the accident was proof of a failure on the part of the defendant to discharge a duty attaching to it in respect to the hatchway, I should find no difficulty in holding the defendant liable, whether the grating was misplaced by the stevedores, the elevator men, or the crew of the vessel. But, I cannot agree to the proposition that it was a part of the defendant's duty to maintain a safe covering upon this hatchway. Hatchways are well-known features and sources of danger on a ship. They are intended to be open a large portion of the time, especially in port, not only for the purposes of loading and unloading cargo, but also for ventilation. An open hatchway on a ship, when provided with the usual coamings, is not evidence of a neglect of duty on the part of the shipowner. On the contrary, a shipowner has the right to allow the hatchways of his ship to remain uncovered and unprotected, except by the usual coamings, and all persons moving upon the decks of a ship are chargeable with notice of the probable presence of open hatchways in the decks. Neither is it the duty of the shipowner to maintain a guard, stationed at the hatchway of his ship, for the purpose of protecting persons from injury by falling into it. Such a duty would be burdensome in the extreme, and is not required by the law. *Murray v. McLean*, 57 Ill. 378. The requirement would be unreasonable, and has never been observed in practice, nor, so far as I know, declared in any adjudged case. \* \* \* If the defendant be liable at all, that liability arises not from an act of omission. He had the right to omit to cover the hatchway, and the bare fact that it was wholly uncovered, or partly uncovered, is not sufficient, therefore, to establish his liability. He is liable, if at all, for an act of commission, namely, the act of placing the grating upon the hatch in a negligent

manner, or the act of disturbing the grating after it had been placed upon the hatchway in a proper manner."

The foregoing cases are cited by the claimant's counsel to illustrate his position that the law itself recognizes the existence of a custom of keeping hatches open in port, to such an extent that the person serving upon a ship must be presumed to know of the custom, and to conform himself to it. It will be observed, however, that in several of the cases there was evidence proving the custom, and that the court did not take judicial notice that such a custom existed, or of the propriety or necessity or convenience of having the hatches open while the ship was lying in port. In any case, the evidence here clearly proves that the custom did exist, and that the libellant knew, or should have known, of the same. To this state of facts, then, may be applied a rule of law so generally accepted, and so fundamental, that no citation of authority is necessary to establish its existence. By the usual implication of the contract of hiring, it becomes the duty of the master to exercise the care and skill that a man of ordinary prudence would observe under the circumstances, to furnish his servants with a reasonably safe place to work. But this is a mere primary duty, and the master need not perform it, provided he fully instructs his servants respecting the dangers arising from the absence of such performance, or providing the servant have from any source like information; for it is the personal right of every man to use such machinery, appliances, plant, assistance, or system of work, as he desires, provided he do not infringe upon the rights of others. It is equally true that the servant assumes the risks of his employment discoverable by the use of ordinary care, and the servant should use due diligence to discover the particular arrangements of the place where he is to work, and the machinery and appliances he is to use, and the dangers to which they expose him, and the risks so discoverable he assumes. And so, if the master do not use the care required of him, and if, in the matter of machinery, appliances, tools, system of work, selection or continuance of the employment of fellow servants, the issuing or enforcement of rules, there be dangers discoverable by the use of ordinary care on a servant's part, or if there be dangers of which the servant knows, either by information derived from the master, or from any other source, and the servant remains voluntarily in the employment, he takes the risk of such danger, excepting those cases where the master by some act or words induces the servant to continue the employment. Applying these rules to the established custom of leaving hatches open, it results that the libellant fully knew of such custom of leaving hatches open; that he continued his employment, knowing of such custom; and that he assumed the risk of any danger naturally arising from such open condition. The authorities are very numerous: *Kennedy v. Railway Co.*, 145 N. Y. 288, 39 N. E. 956; *Knisley v. Pratt*, 148 N. Y. 372, 42 N. E. 986; *Sharpsteen v. Mining Co.*, 3 App. Div. 144, 38 N. Y. Supp. 49.

The libellant's counsel cites *The Manhanset*, 53 Fed. 843. There the libellant, a seaman, stepped into a snarl in the fall of the winch on the deck of the ship, and was thereby injured. It was after dark,

and there was no light at the winch. It was held that the absence of a light constituted such negligence as rendered the ship liable. The opinion does not disclose that it was the custom to operate the winch without a light, or, if such custom existed, that the libellant was aware of the same. An examination of the case shows that there was evidence that the libellant was a seaman; that most ships furnished a light at the winch, but that the ship in question did not. It was urged by the claimant that it was not sufficiently dark to demand artificial light, and also that a light was not desirable at the winch, for the reasons given by the witnesses. It does not appear that the question of the assumption of the risk was raised. In any case, there were facts present in *The Manhasset* which bring that case within the modification of the general rule relating to the assumption of risk. The rule assumes that the servant is a free agent to accept or decline risks of which he is made aware. It has been considered that seamen are under coercion which requires them to obey orders, and that if they are commanded to operate a winch, although such operation be known to them to be dangerous on account of defects, yet their obedience is enforced by the discipline of the ship, and, therefore, that they are not precluded from recovering for injuries received while executing such commands. *Eldridge v. Steamship Co.*, 134 N. Y. 187, 32 N. E. 66, affirming 58 Hun, 96, 11 N. Y. Supp. 468. It is not to be assumed that the learned judge writing the opinion in *The Manhasset* intended to ignore one of the recognized features of the law of negligence, and to disregard the well-known and accepted doctrine of assumption of risk.

It must be concluded that the libellant assumed the risk of danger arising from the known fact that it was the custom to leave hatches uncovered. It does not follow, however, that the claimant is not liable for the injuries in the present case. The law would require, as a primary duty on the part of the master, that he keep closed a hatch appropriated for a passageway, while in such use, or, if open necessarily or for convenience, that he use ordinary care to have the same reasonably lighted. This is a rule of general application, and no reason appears for withdrawing ships in ports from its operation. But, although this be a primary duty of the master, yet he has the full right, subject to the modification soon to be noticed, to leave hatches open and unlighted at all times, whether used as a means of passageway or otherwise. He has a right to establish the regulation that an open hatch shall yawn at the foot of the hatch ladder, and that it shall remain in total darkness, and, in such a condition, direct his servant to use it as a footway. But there is no presumption of law that he will do this, and his right to do so is limited by the accompanying duty of bringing home to his servants a knowledge of the dangerous condition, or of enabling a servant to learn by his own observation of the perilous system. Therefore, on a trial like the present, the master must show, affirmatively, not only that he customarily left these pitfalls in the footway of gangs of workmen, but that he did so on dark nights without lighting the same. Such proof devolves on the claimant, and, when given, casts the assumption of the risk upon the servant. When, as in the case

at bar, the master simply shows that he customarily left the hatches open, he falls short of discharging the burden of proof that rests upon him, as he fails to establish that he customarily omitted, not only to keep shut a hatchway used as a passageway, but also omitted to light the same when in special use for a pathway for his servants on dark nights. The claimant must have felt the necessity of such proof, for he sought to show that the master kept a large number of lanterns at New York, and that he sent some 14 to be used by the men in their work. And it was argued that, having furnished the lanterns, it became the duty of the men to light and use or place the same in such way as should be suitable for their safety. The evidence more strongly tends to show, however, that the libelant was not charged with the duty of making distribution or disposition of the lanterns outside the bunkers; but the duty of looking after the lamps seems to have been confided by the foreman to two particular persons, who received a concession of time for their services in that regard. In any case, the evidence does not convince the court that it was the duty of the men to light passageways leading to, but not immediately connected with, their work. It is urged, and some authority is cited to support the claim, that the disposition of the lamps was the work of an operative, and that any failure to place them so as to suitably light the hatch would be the fault of a fellow servant, for which the master would not be liable. However, if the lighting of the hatch be a duty of the master, as it is here held to be, he may not escape his responsibility for the same by furnishing lanterns to his servants, and be thereafter acquitted, whatever their misfeasance or nonfeasance. The conclusion is that the claimant was guilty of negligence because it did not use ordinary care to reasonably light the hatch which formed a part of the passageway, and that the libelant did not assume the risk of an unlighted hatch, because it is not proven that it was the custom of the master to leave it unlighted. The leaving of the hatch open and unlighted, without occasion therefor, was a highly-dangerous act, in view of the fact that the master knew that it was to be a part of a way to be used by a gang of men in the nighttime; and it cannot be presumed that the master customarily did such rash and inhumane acts, but strict proof of such recklessness is required before the risk thereof can be imposed upon the servant.

The next question is whether the libelant was guilty of contributory negligence. The respondent contends that the libelant was guilty, and, in support of such contention, cites *Anderson v. Steamship Co.*, 13 App. Div. 218, 43 N. Y. Supp. 213; *The Jersey City*, 46 Fed. 134; *The Carl*, 18 Fed. 655; *The Sir Garnet Wolseley*, 41 Fed. 896; *The Gladiolus*, 22 Fed. 459, 21 Fed. 417; *Geoghegan v. Steamship Co.*, 146 N. Y. 369, 40 N. E. 507. This contention of the respondents is fully sustained. The libelant knew—constructively, at least—that the hatch was open; he discovered that the place was insufficiently lighted; and, indeed, he claims that the place was so dark that he was obliged to grope his way. It was within his power to go back and obtain one of the lanterns, and thereby escape the results of the negligence of the master. He preferred, however, to

continue without taking the trouble of doing so. This was a negligence on his part, which contributed to his injury. Under the ordinary rules of law, such negligence would require the dismissal of the action; but, under the peculiar principles applicable to cases of this nature in admiralty, an apportionment of the damages must result. The injury to the libelant naturally resulting from the accident, including his loss of time and medical services, may be fairly put at the sum of \$1,000. He should, under the finding herein, receive one-half of such sum, or \$500; and a decree should be entered in his favor for that sum, with costs.

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THE H. C. WAHLBERG.

LORENTZEN v. SCHLEHEN et al.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1898.)

No. 384.

1. MARITIME LIENS—SALE OF CARGO—DISPOSITION OF PROCEEDS.

Where one, under contract to purchase the entire catch of a schooner upon a proposed seal-hunting expedition, lent money to her owner and master upon the security of a mortgage on the schooner, and later advanced money for the wages of her crew, and for necessary repairs and supplies in a foreign port, *held*, that the proceeds of sale of the catch should be first applied to reimbursement of the latter advances, in so far as they were justified, rather than to payment of the loan.

2. SEAMEN—WAGES—FORFEITURE.

Where shipping articles provide that members of the crew shall not be entitled to wages until return to the home port, their refusal, in a foreign port, to proceed with the voyage, no excuse for such refusal appearing, works a forfeiture of their right to wages.

Appeal from the District Court of the United States for the Northern District of California.

Anders & Frank, for appellant.

C. A. Carter and H. W. Hutton, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The question presented by this appeal is whether or not the intervener, Lorentzen, should be allowed to participate in the distribution of the proceeds of the sale of the schooner Wahlberg, he having been denied that right by the court below, and such proceeds having been by that court distributed to—First, those rendering services on board the schooner at the request of, or under contract with, her master; and, second, to those who furnished supplies for the schooner in this state, at the request of the master. The schooner was a domestic vessel, San Francisco being her home port.

By section 813 of the Code of Civil Procedure of California it is provided, among other things, as follows:

"All steamers, vessels, and boats are liable: (1) For services rendered on board at the request of or on contract with their respective owners, masters, agents, or consignees. (2) For supplies furnished in this state for their use at the request of their respective owners, masters, agents, or consignees. (3) For work done or materials furnished in this state for their construction, repairs, or equipment. \* \* \* Demands for these several causes constitute liens upon all steamers, vessels, and boats, and have priority in their order herein enumerated and have preference over all other demands."

One James Crew was the managing owner of the schooner, and as such, on the 13th day of December, 1893, entered into a written agreement with the intervener, Lorentzen, who was a dealer in fur seal skins in San Francisco, whereby Crew agreed to send the schooner on a hunting and fishing voyage in the waters of the North Pacific Ocean, and to sell and deliver at San Francisco to Lorentzen all the fur seal skins obtained by the vessel during the season of 1894, Lorentzen binding himself to pay to Crew, as such managing owner, certain stipulated prices for the catch of the voyage delivered at San Francisco prior to December 31, 1894. Five days afterwards, to wit, on the 18th day of December, 1893, Lorentzen loaned Crew \$2,800, taking therefor Crew's promissory note in that sum, together with a mortgage on the schooner as security therefor. The vessel sailed from San Francisco January 18, 1894, to the coast of Japan, with Crew as master, one Gus Schlehen as mate, a cook, a cabin boy, three hunters, and five seamen. By the terms of the agreement attached to the shipping articles, each and every officer and seaman who should well and truly perform the voyage and comply with the regulations and duties specified in the agreement, and commit no dishonest or unlawful act, should be "entitled to the payment of his share of the net proceeds of the voyage, pursuant to this agreement, as soon after the return of said schooner to San Francisco as the oil and other products of the voyage can be sold and the settlement adjusted by the owner or agent." The respective shares designated in the agreement were as follows: For the master, mate, and hunters, "as per agreement"; for the cook, \$50 per month; for the cabin boy, 20 cents for each skin delivered on board the schooner (excluding grey pups); for each seaman, 20 cents for each skin delivered on board the schooner. While the vessel was in Japanese waters, the master was taken sick, and was landed at Hokodata, Japan, where he died, in July, 1894. The mate, Schlehen, thereupon took charge of the vessel as master, and took her to Yokohama. At Yokohama was the firm of Ahrens & Co., correspondents of the intervener, Lorentzen. On August 22, 1894, Ahrens & Co. cabled Lorentzen as follows: "Wahlberg arrived here yesterday. 191 seals. Please send instructions forthwith." To which Lorentzen replied, August 25, 1894, as follows: "Watch our interest. Send vessel and cargo here. Will pay crew." On the 30th of August, 1894, Ahrens & Co. cabled Lorentzen to the effect that the crew and hunters refused to proceed further, and that the schooner was in need of repairs, and was entirely without provisions, to which Lorentzen replied as follows: "Discharge [pay off] the crew according to agreement. Provide what is necessary. Engage a fresh crew." Ahrens & Co. accordingly paid to

the master and crew of the schooner in Yokohama \$1,413.22, and for supplies furnished and repairs to the schooner \$774.09, and for expenses on the cargo of the schooner \$165.18, and also for other advances, including cash paid to Capt. Crew and the expenses of his last illness, \$741.94, aggregating \$3,094.43, for which they drew on Lorentzen at San Francisco, which draft Lorentzen paid. From Yokohama there were sent to Lorentzen, at San Francisco, by steamer, 128 skins of the catch of the schooner, including the skins of 27 pups, for which Lorentzen realized \$1,096; and upon return of the schooner to San Francisco, which was done by means of a new crew shipped at Yokohama, Lorentzen received from the schooner 108 skins, besides the skins of 85 pups, for which he realized \$1,298, aggregating \$2,394. The claim preferred by him by means of his intervention includes, in addition to the \$3,094.43 paid on the draft of Ahrens & Co., the \$2,800, loaned by Lorentzen to Crew on the 13th of December, 1893, aggregating \$5,894.43, from which, in his account, he deducts the \$2,394 realized by him for the skins, but which amount he claims the right to apply in part payment of the \$2,800 loan, leaving the whole amount of the advances made in Yokohama by Ahrens & Co. for Lorentzen unpaid, and which the latter contends are preferred in character to the claims for supplies furnished in this state for the use of the schooner, upon the request of her master, prior to the commencement of the voyage.

There are several reasons why we think the court below was right in refusing to sustain this contention on the part of Lorentzen. It will be sufficient to state one or two. In the first place, he had not a particle of right to appropriate the proceeds of the skins to the payment of the money loaned by him to Crew on December 18, 1893. For that loan he took Crew's note, secured by a mortgage upon the schooner. By his contract of December 13, 1893, he agreed to buy the skins constituting the catch, and pay for them at certain stipulated rates. Out of that purchase money, expenses necessarily incurred on the voyage were properly payable; and, out of the net proceeds, the officers and men of the crew were entitled to their respective shares, in accordance with the agreement annexed to the shipping articles, for the services rendered by them on the voyage. If, therefore, it be conceded that the \$1,413.22 paid by Lorentzen through Ahrens & Co., at Yokohama, to those of the crew who refused to proceed with the voyage, was properly paid, the proceeds of the skins are properly applicable to the reimbursement of that payment so far as necessary. But, according to the shipping articles, not one of the officers or men of the crew was entitled to pay for his services until the return of the schooner to her home port. They were not therefore entitled to be paid in Yokohama by anybody. By their refusal at that place to proceed with the voyage,—no excuse for such refusal appearing,—they forfeited their right to pay.

What has been said with respect to the application of the proceeds of the skins to the payment of the seamen's wages applies equally to the advances for supplies and repairs to the vessel made

at Yokohama by Lorentzen, through Ahrens & Co., and to the advances there made for expenses on the schooner's cargo. Even if it be conceded to be shown that those advances were made on the credit of the vessel, the proceeds of the skins are properly applicable to their repayment. It results that the judgment must be affirmed, and it is so ordered.

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THE FRANK R. GIBSON.

THE CYCLONE.

THE FITZPATRICK.

BAKER v. THE CYCLONE.

(District Court, N. D. New York. March 25, 1898.)

**COLLISION WITH DOCK—DRIFTING VESSELS.**

A schooner was moored by means of ropes to the breakwater of the Erie Basin, and her cargo was being transferred to a canal boat by a floating elevator. The elevator was held in position at the side of the schooner by lines thrown out to her, and also by means of four oak spuds driven into the ground, one at each corner; and the canal boat was lashed to her. The wind was blowing a gale, and parted the forward lines of the schooner, and she drifted around, carrying the other boats with her, until at right angles with the breakwater. The foreman of the elevator having failed to cut the lines that held the elevator to the schooner, although requested, the master of the schooner cut them, and she was safely removed. The elevator and barge then soon drifted across the basin, colliding with a dock, and both were damaged. *Held*, the canal boat was not at fault; that the schooner, having placed the vessels in a dangerous position, was at fault in cutting the lines at the time and manner shown; and that the elevator was at fault in making no effort to secure herself by additional lines, or procure assistance, though she had time and opportunity to do so, prior to the cutting of the ropes; and both were jointly liable for the damage done the canal boat.

The libel was filed by William F. Baker against the Cyclone in January, 1895, to recover damages in the sum of \$925 sustained by the canal boat Frank R. Gibson by reason of the alleged negligence of the Cyclone. In June, 1895, the Fitzpatrick was brought in on petition filed by the Cyclone alleging that the accident was the result of the negligence of the Fitzpatrick which caused the damages to the canal boat, not only, but also to the Cyclone in the sum of \$1,191. The Fitzpatrick duly filed an answer denying negligence on her part, and charging that the accident resulted from the negligence of the Cyclone and the canal boat.

Josiah Cook, for libelant.

John L. Romer, for the Cyclone.

Harvey L. Brown and Harvey D. Goulder, for the Fitzpatrick.

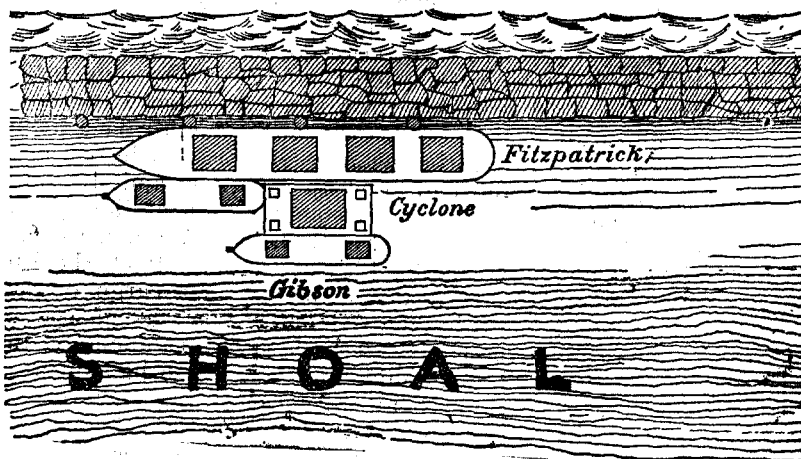
COXE, District Judge. The accident which caused the damages complained of occurred October 14, 1893. The Gibson was an ordinary canal boat, 96 feet long and about 17½ feet beam, having no motive power of her own. The Cyclone was a floating elevator, 82 feet long, 36 feet beam and about 4½ feet draught. She had

square ends and a flat bottom. On the center of this scow was built a tower 40 feet high, 35 feet square at the base and 25 feet at the top. There was a yoke, and two slides running up to a height of 104 feet above the deck, in which the elevator's leg was raised and lowered. She was anchored by means of four spuds, one at each corner. These spuds were of white oak 12 inches square and 35 feet long. The elevator would move up and down on these spuds as the water rose and fell, the ends of the spuds being imbedded in the mud. The Fitzpatrick was a four-masted schooner, 240 feet long, 41 feet beam and 16½ feet draught, when loaded. At the time in controversy the Cyclone was lying near the southerly end and on the east side of the Erie Basin breakwater, which was her usual place for transacting business. The breakwater is a stone wall about three-quarters of a mile long, 50 feet wide and from 12 to 16 feet above the level of the lake when the water is in a normal condition. On the inner side of the wall at intervals of 56 feet large iron rings are placed in staples anchored in the wall so that vessels can moor there. These rings are 6½ inches in diameter on the inside. The Erie Basin had gradually fallen into disuse and had filled up with mud and silt, but a channel had been dredged for the accommodation of the Cyclone 125 feet wide, 18 feet deep and long enough to enable large vessels to lie there and unload. On the 13th of October, 1893, the Fitzpatrick was sent to the breakwater to have her cargo of corn transferred to canal boats by the Cyclone. She was moored by means of lines through the rings. The elevator was anchored just east of the schooner and about midships. She also had lines out to the schooner. The canal boat was east of the elevator and lashed to her. The elevator was thus between the schooner and the canal boat, her leg being on the one side and her discharge spouts on the other. The work of unloading was not entirely completed on the 13th of October, and was resumed on the morning of the 14th at 7:30 o'clock, continuing for about an hour. The wind was blowing a gale down the lake on the morning of the 14th, and increased in velocity until it caused the forward lines of the Fitzpatrick to part, with the result that she struck the elevator with sufficient force to break her spuds, and the two vessels, with the canal boats moored to the elevator, drifted around until the Fitzpatrick was nearly at right angles with the breakwater, her bow extending into the shallow water to the east of the dredged channel. She remained in this position, held by her stern lines to the breakwater, until about 3 o'clock, when she was pulled out of danger by three tugs which were sent to assist her. The tugs first attempted to pull the schooner and elevator around to their original position at the breakwater, but after working for some time without success the master of the schooner notified the foreman of the elevator to cast off the lines which held the elevator to the schooner. The foreman having refused or neglected to do this, the master of the schooner cut the lines, and the tugs immediately thereafter released the schooner and towed her to a place of safety. The two lines which the elevator had to

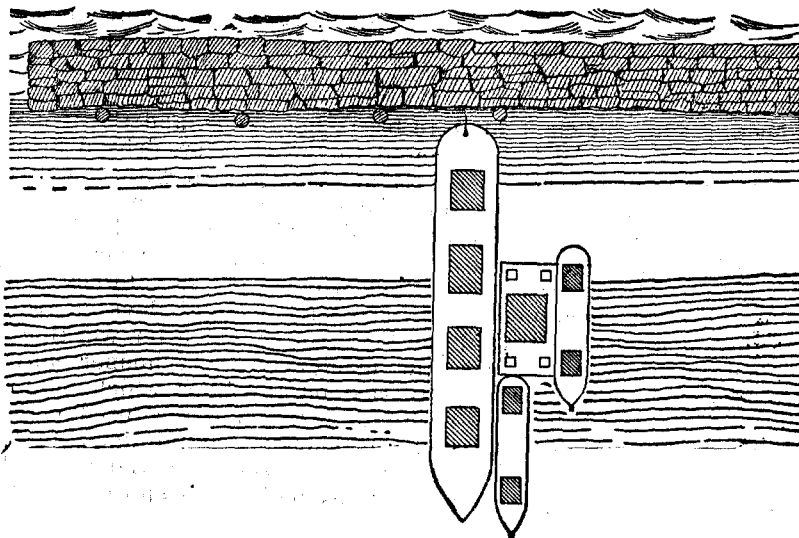
the breakwater soon parted after the lines to the schooner were cut, and she drifted across the Erie Basin, and collided with the dock on the opposite side, causing damage to the canal boat and to herself. The following diagrams are prepared by the court simply as illustrations. They are not drawn to a scale, and are introduced solely to make the situation more intelligible. No. 1 shows the vessels when moored to the breakwater, No. 2. after the Fitzpatrick's lines were parted and she had swung around at right angles to the breakwater:

No. 1.

## LAKE ERIE



No. 2.



### The Gibson.

No negligence is imputed to the canal boat, except that she was not sufficiently manned. This proposition cannot be maintained either on the law or the facts. Two persons were aboard at the time, a sufficient number for all ordinary contingencies. It is said that if her captain or steersman had been on board she might have been cut loose, and so have avoided the accident. But this is highly problematical. She had no notice that the lines from the elevator to the schooner were to be cut. Apparently her safest course after the elevator was adrift was to remain where she was. Had she cast off her lines she might have encountered more serious difficulties. She had no means of propulsion, and might have drifted helplessly upon the rocks or sunken wrecks of "the middle ground." She certainly would have collided with something. In these circumstances she was not at fault in maintaining her position.

### The Fitzpatrick.

It must be conceded that the initial cause of the accident was the parting of the schooner's head lines. Had these held, the vessels would have been perfectly safe. The schooner was sheltered from the wind, to some extent, by the breakwater, which must have been from six to ten feet above the water of the basin. The schooner's side was about nine feet above the breakwater. That her lines parted affords a presumption that they were insufficient. When the schooner swung around she carried the Cyclone with her. The latter's spuds were broken, and it is a fair presumption that this was caused by the schooner striking against her. No other sufficient cause is proved or suggested. The elevator was then helpless, made so by the act of the schooner. Their relative obligations were thus changed, and it cannot be asserted that after depriving the elevator of her principal means of anchorage the schooner owed her no greater obligation than before. The master of the schooner testifies that he had all the lines out to the breakwater that it was possible for him to use. Assuming that he is correct in this statement, it was still his duty, having placed the elevator in a situation of danger, to act with discretion and prudence, and not subject her to additional and unnecessary risk. The schooner was not called upon to remain where she was, as the subsidence of the water would place her in great peril; but in releasing herself it was her duty not to subject the other vessels to danger which could have been avoided. Having informed the foreman of the elevator that "if he wished to take his own chances he could stay right alongside of the schooner," she should, if she intended to cut the lines, at least have given timely warning of her intention. The schooner was not justified in cutting the lines at the time and in the manner shown by the proof. The danger was not then imminent, and insufficient notice of the schooner's intention was given to the elevator. The latter had not sufficient time thereafter to secure other assistance or provide additional means of safety. If the elevator had known

that her lines were to be cut, she might have taken a number of precautions to insure her against drifting across the basin. Had the canal boat known of this in time, she could have procured the services of a small tug and been towed to a place of safety.

#### The Cyclone.

Assuming that the Cyclone was properly equipped for ordinary purposes, she certainly was in no condition to cope with the situation which confronted her on the morning in question. From the time she was swung around by the schooner, and rendered comparatively helpless by the breaking of her spuds, to the time when she was finally set adrift, six hours elapsed. During this time she did practically nothing to better her condition, except to put out an additional line. She had two lines to the breakwater, but she could have put out other lines. The foreman testified that he knew the lines he had out to the breakwater would not alone hold the elevator. There was a line several hundred feet in length on the elevator which was not used. This could have been utilized, and any number of additional lines could have been procured. The Cyclone had no anchor. An anchor might have held her at least until she could have procured the assistance of a tug. That such assistance would have been available is demonstrated by the fact that after she drifted across the basin a tug got a line to her, and arrested her further progress. A tug came to her during the morning and offered help, but the offer was not accepted. The harbor of Buffalo was full of tugs, and one was lying near to assist the vessels when called on. After being warned repeatedly to do something to relieve the situation, the Cyclone persisted in doing nothing. The conclusion cannot be resisted that the accident was the result of the joint fault of the Fitzpatrick and the Cyclone. It follows that the libellant is entitled to a decree against the Fitzpatrick and Cyclone with costs. The Cyclone is entitled to a decree against the Fitzpatrick for half her damages and half her costs. There should be a reference to compute the amount due.

## FLORIDA C. &amp; P. R. CO. v. BELL et al.

(Circuit Court of Appeals, Fifth Circuit. May 24, 1898.)

No. 599.

## 1. FEDERAL COURTS—JURISDICTION.

The federal courts have jurisdiction of an action to recover possession of lands which plaintiff claims by virtue of pre-emption under the laws of congress, and which defendant claims under an act of congress granting land to railroads, and where it appears that defendant resisted the plaintiff's pre-emption claim in the different stages of the prosecution thereof.

## 2. SAME.

The federal courts have jurisdiction of an action for mesne profits of land during the time between plaintiff's pre-emption entry and the issuance of the patent.

## 3. PLEADING—JURISDICTION.

The jurisdiction of a court does not depend on defendant's answer, and cannot be taken away by it.

## 4. PLEADING.

A plea that "plaintiff is a person non compos mentis and insane, and cannot maintain the said above-entitled suit," is not good.

In Error to the Circuit Court of the United States for the Southern District of Florida.

This was an action by William J. Bell and others against the Florida Central & Peninsular Railroad Company to recover possession of land and damages for the occupation and use thereof. There was a judgment for plaintiffs in the circuit court, and defendant brings error.

J. C. Cooper, W. W. Howe, W. B. Spencer, and C. P. Cocke, for plaintiff in error.

H. Bisbee, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

McCORMICK, Circuit Judge. This case is brought here on a writ of error to the circuit court of the United States for the Southern district of Florida. The declaration, filed in that court, December 29, 1896, is as follows:

"William J. Bell, John W. Bell, Frank A. Bell, who at and before the time this suit was commenced were citizens of the state of Texas, E. A. Bell, Matilda P. Feihe (née Bell), all heirs of and children of Louis Bell, late of Hillsborough county, state of Florida, deceased, George A. Bell and Simon Bell, heirs of and grandchildren of the said Louis Bell, and Antone Feihe, the husband of said Matilda P. Feihe, plaintiffs, by H. Bisbee and Padgett & Forrest, their attorneys, sue the Florida Central & Peninsular Railroad Company, a corporation organized and existing under the laws of Florida, the defendant, because the defendant heretofore, to wit, in the year 1890, took possession of, as its railroad bed and right of way, and built its railroad of four tracks across and through and upon, a strip and parcel of land, being a part of lot 8, section 2', township 29 south, of range 18 east, according to the surveys, maps, and plats thereof made by the government of the United States, and under and according to the laws of the said United States, which said lot 8 is in Hillsborough county, state of Florida, and in the said Southern district of Florida; which said strip and parcel of land, so taken as aforesaid by

the defendant, and which the said defendant is in possession of and was in possession of at the time of the commencement of this suit, contains about seven acres, of the value of \$30,000, to which the plaintiffs claim title; and the defendant has received the rents and profits of said land since the 1st day of December, 1889, of the yearly value of \$4,000, and refuses to deliver the possession of the said land to the said plaintiffs, or to pay the rents or profits thereof. And the said plaintiffs allege that, in and by the construction of its said railroad upon, over, and through the said strip and parcel of land by the defendant, the defendant has dug up the said land in making its roadbed, and has taken away and removed the plaintiffs' fences thereon, and the soil and sand thereof, and other wrongs and trespasses and injuries to the said land and to the plaintiffs' possession and freehold committed, to the plaintiffs' damage of \$10,000, exclusive of such rents and profits, which the defendant neglects and refuses to pay to the plaintiffs. And the plaintiffs allege that they claim title to the said land under and by virtue of a patent granted by the government of the United States of America to the said Louis Bell and his heirs, upon a pre-emption claim for said land under the laws of the United States, originally commenced and filed in the local land office of the United States of America at Gainesville, Florida, in 1883, and prosecuted by the heirs of the said Louis Bell and his heirs, the plaintiffs, in said land office, and upon appeal in the general land office of the government; and upon and from an appeal from the decision of the commissioner of the said general land office to the secretary of the interior of the United States the said heirs prosecuted the pre-emption claim, until, by the order and decision of the said secretary, the said patent was granted. And the plaintiffs allege that at various and sundry times during the said prosecution of the said pre-emption claim in the general land office aforesaid, and in the office of and before the said secretary, the defendant claimed, insisted, and contended that the plaintiffs were not, under any of the laws of the United States, entitled to have a patent to said land granted to the said Louis Bell and his heirs; and the said defendant, at the time of the commencement of this suit, claimed and insisted that the plaintiffs derived no title to the said land under and by virtue of the patent, and at said time claimed that under the laws of the United States of America, and especially under and by virtue of the first section of an act of congress entitled 'An act granting public lands in alternate sections to the states of Florida and Alabama, to aid in the construction of certain railroads in said states,' approved May 17, 1856, it was entitled and had the right to locate the route of its railroad and construct the same through the said lands, and to be in possession thereof, on the ground, among other grounds, that the said section 8 was a part of that tract of land, which constituted at one time a military reservation known as the 'Fort Brooke Military Reservation,' at Tampa, state of Florida. And the plaintiffs allege that after the passage of an act of congress entitled 'An act to provide for the disposal of abandoned and useless military reservations,' approved July 5, 1884, they contended for and claimed title to, and a patent to, the said parcel of land under and by virtue of the first proviso of the second section of the last-mentioned act of congress, both in the office of the said general land office and of the secretary of the interior, and the defendant appeared in both of the said offices by its counsel, and there claimed and contended, and at the commencement of this suit claimed and contended, that the plaintiffs were not entitled to a patent or title to said parcel of land under the said proviso of the said act of congress, and at the times aforesaid it claimed and insisted that it was entitled to locate the route of its railroad through said parcel of land, and to be in the possession thereof, under and by force of the third proviso of the aforesaid act of congress approved May 17, 1856; to the plaintiffs' damage of \$40,000."

To this declaration, the Florida Central & Peninsular Railroad Company, the plaintiff in error, on February 1, 1897, submitted the following plea:

"Now comes the defendant in the above-entitled cause, by John C. Cooper, its attorney, and for a plea to plaintiffs' declaration says it is not guilty as alleged in said declaration."

On February 5th the defendant moved the court for leave to submit additional pleas, as follows:

"(2) Now comes the defendant in the above-stated cause and for a further plea, filed by leave of court, says that this honorable court has no jurisdiction, and did not have any jurisdiction at the time of the commencement of this suit, to entertain said suit; and defendant admits that before the commencement of this suit a patent was issued from the United States to Louis Bell and his heirs to all of lot 8, section 24, T. 29 S., R. 28 E., and that the plaintiffs claim title to said land described in the declaration as heirs of Louis Bell under said patent; and this defendant says it is not true that the defendant, at the time of the commencement of this suit, claimed and insisted that the plaintiffs derived no title to the said land under and by virtue of the said patent; and it is not true that at said time, or at any time since, the defendant claimed under the laws of the United States of America, or under an act of congress entitled 'An act granting public lands in alternate sections of the states of Florida and Alabama, to aid in the construction of certain railroads in said states,' approved May 17, 1856, or under an act of congress entitled 'An act to provide for the disposal and abandonment of useless military reservations,' approved July 5, 1884, or any other act of congress or law of the United States, any right, title, or interest in said land, or to locate the route of its railroad and construct the same through said land, but this defendant admits that now, and at the time of the commencement of this suit, it had no claim or title, and that it does not now, and did not at the time of the commencement of this suit, assert any claim or title, to said land under any act of congress or law of the United States. Wherefore the defendant says that this honorable court should no longer entertain jurisdiction of said suit, and said suit should be dismissed.

"(3) And for further plea defendant says that the plaintiff Matilda P. Feihe is a person non compos mentis and insane, and cannot maintain the said above-entitled suit.

"(4) And for a further plea defendant says that in December, 1889, and in January, 1890, it located and constructed its road and took possession of said right of way across and through said lot 8, section 24, township 29 south, of range 28 east, described in the plaintiffs' declaration, and laid its tracks thereon, and has continuously ever since maintained and operated said railroad thereon; and that on the 21st day of December, 1896, it filed its proceedings and petition in the circuit court for the Sixth judicial circuit in and for the county of Hillsborough, state of Florida, for the purpose of having valued and condemned the said land, and to acquire title under its right of eminent domain under the laws of the state of Florida, and that process was duly issued upon the said petition and proceedings as required by the laws of the state of Florida, directed to the plaintiffs in this suit as defendants to said proceeding, and the said process has been served upon said defendants, who have answered the said petition, and said proceedings are now pending and undisposed of in said court; and that in and by the said proceedings, and the judgment of said court thereof, this defendant will acquire the title of the plaintiffs to the said property, and the compensation will be awarded and paid thereunder to the plaintiffs for their right, title, and interest in the said property.

"(5) And for a further plea defendant says that theretofore, to wit, on the 21st day of January, 1890, the complainants, and those under whom they claim as heirs at law, filed their original bill in this honorable court, on the equity side, to enjoin the defendant from constructing and operating its railroad across said land; and that on the 2d day of January, 1890, his honor, Don A. Pardee, circuit judge, issued an order on said bill for a temporary injunction against the defendant, but providing that, upon the defendant's filing its bond in the sum of \$5,000, said injunction should be dissolved, or on the defendant's acquiring title under condemnation proceedings under the laws of the state of Florida; that said defendant did file the said bond, which was approved by the clerk of this court, through his deputy clerk at Tampa, Florida, and that on the 22d day of December, 1896, said plaintiffs in this suit, by leave of court, filed their supplemental bill in the said above-mentioned equity cause in this court, setting up the former proceedings on the original

bill, and that they, as heirs at law of Louis Bell, had acquired a patent to said land from the United States, and praying for an injunction against the defendant's using or occupying any portion of said land, or from running or operating its said railroad upon said land, and that the defendant be decreed to have no right to condemn any part of said land under the laws of eminent domain of the state of Florida, and to enjoin the same, and for compensation to the complainants for the value of said land, and to remove said railroad from said lot, and for compensation for the use and occupation of said land by the defendant, and for waste and damage alleged to have been committed on said lot by the defendant. On February 1, 1897, this defendant filed its answer to the said supplemental bill, setting up its defenses thereto, and also alleging that it had not commenced proceedings in the circuit court of the Sixth judicial circuit, Hillsborough county, state of Florida, for the purpose of condemning said property under the laws of eminent domain of the state of Florida; and that the said equity cause involves the title to the same land, and in all respects the same subject-matter and the same relief, as this suit, and said equity cause is still pending and prosecuted by the complainants. Wherefore defendant says the plaintiffs ought not to maintain this suit against this defendant."

Thereupon the court made this order:

"This cause coming on to be heard upon the motion of the defendant for leave to file additional pleas, \* \* \* and it having been fully heard and considered, and it appearing that none of said pleas constitute a good defense to said action that could not as well be shown under the general plea of not guilty, it is ordered that said motion to file additional pleas be denied. \* \* \*"

On March 5, 1897, the plaintiff in error presented its motion as follows:

"Now comes the defendant in the above cause on this day and moves the court to dismiss said cause, for the reason that there is nothing upon the face of the declaration to show that this court has jurisdiction to hear and determine the said cause."

—On which the court made its order, to wit:

"On consideration of this motion to dismiss, it is ordered in open court, March 11, 1897, that said motion be dismissed."

Thereupon the parties filed in open court a written stipulation in these words:

"Now come the above-named parties, plaintiffs and defendant, by their respective counsel, and hereby agree to waive a jury, and that the action may be tried by the court without a jury."

On March 23, 1897, the circuit court made its findings, as follows:

"This cause coming on for a hearing by the court without a jury, a jury having been waived herein by a stipulation by the parties in writing, and having been fully heard by the introduction of documentary evidence and the testimony of witnesses, and being duly considered, the court finds, as matters of law, that the plaintiffs are entitled to the possession of, and have a fee simple title in and to, the land hereinafter described, and the undivided interests of the plaintiffs in and to the said land are as follows, to wit: William J. Bell, John W. Bell, Frank A. Bell, Eliza A. Bell, and Matilda P. Feihe (née Bell) have and own each one undivided sixth part and interest in the said land; and that George A. Bell and Simon Bell have and own each one undivided twelfth part and interest in said land. And the court further finds, as a matter of law, that the plaintiffs have at all times within seven years next before the commencement of this action been entitled to the exclusive possession of said tract or lot of land hereinafter described, and are entitled to such amount in the form of judgment for damages and mesne profits as will fully compensate them for any damages that have been sustained, and loss of rents and profits which have been caused, by the unlawful trespass and

possession of the defendant herein. And the court further finds, as a matter of fact, that in damages and in loss of rents and profits the plaintiffs have been injured and damaged to the extent of \$1,955. And the court further finds, as a mixed matter of law and fact, for the plaintiffs, and that they should have judgment for the shares and portions as found in the first finding, to wit: William J. Bell, John W. Bell, Frank A. Bell, Eliza A. Bell, Matilda P. Felhe (née Bell), each one-sixth part, and George A. Bell and Simon Bell each one-twelfth part, in fee simple interest in and to the following described lot or tract of land, to wit: A strip and parcel of land, being a part of lot 8, section 24, township 29 south, range 18 east, of the meridian of Tallahassee, state of Florida and county of Hillsborough, known and described as follows, to wit: Beginning at a point in the east boundary line of said lot 8, at a distance of 75 feet in a south direction from the northeast corner of said lot,—running southwesterly parallel to the northwesterly boundary line of said lot, to the western boundary line of said lot 8, fourteen hundred and twenty-four feet; thence south, on said western boundary line of, 75 feet; thence north-easterly, on a line parallel to said northwestern boundary line of said lot, to the eastern boundary line of said lot; thence north, along said eastern boundary line 75 feet, to the place of beginning. And the court further assesses their damages for injury, use, and occupation while said land has been held and occupied by said defendant company at \$1,955, for which judgment should be given."

—And on the same day entered judgment in favor of the plaintiffs below (defendants in error here) to the effect that they "receive and recover from the defendant, the Florida Central & Peninsular Railroad Company, the sum of nineteen hundred and fifty-four dollars, as well as ——— for costs in this behalf; and it is further considered that said plaintiffs have a fee-simple title in and to the lands and premises described as follows, to-wit: [Giving a description of the land.]"

The assignment of errors embraces 12 specifications. After a careful examination and consideration of the record and the briefs and oral arguments of counsel submitted, we deem it necessary to notice only the fourth ground of error suggested by the plaintiff in error, that the court below refused to grant the defendant's motion to dismiss for want of jurisdiction. It is clear to us that this assignment of error is not well taken. The plaintiffs' whole suit in the circuit court rested upon the different statutes of the United States giving their ancestor a right to pre-empt the land for which their action is brought. Moreover, their action was not for a recovery of the land alone, nor for the establishment of their title to it alone, but an important part of their action, if not the chief part, so far as it invoked litigation, was the recovery of damages for the occupation and use of the land for the years prior to the issuance of the patent. That part of the plaintiffs' action the defendant below did not admit, but, on the contrary, zealously denied, and still stoutly contests, and makes that contest the foundation of four specifications of error embraced in its assignment.

There is no effort in this case to found the jurisdiction of the court on the diverse citizenship of the parties. There is nothing in the record to indicate that the judge of the circuit court entertained jurisdiction of the case on that ground. The declaration shows that, in the pre-emption claim by the ancestor of the defendants in error to the land involved, the claim was stoutly resisted by the plaintiff in error in the different stages of the prosecution thereof and before

the different officers of the land department. It shows that under a named act of congress (approved May 17, 1856) the defendant claimed the right to occupy the land in question in the manner that it was occupying it, without accountability to the defendants in error. It is difficult to perceive how the case made in the circuit court by the defendants in error could be determined by that court without its construing the acts of congress with reference to entries thereby authorized to be made on public lands, conditioned as the land in question was at the time of Louis Bell's entry; and the fact that there had been a long-continued contest in reference thereto in the different offices, and before the different officers, of the land department, would seem sufficient to show that there might be a construction of the public laws relating to that particular part of the public domain which would uphold the right of the heirs of Louis Bell, and support their patent thereto, and also that there might be a construction of the laws of congress relating thereto which would defeat, as the defendant had long attempted to defeat, the right of this pre-emptor and his heirs. So that, independently of the claim for mesne profits for the time transpiring between the pre-emption entry and the issuance of the patent, it is clear that the issues made by the declaration presented a case within the jurisdiction of the circuit court. *Doolan v. Carr*, 125 U. S. 618, 8 Sup. Ct. 1228; *Railway Co. v. Ziegler*, 167 U. S. 65, 17 Sup. Ct. 728; *Pierce v. Molliken*, 78 Fed. 196. There is even less room to doubt that the circuit court has jurisdiction of the case for the recovery of mesne profits accruing before the issuance of the patent. *Evans v. Durango Land & Coal Co.*, 25 C. C. A. 531, 80 Fed. 433.

We think the court did not err in refusing the motion of the plaintiff in error for leave to file the additional pleas submitted. So far as these pleas were intended to affect the jurisdiction of the court, they are clearly bad, because the jurisdiction of the court did not depend upon the defendant's answer, and could not be taken away by it. *Osborn v. Bank*, 9 Wheat. 826.

As to the plea which sought to question the capacity of one of the plaintiffs to sue, it came too late, and, if it had been presented in time, it was clearly not good as pleaded. *Dudgeon v. Watson*, 23 Fed. 161.

As the record shows no error in the proceedings in the circuit court for which, in our opinion, the judgment of that court should be reversed, it is affirmed.

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MONTGOMERY v. McDERMOTT et al.

(Circuit Court, S. D. New York. May 9, 1898.)

1. RES ADJUDICATA—FEDERAL AND STATE COURTS.

The decision in an interpleader suit in a state court, that no lien was obtained by a certain attachment levy, is binding upon the federal court to which the original attachment suit has been removed.

2. ATTACHMENT—TITLE TO ATTACHED PROPERTY.

A federal court does not, by virtue of an attachment levy, draw to itself the question of the title of the attached property, so as to prevent the state

courts from deciding such question in a suit subsequently brought for that purpose.

Stephen H. Olin, for complainant.  
E. Clifford Perkins, for defendants.

WALLACE, Circuit Judge. To the bill of complaint filed in aid of an attachment obtained in a suit at law the defendants Perkins and Fowler have interposed a plea of *res adjudicata*. The plea is directed to so much of the bill as alleges that the complainant obtained a lien by the attachment upon the fund which the bill seeks to reach. The case presented is substantially this: The complainant, as plaintiff in an action at law in *assumpsit* brought against one McHenry, caused a warrant of attachment to be issued in the action against the property of McHenry. The writ was levied upon certain certificates representing the beneficial interests of the holders thereof in a trust fund of which Perkins and Fowler were trustees. The action, originally brought in a state court, was removed to the United States circuit court. Subsequently, and while that action was pending, Perkins and Fowler, trustees, brought in a court of the state of New York an action of interpleader, making the complainant and certain persons who claimed to be owners of the certificates defendants therein. The trustees alleged in the interpleader action that the several defendants therein were rival claimants to the fund represented by the certificates; the present complainant by virtue of the attachment against McHenry, and the other defendants by transfer of the certificates to them from McHenry prior to the levying of the attachment. Relief was prayed that the controversy as to the rights of the several defendants to the fund be settled, and that, upon payment to such defendant as might be adjudged entitled thereto, the trustees be discharged from any further liability. The action was heard upon issues of law raised by demurrer. The court decided that the defendant, the present complainant, acquired no lien upon the fund by the levying of his attachment. The judgment is pleaded as *res adjudicata* upon that issue.

Contrary to the impression entertained upon the argument of the cause, I am of the opinion that the plea of *res adjudicata* is good. In the interpleader suit the state court had jurisdiction of the parties and of the subject-matter of the controversy. One of the issues litigated was whether the present complainant acquired any lien under his attachment upon the fund in controversy. Unless he did, the trustees could not maintain their action. It was essential for them in that action to make it appear that there was a real controversy between the rival claimants to the fund. They sought to do this by setting forth the facts upon which the respective rights of the claimants were based. Those upon which they alleged the rights of the present complainant to be based were precisely those upon which in the present action the complainant bases his right. The state court decided in the interpleader action that these facts did not give the complainant any lien. Whether this was well decided or not is a question which cannot be relitigated in another action between the trustees and the complainant.

It is objected that the state court was not competent to entertain the question whether the complainant acquired any lien under his attachment, because that was a question exclusively for the determination of the United States circuit court, which was in legal custody of the fund, notwithstanding the trustees were in the actual possession. If the attached fund had been the res, the title to which was to be adjudicated in the action in the United States circuit court, brought under the dominion of that court for that purpose, the jurisdiction of that court would have been exclusive, and any subsequent proceeding against the fund in a state court, involving its control and disposition, would have been nugatory and void. The general principle is stated in *Covell v. Heyman*, 111 U. S. 182, 4 Sup. Ct. 355, as follows:

"These courts do not belong to the same system, so far as their jurisdiction is concurrent; and, although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and, when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decisions of questions relating to it, are part of the jurisdiction of the court from which it issues."

These principles were applied in this court in *Bank v. Hazzard*, 49 Fed. 293, and they have been more recently considered by the supreme court of the United States in *Moran v. Sturges*, 154 U. S. 256, 14 Sup. Ct. 1019, and in *Bank v. Stevens*, 169 U. S. 432, 18 Sup. Ct. 403.

But the action in the United States circuit court was not one in which the title to the attached fund was in litigation. It was decided in *Buck v. Colbath*, 3 Wall. 334, that an action of trespass could be maintained in a state court against the marshal of a federal court who had seized the plaintiff's property upon an attachment against the property of the person named in the writ, notwithstanding the possession of the marshal was the possession of the federal court; and that judgment was quoted with approval in *Covell v. Heyman*, and has been in many subsequent judgments of the supreme court. The principle of that decision was that the suit in the federal court did not draw to it the question of title to the attached property, and the action in the state court did not disturb the possession of the federal court. The court said:

"The federal court could proceed to render its judgment in the attachment suit, could sell and deliver the property attached, and have its execution satisfied, without any disturbance of its proceedings or any contempt of its process, while at the same time the state court could proceed to determine the questions before it involved in the suit against the marshal, without interfering with the possession of the property in dispute."

Upon the same principle the action could have been maintained against the party who directed the marshal to levy the attachment.

In the present case the jurisdiction of the state court was not invoked to disturb the custody of the fund by the United States circuit court. It was invoked to try the title to the attached property, at

least sufficiently to relieve the trustees, who were in actual possession, from liability to the rival claimants of the fund.

The plea is allowed.

The second plea which has been filed by the defendants to the complainant's bill cannot be allowed without disregarding the decision of Judge Coxe (83 Fed. 576) made upon the demurrer to the bill, and is therefore overruled.

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TUSTIN v. ADAMS et al.

(Circuit Court, D. Washington, S. D. May 17, 1898.)

1. HOMESTEAD.

Public land which has in good faith been inclosed, extensively improved, and lived upon for a number of years, although it has not been entered as a homestead, is not subject to entry under the homestead law by other parties.

2. HUSBAND AND WIFE—COMMUNITY PROPERTY.

A sale, by the husband, of a house built on public land in which the wife had a community interest, is binding on the wife.

This was a suit in equity by Frances M. Tustin against Phoebe D. Adams and Spencer Jacobs to determine the rights of contesting homestead claimants to public lands.

John C. Stallcup, for complainant.

Danson & Huneke, for defendants.

HANFORD, District Judge. This suit is to obtain a judicial determination of the rights of contesting homestead claimants under the land laws of the United States. On December 13, 1889, the complainant, Mrs. Frances Tustin, offered to file in the United States district land office at North Yakima her application to enter as a homestead the tract of land in controversy, but her application was rejected by the register and receiver for the reason that the land is part of an odd-numbered section, and was at that time supposed to be included in the land grant to the Northern Pacific Railroad Company. In subsequent proceedings in the land department the claim of the railroad company has been set aside. Subsequent to the date of complainant's application to enter the land as a homestead, the defendant Mrs. Adams claimed the same tract as a homestead, and in the contest proceedings between them the land department finally decided that Mrs. Adams had the better right, and a patent conveying the title has been issued to her. In the amended bill of complaint filed herein, the decision of the secretary of the interior containing a recital of the facts and the secretary's conclusions of law is set forth in full, and the complainant alleges that the facts as found and set forth in the secretary's decision are such as to entitle her legally to a decree declaring her to be the real owner of the land, and that Mrs. Adams holds the title as trustee, and requiring her to convey the same to complainant. The defendants have demurred to the amended bill, and the case has been argued and submitted by counsel for the parties, respectively, upon the demurrer.

In the argument counsel for the complainant insists that the only material facts shown by the decision of the secretary of the interior are:

"First. That on the 13th day of December, 1889, the plaintiff herein, Frances M. Tustin, duly applied to enter the tract of land in controversy herein as a homestead under the land laws of the United States, and thereafter fulfilled all lawful requirements in relation thereto. Second. That a year and ten days afterwards, to wit, December 23, 1890, defendant herein Phoebe D. Adams applied to enter the same tract as a homestead. Third. That defendant's application was at first rejected on two grounds, one of which was plaintiff's prior application, but that this ruling was afterwards reversed by the various officers of the department, and decided in defendant's favor, and a patent to said lands issued to her."

This statement of facts is, indeed, quite simple, and success would be easy for the complainant if her counsel could eliminate from the case all other facts, and confine the inquiry to questions as to the rights of the parties arising from his statement. Were the controversy restricted within the narrow limits proposed, I should agree with him that the only logical and legal conclusion to be drawn would be that his client is entitled to the land. The premises, however, are false in two particulars, and the argument built thereon is necessarily unsound. In the first place, it is not true that the secretary of the interior, in his decision, found as a fact that the complainant "fulfilled all lawful requirements in relation" to her homestead claim. The law requires as a prerequisite to perfecting a title to land under the homestead law that the homestead claimant shall make a peaceable entry upon unappropriated public land, and establish a home thereon, by either erecting a dwelling house, or purchasing from the owner a house suitable for habitation, and continued residence upon and cultivation and improvement of the land. The secretary's decision contains no findings of such facts in the complainant's favor.

In the second place, it is necessary, in order to reach a just decision in accordance with the legal rights of the parties, to take into consideration the facts as to the status of each party,—as to the nature and condition of the land, as to the date and manner of taking possession, as to the improvements made upon the land, and as to the good faith of each in meeting the requirements of the homestead law. The facts set forth in the secretary's decision, which I deem important and material, are as follows, viz.:

"The tract here involved, viz. the N. W.  $\frac{1}{4}$  of Sec. 31, T. 13 N., R. 19 E., North Yakima, Washington, land district, is within the primary limits of the grant to the Northern Pacific Railroad Company, branch line, the withdrawal for the benefit of which became effective July 11, 1879. Map of definite location was filed May 24, 1884. \* \* \* In 1880, J. M. Adams, who was at that time receiver of the land office at North Yakima, took possession of the tract, and began fencing, irrigating, and otherwise improving it. Supposing, under the rulings of the department at that time, that it was railroad land, he filed with the Northern Pacific Railroad Company his application to purchase said tract when the company should have acquired title thereto, and on June 22, 1881, he received from the general land agent of said company a card acknowledging the receipt of his application. In the spring of 1884, Joshua L. Tustin built a small house on one corner of the tract, and on March 21, 1884, he filed his homestead application for the land. This application was rejected for the reason that 'it does not appear or is not shown that the tract was occupied bona fide at the date of withdrawal of June 11, 1879, for the benefit of the

branch line of the Northern Pacific Railroad.' Tustin appealed, and a hearing was ordered by your office to determine the status of the tract. At this hearing, which was held on May 7, 1884, Adams was allowed to intervene. The record of the evidence submitted at said hearing remained in the local office unacted upon until September 20, 1888, when it was sent up with the report that the case had been dismissed at the request of all parties; Tustin having filed a dismissal of his contest on September 7, 1888. July 30, 1889, Adams, who had become register of the land office at Spokane, Washington, filed his timber-culture application for said tract. This application was withdrawn by his attorney on September 21, 1889, and on the same day the tract was listed by the Northern Pacific Railroad Company. December 13, 1889, Mrs. Frances M. Tustin applied to enter this tract as a homestead, alleging in an affidavit filed with her application that she was the wife of Joshua L. Tustin, and that she had been deserted by him on December 6, 1889. Said application was rejected on account of the railroad selection, and Mrs. Tustin appealed. \* \* \* About December 1, 1890, Adams died, and on December 23d. following, his widow, Mrs. Phoebe D. Adams, applied to make homestead entry of the tract in question. Said application was rejected on account of the pendency of the railroad company's appeal and the prior application of Mrs. Tustin, and from this action Mrs. Adams appealed. She also filed motion for leave to intervene in the contest between Mrs. Tustin and the railroad company, and this motion, together with all other papers filed by her, was forwarded to the department. \* \* \* The evidence shows that from the time J. M. Adams took possession of this tract, in 1880, up to the date of his death, he was constantly improving it; that he brought water several miles to irrigate it; that at the time of his death practically the whole tract was irrigated and under cultivation; and that he had thereon a good dwelling house and several outhouses. Since his death his wife and children have continued to reside on the land. In 1888, Adams, in order to settle the dispute between himself and Joshua L. Tustin, paid Tustin \$540 to relinquish his contest, abandon all claim he might have to the tract, and change his residence. \* \* \* About the last of May or first of June, 1889, Tustin and his wife moved to the Big Bend country, one hundred and fifty miles distant, where Tustin filed a pre-emption declaratory statement for a certain tract in Douglas county, Washington. They camped on this pre-emption tract in the Big Bend country for two days, and then went to the home of Mrs. Tustin's mother, adjoining the land in controversy, where they remained three weeks. At the expiration of that time they again took up their residence in the house they had formerly occupied on the tract in dispute, the same house that Tustin had sold to Adams only a short time before. The testimony is conflicting as to whether or not they made a forcible entry on the land at this time. A preponderance of the evidence shows, however, that at the time the Tustins made their original settlement, in 1884, Adams had all the tract inclosed with a wire fence, except one corner down under a hill; that Tustin built his house on that uninclosed corner; that afterwards Adams extended his fence entirely around the tract, and Tustin made an opening therein for entrance and exit; that after Tustin and his wife left in the spring of 1889 Adams had the opening closed; and that when the Tustins returned to the land they broke the fence to get in. December 6, 1889, Joshua L. Tustin left, and three days later Mrs. Tustin made out her homestead application as a deserted wife, filing the same on December 13, 1889. A decree of divorce was granted Mrs. Tustin on July 13, 1891. No improvements have been placed on the land by Mrs. Tustin since her return from the Big Bend country. In the fall of 1890 she attempted to have some plowing done, but was restrained by an injunction. \* \* \*

In the argument counsel for the complainant takes the ground that on the 13th day of December, 1889, Mr. and Mrs. Adams had no standing as homestead claimants because they had not then filed a homestead application in the land office, and on this date Mrs. Tustin made a proper application to enter the land as a homestead, and then and thereby her right to the land was initiated. In effect this argument is a disclaimer of any right based upon prior

occupation, or improvement of the land by Mrs. Tustin or her husband, and I understand that her whole case rests upon what she herself has done on and subsequent to the date mentioned. Let it be conceded that at the time Mrs. Tustin tendered her homestead application for filing in the land office the Adamsses had no standing as homestead claimants, and that the defendants' title was initiated subsequent to December 13, 1889, still they were in possession of the land, had it inclosed, and were the owners of the improvements which they had made and paid for. Their occupation, inclosure, and cultivation of the land was not, in view of the facts recited in the secretary's decision, *mala fide*. No individual was wronged thereby, and only the government of the United States could legally institute proceedings to dispossess them. Under the circumstances mentioned, Mrs. Tustin could not legally initiate any right to the land under the homestead law. The policy of the government in offering public lands to the heads of families upon the terms prescribed in the homestead law, is benevolent, and the act is to be liberally construed in favor of the class of citizens intended to be its beneficiaries, but the benevolent spirit of the law does not sanction such rank injustice as the forcible seizure and appropriation by one individual of houses and costly improvements owned by others, nor the forcible breaking of inclosures, even though as against the government the inclosures are unlawful. *Atherton v. Fowler*, 96 U. S. 513-520; *Haws v. Mining Co.*, 160 U. S. 303-319, 16 Sup. Ct. 282. The house occupied by the complainant upon the premises was erected by her husband after her marriage, and before her separation from him; therefore it was community property under the laws of Washington territory in force at that time. By virtue of her marriage the complainant had an interest in the house as community property, and she never acquired any other right to it. The house being upon public land, the only title which its owners could claim was a chattel interest, and the husband being the manager of the community property, and expressly authorized by the statutes then in force to sell and dispose of the community personal property, the contract which he made, whereby he sold the house to J. M. Adams for a consideration of \$540, was valid, and the complainant was bound by it, exactly as she might be bound by any other contract made through a duly-authorized agent. Absolute want of good faith on the part of the complainant in claiming this land under the homestead law clearly and conclusively appears by the taking possession of this house, which her husband had previously sold to J. M. Adams, without his consent. I consider that the demurrer to the amended bill should be sustained for the reasons that it is shown conclusively by the findings of the secretary of the interior that the land was not, on or subsequent to December 13, 1889, subject to entry by the complainant under the homestead law, and she has not fulfilled any of the requirements of the law as to residence upon and cultivation and improvement of the land.

## MASURY v. ARKANSAS NAT. BANK et al.

(Circuit Court, E. D. Arkansas, W. D. June 2, 1893.)

## 1. CORPORATIONS—TRANSFER OF STOCK—LAWS GOVERNING TRANSACTION.

A transfer of stock in a corporation is governed by the laws of the domicile of the corporation, rather than of the place where the transfer occurs.

## 2. SAME—RECORDING TRANSFER WITH COUNTY CLERK.

Sand. & H. Dig. Ark. § 1338, provides that no transfer of corporate stock shall be valid, against creditors of the transferor, until recorded with the county clerk in the county where the corporation has its office. *Held*, that a pledge in New York of stock in an Arkansas corporation, not recorded in Arkansas, was void as to an attaching creditor of the transferor in the latter state.

This is a bill in equity by Grace Masury against the Arkansas National Bank and others to cancel a sheriff's sale of shares in a corporation, and to declare and foreclose a lien on the stock. The cause was heard on demurrer to the bill.

This cause is before the court on a demurrer to the bill and amended bills. The material facts necessary to a determination of the demurrer are: Hogaboom was the owner and holder of shares of stock of the Park Hotel Company, a corporation existing under the laws of the state of Arkansas, and having its domicile in the county of Garland. That, of the shares thus owned by him, he held 400 shares evidenced by certificate No. 36. That the face value of each share was \$25. That in January, 1891, he borrowed the sum of \$10,000 from the complainant, and executed his note therefor; and, as security for this loan, he assigned and delivered to complainant certificate No. 36. That the loan was made and the shares assigned in the city of New York, and that but a small part of the loan has been paid off. That complainant was not advised as to the laws of this state, which require transfers of corporate stocks to be recorded in the office of the county clerk of the county in which the corporation has its domicile. That in 1896 the defendant bank instituted a suit by attachment against the said Hogaboom for a large indebtedness due it from him, and that these 400 shares of stock evidenced by certificate No. 36, assigned and delivered to complainant as security as aforesaid, were, with other stock standing in the name of said Hogaboom on the books of the corporation, seized by the sheriff under and by virtue of said writ of attachment issued and directed to him out of the circuit court of Garland county, in which court said suit was pending, as the property of said Hogaboom. That before making said levy the secretary of the Park Hotel Company, at the request of said sheriff, gave him a certificate that these 400 shares evidenced by said certificate No. 36 appeared, with other stock, which it is unnecessary to mention here, on the books of the corporation in the name of said Hogaboom; and thereupon said shares were seized by the sheriff, under said writ, as the property of Hogaboom, the defendant in said writs, in the manner prescribed by the laws of the state, and a proper return made of the facts to the court. In due time said bank recovered a judgment against said Hogaboom, the attachment sued out at the beginning of the suit was sustained, and the sheriff ordered to sell the same. That in conformity with that order of the court the sheriff sold said 400 shares of stock, and the bank, the attaching creditor, became the purchaser thereof; the complainant giving notice at the sale, and before the purchase of the bank, that she held the same as a pledge for the indebtedness due her from Hogaboom. The sale was duly reported to the court by the sheriff, and confirmed. That before the sale complainant applied to the secretary of the corporation for a transfer thereof, and a certificate of such transfer, in order that she might have it recorded; but he refused to make such transfer, or issue her a certificate, for the reason, as stated by him, that this stock had before then been attached by the sheriff as the property of Hogaboom, under the writ of attachment

aforesaid. That complainant did not know that the laws of Arkansas required a transfer of corporation stock to be recorded, but thought an assignment and delivery thereof sufficient to pass title. The prayer of the bill is that the sheriff's sale be canceled; that the corporation be compelled to execute to her a proper certificate of transfer, in order that the same may be filed by her for record; and that she have a foreclosure of her lien.

Rose, Hemmingway & Rose and John M. Moore, for complainant.  
George G. Latta and Jacob Trieber, for defendants.

WILLIAMS, District Judge. The only questions involved are whether, under the statutes of Arkansas, a seizure of shares of the capital stock of a corporation existing under the laws of that state, by virtue of a writ of attachment, or under execution, takes precedence over a prior transfer or pledge, not transferred on the books of the corporation, nor filed for record in the office of the county clerk of the county in which the corporation transacts its business, and whether the laws of this state govern such a transfer, if made in another state. As to the last proposition, learned counsel for complainant claim that *Black v. Zacharie*, 3 How. 483, is conclusive that the laws of New York, where the transfer was made, and not the laws of Arkansas, of which state the company was a corporation, control. The question involved in that suit was not that of a transfer of shares, but an assignment of the equity of redemption in stock previously assigned and delivered as a pledge. The court say:

"We admit that the validity of this assignment to pass the right to Black in the stock attached depends upon the laws of Louisiana [the domicile of the corporation], and not upon that of South Carolina [where the assignment was made]. From the nature of the stock of a corporation, which is created by and under the authority of a state, it is necessarily, like every other attribute of the corporation, to be governed by the local law of that state, and not by the local law of any foreign state."

Judge Lowell, speaking of the same subject, says:

"Whatever the general principles of international law in relation to assignments of personal claims may be, the validity of a transfer of stock is governed by the law of the place where the corporation is created." Lowell, *Stocks*, § 50; *Hammond v. Hastings*, 134 U. S. 401, 10 Sup. Ct. 727; *Green v. Van Buskirk*, 7 Wall. 140.

I am therefore of the opinion that, unless the transfer of this stock is valid under the laws of Arkansas, the state which created the corporation, the laws of the state where the transfer was actually made cannot control. The statutes of this state regulating private corporations, and specially the transfer of stocks, are peculiar, and different from those of any state except Connecticut, from which state this statute was evidently taken. In that state it has always been held—and it is the settled rule of that state—that a transfer of corporation stock is void, against attaching creditors, unless made in strict conformity with the charter and by-laws of the corporation. *Manufacturing Co. v. Smith*, 2 Conn. 579; *Northrop v. Turnpike Co.*, 3 Conn. 544; *Turnpike Co. v. Bunnell*, 6 Conn. 552; *Dutton v. Bank*, 13 Conn. 493; *Shipman v. Insurance Co.*, 29 Conn. 253; *Colt v. Ives*, 31 Conn. 35; *Platt v. Axle Co.*, 41 Conn. 255; *First Nat. Bank of Hartford v. Hartford Life & Annuity Ins. Co.*, 45 Conn. 22.

Learned counsel for both sides have cited a large number of au-

thorities as to the construction of charters which merely provide that "no transfer of stock shall be valid, until transferred on the books of the corporation." The same provision is found in our statutes, and is section 1342, Sand. & H. Dig.; but counsel for defendants do not rely on this provision of the law, but base their demurrer on section 1338. As to the effect to be given to section 1342, the authorities are very conflicting; some holding that this provision is for the benefit of the corporation solely. In view of the legislature of this state having enacted section 1338 in addition to section 1342, it is only important to notice the fact that the courts holding that the latter section is only for the benefit of the corporation, in order that they may know who are its stockholders, entitled to vote at corporate elections and receive dividends, base their opinions principally on the fact that a creditor of a stockholder not a shareholder of the corporation has no access to the stock books, and no means to find out who are stockholders. No doubt, to meet these objections, and to leave no room for doubt, the legislature enacted the statutes now in force. Section 1338, Sand. & H. Dig., provides:

"Whenever any stockholder shall transfer his stock in any such corporation, a certificate of such transfer shall forthwith be deposited with the county clerk aforesaid, who shall note the time of said deposit and record it at full length in a book to be by him kept for that purpose; and no transfer of stock shall be valid against any creditor of such stockholder until such certificate shall have been so deposited."

The language used is so clear and unambiguous that there is really nothing to construe. It shows, as clearly as language could express it, that this provision is intended for the benefit of the creditors of the stockholders. The requirement that the transfers shall be recorded in the county clerk's office meets the objection that the creditor,—unless a stockholder,—having no access to the stock books of the corporation, cannot know who are the stockholders; for, that being a public office, every citizen can at all times ascertain from the public records whether his debtor is a stockholder or not.

There is no doubt that the tendency of modern legislation is to make this class of instruments as near negotiable as possible; but the legislature of this state has seen proper to restrict their negotiability, and, under the laws of this state, the stock may have been canceled, although the certificate thereof is still outstanding. Section 1342 gives the corporation a lien on the stock for all debts due it from the stockholder, and this lien is superior to the rights of any purchaser or pledgee, even without notice. *Olyphint v. Bank*, 60 Ark. 198, 29 S. W. 460; *Bank of Commerce v. Bank of Newport*, 27 U. S. App. 486, 11 C. C. A. 484, and 63 Fed. 98. By the provisions of section 1353, the stock of one indebted to the corporation may be sold for such debts; and section 1354 makes it the duty of the corporation to issue to the purchaser a new certificate of stock, and cancel upon its books the certificates of the indebted stockholder; and that without a surrender of the certificates. And the same procedure is prescribed when the stock is sold under attachment or execution. Section 3059, Sand. & H. Dig. The corporation laws of this state clearly intend that there shall be a public record of the ownership

of corporation stock from the time of the organization of the corporation, and this must be kept in the county where the corporation transacts its business. Section 1334 provides that before a corporation shall commence business a duplicate of the articles of incorporation, together with a certificate under oath, must be filed for record in the county clerk's office, showing the names of each stockholder, the number of shares held by each, and the amount paid on the stock. Section 1344 provides for a like record if the stock is increased. Section 1337 provides for a record, to be filed annually, showing, among other things, the names of each stockholder, and the number of shares held by each. Section 1357 provides that, if the place of business is removed from one county to another, a certified copy of all records showing the state of its affairs must be procured from the county clerk of the county from which it is removed, and recorded in the county to which it is removed. It thus appears that the intention of the legislature was to provide for the same system of registration for this kind of property as is provided for real estate.

The fact that section 1338 was enacted in addition to section 1342 is almost conclusive that the legislature intended to protect creditors against unrecorded transfers. While I have not been able to find any statute exactly like section 1338 which has ever been construed by a supreme court, there are several which, although not as plain as this, yet have invariably been construed by the highest courts of those states in favor of the attaching creditor. In Alabama the statute provides that, unless the transfer is registered within 15 days, it shall be void as to bona fide creditors. A transfer of stock without such registration within the time prescribed by statute was held void as against an attaching creditor. *Bank v. Pinckard*, 87 Ala. 577, 6 South. 364; *Abels v. Insurance Co.*, 92 Ala. 382, 9 South. 423. In Colorado the statute declares transfers void, for all purposes, unless registered within 60 days. In passing upon this statute the supreme court of that state say:

"There is not much room for construction of this language. The assignment of stock vests in the assignee an inchoate title, which for sixty days has the effect of a complete title; but, unless within that time it is perfected by the entry of the transfer upon the books of the company, it expires, and the transfer becomes invalid. The title of the assignor has not been divested, and the stock is subject to attachment at the suit of his creditors." *Conway v. John*, 14 Colo. 30, 23 Pac. 170; *Bank v. Hastings*, 7 Colo. App. 129, 42 Pac. 691.

The Wisconsin statute is as follows:

"But such transfer shall not be valid except between the parties thereto, until the same shall have been so entered on the books of the corporation." Rev. St. § 1751.

In a well-considered case it was held by the supreme court of that state that an execution levied on stock before the transfer is entered on the books of the corporation is entitled to priority over the transferee. In *re Application of Murphy*, 51 Wis. 519, 8 N. W. 419. In New Mexico the statute is like that of Wisconsin, and the same conclusion was reached by its court. *Bank v. Folsom*, 7 N. M. (Gild.) 611, 38 Pac. 253. In Maine and Iowa similar statutes prevail, and like

constructions were made by the courts of those states. *Bank v. Cutler*, 49 Me. 315; *Ft. Madison Lumber Co. v. Batavian Bank*, 71 Iowa, 270, 32 N. W. 336.

In Massachusetts the statute is:

"No sale, assignment or transfer of stock in a corporation shall \* \* \* affect the right of an attaching creditor until it is recorded upon the books of the corporation." Pub. St. c. 105, § 24.

In a proceeding in equity, like this, the rights of an attaching creditor were held to be superior to those of a vendee of an unrecorded sale. *Newell v. Williston*, 138 Mass. 240; *Bank v. Williston*, Id. 244.

Learned counsel for complainant rely on the decisions of the supreme court of the United States in *Bank v. Lanier*, 11 Wall. 369, and *Bullard v. Bank*, 18 Wall. 589, as sustaining their view of this case. Neither of these cases can have any application to the case at bar. In the *Lanier Case*, which was an action against the bank for a refusal to make a transfer of its stock to a purchaser who was the holder by assignment of the certificate of stock, the liability of the bank was sustained by reason of its conduct, which created an estoppel. The court say:

"It is clear that the bank, in allowing its stock to be transferred to other parties while the certificates were outstanding in the hands of a bona fide holder, was guilty of a breach of corporate duty; and, as its conduct operated to the injury of *Lanier and Handy*, an action will lie in their behalf to obtain satisfaction for the injury."

The duties of the bank, the court say, were regulated by the act of congress which created the corporation, and its own by-laws, which provided that the stock of the bank shall be transferable only on the books of the bank, subject to the provisions and restrictions of the act of congress. Having made a transfer without surrender of the certificate, which certificate showed on its face that it was transferable only on its surrender, the bank was guilty of a wrong. In the *Bullard Case* the court held that the transfer of national bank shares was regulated solely by the acts of congress,—they existing under those acts,—and, as those acts gave no authority to a bank to limit the right of transfer by a by-law, such a by-law is void.

In this state, registration laws have always been strictly construed. As early as 1848 the supreme court held that the statute regulating the registration of mortgages (now section 5091, Sand. & H. Dig.) must be strictly construed, and a mortgage not recorded, or, if recorded, defectively acknowledged, so as not to entitle it to record, is void, against an attaching creditor, although he had actual notice thereof. *Main v. Alexander*, 9 Ark. 112. This case has been recognized as the settled law of the state ever since. Learned counsel for complainant, with apparent sincerity, contended in their argument that this case has been overruled by *Byers v. Engles*, 16 Ark. 543, and *Tennant v. Watson*, 58 Ark. 252, 24 S. W. 495. But they overlook the fact that those cases construe different statutes; one construing section 5091, and the other section 728, Sand. & H. Dig. The latter statute makes an exception of parties purchasing with actual notice. This is fully shown in the decision of the supreme court in the late

case of *Ghio v. Byrne*, 59 Ark., on page 292, 27 S. W. 243. *Doswell v. Adler*, 28 Ark. 85, overlooks entirely the distinction between these two statutes, and also *Main v. Alexander*, and the numerous cases following that decision. Since the decision of *Doswell v. Adler*, which was decided in 1873, the supreme court of this state has delivered written opinions in 11 cases on that question, and in none of them is that case recognized as an authority, while *Main v. Alexander* is followed. The most recent decision was published as late as October, 1895. *Milling Co. v. Mikles*, 61 Ark. 123, 32 S. W. 493. When the corporation act was enacted by the legislature, both of these sections were on the statute book, and had been construed many times. The fact that the legislature, with full knowledge of the construction given to those statutes by the supreme court, saw proper to follow section 5091, and not except purchasers with actual notice from the provisions of the act, as was done in section 728, is proof conclusive that it did not intend to limit the rights of these creditors to such as purchase without notice. It may be a great hardship on complainant to be thus deprived of her security, when, as alleged in the bill, she was not aware of the statutes of this state, but even courts of equity are powerless to afford relief against the harsh provisions of a statute. As to the policy of these statutes, courts cannot control that. The framers of the constitution in their wisdom have vested that power in another department of the government. Courts must enforce the laws as enacted by the legislature, unless they are in conflict with some provision of the constitution, and that is not contended for. It follows from these views that the demurrer to the bill must be sustained, and the bill dismissed.

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In re *LINFORTH et al.*

(District Court, N. D. California. May 14, 1898.)

No. 2,071.

**1. MORTGAGES—FORECLOSURE—DEFICIENCY—CONSTRUCTIVE SERVICE.**

Where, in a foreclosure suit, constructive service only is had upon the defendant, while a deficiency decree may not be entered, the deficiency after sale constitutes a valid and subsisting indebtedness, which may be recovered by appropriate action.

**2. BANKRUPTCY—SECURED CREDITOR—DETERMINATION OF VALUE OF MORTGAGED PROPERTY.**

Rev. St. § 5075, prescribing the manner in which the value of mortgaged property must be determined in order that the mortgagee may be admitted as a creditor against the bankrupt estate of the mortgagor, applies only to cases where bankruptcy proceedings are pending. Hence, where a foreclosure suit has been begun, and prosecuted to judgment, after an order discharging bankruptcy proceedings against the mortgagor, and returning him his property, the mortgagee is entitled to prove his claim for the deficiency against the estate upon the subsequent setting aside of the order of discharge.

**3. ELECTION TO RELY UPON SECURITY.**

Where a mortgage creditor of a bankrupt obtains, from the federal court in which the bankruptcy proceeding is pending, permission to foreclose his mortgage in a state court, upon condition of waiving any personal claim for deficiency, but for good reason, and without laches, fails to

prosecute his suit to judgment, such creditor or his assignee is not bound as by an election to rely solely upon the mortgaged property, so as to preclude him from being subsequently admitted as a creditor against the estate of the bankrupt on account of the same debt.

4. SAME—DISCHARGE SET ASIDE—INTERVENING RIGHTS.

A partnership and the individual partners having been adjudged bankrupt, one of the partners, by agreement of all parties in interest, including firm creditors, was discharged, and his individual property returned to him; the agreement providing that his individual creditors should have the same right to proceed for the collection of their debts as if no bankruptcy proceedings had ever been had. Under this agreement, a secured creditor foreclosed his mortgage; but, the service being by publication, no decree for the deficiency could be entered. Subsequently the discharge was set aside by the court, and the debtor's individual property again made subject to the claims of firm creditors. *Held*, that the deficiency claim of the individual creditor was entitled to be paid out of such property in preference to the claims of firm creditors.

Pierson & Mitchell, for assignee.

T. M. Osmont, for E. W. Chapman.

DE HAVEN, District Judge. This is a proceeding commenced by the assignee in bankruptcy, under section 5081 of the Revised Statutes of the United States, for the purpose of determining the validity of a claim filed in this court by E. W. Chapman against the individual estate of John Bensley, bankrupt. The material facts out of which the present controversy arises are these:

On November 24, 1875, John Bensley executed to the Nevada Bank of San Francisco his promissory note for the sum of \$80,000, payable, with interest, one year from its date, and as security therefor on the same day executed to that bank a mortgage upon a large amount of real estate. On the 15th day of February, 1877, this note was still unpaid; and the firm of Linforth, Kellogg & Co., and the individual members thereof (Bensley being one of the co-partners in the firm), were duly adjudicated bankrupts, upon a petition filed in this court on that day by the firm and its individual members. On the 17th day of February, 1877, one James Coffin, to whom the above referred to note and mortgage of Bensley had been assigned by the Nevada Bank, for its convenience, and for collection only, instituted an action in one of the courts of this state for the purpose of foreclosing such mortgage. On March 26, 1877, James Patrick and A. L. Tubbs were duly appointed assignees in bankruptcy of said bankrupts; and on the following day all of the property of the firm of Linforth, Kellogg & Co., and also all the property of its individual members, was duly conveyed to said assignees in bankruptcy. Thereafter, on the 28th day of September, 1877, James Coffin filed in this court a petition in which he asked for an order allowing him to make the assignees of said bankrupts parties to the foreclosure suit commenced by him on February 17, 1877, and that he be permitted to proceed therein. The court thereupon made an order granting the prayer of his petition. The order, however, provided that in any judgment for foreclosure of said mortgage he should waive any personal judgment against Bensley. The said action never proceeded to judgment, and was dismissed on March 20, 1878. Prior to the dismissal of that action, Bensley and his individual creditors, including the Nevada

Bank of San Francisco, and the creditors of the firm of Linforth, Kellogg & Co., entered into a contract by which it was agreed between all the parties thereto that this court should grant to Bensley a decree of final discharge in the bankruptcy proceedings then pending, and direct the assignees in bankruptcy to reconvey to him his individual property, "free from, and discharged of, said proceedings in bankruptcy." This agreement contained the following provision:

"Said individual creditors of said John Bensley may and shall have the right to enforce payment of their claims against said John Bensley as fully and completely and effectually, to all intents and purposes, as though these presents had never been made, and as though said John Bensley had never been adjudged a bankrupt; and said John Bensley hereby agrees to pay and discharge to said individual creditors all their just claims, in the same manner and to the same extent as if said bankrupt proceedings had never been instituted, and as if these presents were never entered into, and that such claims shall have preference to payment out of the individual assets of said John Bensley."

This agreement further provided that the decree of final discharge of Bensley in the bankruptcy proceedings should contain the express provision that the obligation of that agreement, and the matters therein agreed on the part of Bensley to be performed, should be exempt from the operation of such decree of discharge. The contract also provided that it was to be subject to the approval of this court, and without such approval should be of no effect whatever. This contract was ratified by this court on February 12, 1878; and in pursuance thereof Bensley was on March 20, 1878, finally discharged from the bankruptcy proceeding, and from all his debts and liabilities; and on the same day the assignees in said bankruptcy proceeding reconveyed to him all his individual property. In December, 1880, James Coffin reassigned to the Nevada Bank the note and mortgage executed to that bank by Bensley on November 24, 1875; and on January 19, 1881, the bank commenced an action for the foreclosure of the mortgage in one of the superior courts of the state of California. John Bensley, James C. Patrick, and A. L. Tubbs were made defendants. Patrick and Tubbs, as before stated, were the assignees in bankruptcy of the firm of Linforth, Kellogg & Co., but were not sued in their official capacity; and no order was made by this court authorizing the Nevada Bank to prosecute that action. At the date of its commencement, and at all times thereafter, Bensley was absent from the state of California; and summons in the action was served upon him by publication only. On June 5, 1882, judgment was entered in that action in favor of the Nevada Bank against Bensley for the sum of \$93,753.94 and costs; and the mortgaged premises were duly sold under an order of sale for the sum of \$57,152.92, which was applied in part satisfaction of said judgment, leaving unpaid a deficiency of \$37,727.51, which deficiency was on August 10, 1882, docketed in said court as a judgment against Bensley. Thereafter Bensley specially appeared in the action, and upon his motion the judgment for the deficiency was vacated by the court, upon the ground that the court was without jurisdiction to render a personal judgment against him for such deficiency, because the summons in the action was not personally served upon him. The Nevada Bank

thereafter assigned its alleged claim against Bensley for the deficiency arising upon the sale of the mortgaged premises under the decree of foreclosure, and E. W. Chapman now owns the same. On February 25, 1890, John Lloyd, the present assignee in bankruptcy of Linforth, Kellogg & Co., commenced in this court an action in equity to set aside certain conveyances of real property alleged to have been made by Bensley for the purpose of defrauding his creditors, and also to vacate the former order or judgment of this court, discharging him from the bankruptcy proceedings hereinbefore referred to, and also to annul the order of this court of February 12, 1878, ratifying the agreement between Bensley and his creditors, and to compel a reconveyance of all property conveyed to Bensley by the assignees in bankruptcy pursuant to such order. On December 7, 1893, a decree was entered in that action in accordance with the prayer of the bill of complaint therein; and real estate, of great value, belonging to the individual estate of Bensley, was also thereby recovered, and vested in the assignee in bankruptcy for the benefit of his creditors.

1. The state court in the foreclosure suit instituted by the Nevada Bank against John Bensley et al. on January 19, 1881, by the constructive service of summons on Bensley, acquired jurisdiction to enter a valid decree of foreclosure; and while it did not by this manner of service obtain jurisdiction to docket a personal judgment against Bensley for the deficiency left unpaid after the sale of the mortgaged premises, still the deficiency ascertained by the sale under the decree of foreclosure constituted an indebtedness due from Bensley to the plaintiff in that action, which such plaintiff thereupon became entitled to recover by appropriate action (*Blumberg v. Birch*, 99 Cal. 416, 34 Pac. 102), unless the right to proceed against Bensley for such deficiency had been waived.

2. It is claimed, however, by the assignee in bankruptcy, that the holder of this claim cannot be admitted as a creditor against the bankrupt estate of Bensley, because the value of the mortgaged property was not ascertained in the manner provided by section 5075 of the Revised Statutes of the United States. That section provides as follows:

"When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such a manner as the court shall direct; or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt. \* \* \* If the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt."

This section is only intended to prescribe the practice to be pursued by a secured creditor when there is pending a proceeding in bankruptcy against his debtor. Unless there is such a proceeding pending, the section can have no operation. This being so, it must follow that the section is not applicable to the facts now before the court. When, on January 19, 1881, the Nevada Bank commenced the action to foreclose its mortgage, and until after the final decree in that action, there was no bankruptcy proceeding pending against

Bensley, as he had on March 20, 1878, been given by this court a certificate of final discharge in the bankruptcy proceeding; and this discharge continued in force until it was subsequently set aside by the decree of December 7, 1893.

3. It is claimed, however, that the petition filed by Coffin, as the representative of the Nevada Bank, asking for permission to proceed in the action for foreclosure instituted by him while the bankruptcy proceeding against Bensley was pending, followed as it was by the order of the court granting such permission upon the express condition that no judgment for deficiency should be obtained against Bensley, was in effect a conclusive election upon the part of the Nevada Bank to look alone to the mortgaged property for payment of its debt; and the bankruptcy proceeding against Bensley having been revived by the decree of December 7, 1893, Chapman, who has succeeded to the interest of that bank, is bound by that election, and thereby estopped from asserting his claim against the individual estate of Bensley, now in process of administration in the bankruptcy proceeding thus revived. It is, of course, a familiar rule that a party cannot, in the course of litigation, occupy inconsistent positions; and, where one has elected between several inconsistent courses, he is confined to that which he first adopts. In accordance with this rule, it is generally held that where a party, with full knowledge of all the facts, takes legal steps to enforce a contract, it is a conclusive election not to rescind such contract on account of fraud or other matters then known to him. *Conrow v. Little*, 115 N. Y. 387, 22 N. E. 346. So, also, an action *ex contractu* upon an implied contract of sale precludes a subsequent action by the same party for conversion of the same property, based upon the same transaction upon which the former suit was founded. *Terry v. Munger*, 121 N. Y. 161, 24 N. E. 272. And so, when a trustee wrongfully pays to another money which belongs to his beneficiary, the latter may sue the trustee as his debtor, or he may ratify the payment, and sue the person who received the money, but he cannot do both; and his election, once effectually made, is conclusive upon him. *Fowler v. Bank*, 113 N. Y. 450, 21 N. E. 172. In cases like those just mentioned, it is generally held that the bringing of an action, with full knowledge of all the facts, is a conclusive election to pursue the particular remedy or form of action selected, although such action be subsequently dismissed, and not prosecuted to judgment. In my opinion, this doctrine of election, which is really founded upon the principle of estoppel, is not applicable to a proceeding by which a secured creditor obtains from a United States district court, in which a bankruptcy proceeding is pending, permission to foreclose in a state court a mortgage upon a portion of the estate of the bankrupt. If the action thus authorized is not prosecuted to judgment in the state court, the creditor does not occupy an inconsistent position when he afterwards comes into the court having jurisdiction of the bankruptcy proceeding, and asks to be admitted as a creditor against the estate of the bankrupt, on account of the debt secured by his mortgage. Whether he elects to pursue the one course or the other, he affirms the same facts as the basis of his claim against the bankrupt. In such a case

it is clear that the rule that no person should be permitted to occupy inconsistent positions in the same litigation cannot be properly applied. See *Crossman v. Rubber Co.*, 127 N. Y. 34, 27 N. E. 400. It is possible that a case might arise where a mortgagee would not be allowed to thus change the method of procedure first adopted by him,—as, for instance, where there has been great laches upon his part in finally declining to proceed in the state court, and the mortgaged property has in the meantime greatly depreciated in value; but no such case as that is presented here.

4. But, in addition to what has already been said, it appears that, before the dismissal of the action referred to, all parties in interest—all the creditors of the firm of Linforth, Kellogg & Co., as well as the individual creditors of Bensley—agreed that Bensley should be discharged from all further proceedings in bankruptcy, and that the individual creditors of Bensley should “have the right to enforce payment of their claims against said Bensley as fully and completely and effectually, to all intents and purposes, as though these presents had never been made, and as though said John Bensley had never been adjudged a bankrupt; \* \* \* that such claims shall have preference to payment out of the individual assets of said John Bensley.” It was after this agreement that the action of foreclosure first instituted was dismissed, and the decree of foreclosure in the subsequent action brought by the Nevada Bank against John Bensley et al. obtained. When the mortgaged property was sold under that decree of foreclosure, there still remained a balance due to the Nevada Bank of \$37,727.51; and, by the terms of the agreement above referred to, the Nevada Bank was, on the day such deficiency was ascertained, entitled to take all lawful methods to recover such sum from Bensley; and such claim was entitled to preference of payment over the firm creditors of Linforth, Kellogg & Co., out of the individual assets of said Bensley. The subsequent decree of the court on December 7, 1893, setting aside its former order ratifying and approving this contract, and vacating its final discharge of Bensley in the bankruptcy proceedings commenced February 15, 1877, cannot be permitted to have relation back, so as to destroy the intervening right acquired by the Nevada Bank, under the agreement above referred to, to enforce payment of its claim out of the individual assets of Bensley, in preference to the firm creditors of Linforth, Kellogg & Co., and to which right Chapman succeeded by assignment on May 20, 1890, before the commencement of the action in which such decree was entered. The contest in this proceeding is really between the creditors of the firm of Linforth, Kellogg & Co., represented by the assignee, and Chapman, who is the only individual creditor of John Bensley. In my opinion, the firm creditors are estopped by their agreement from disputing the claim now made by Chapman, as the successor in interest of the Nevada Bank, to be paid out of the individual estate of Bensley. The effect of the decree of December 7, 1893, was to again bring all of the individual assets of said John Bensley under the jurisdiction of this court for administration in the bankruptcy proceedings; but it did not affect the then existing right of Chapman, under the agreement made between Bensley and his cred-

itors, to enforce payment of his claim against Bensley out of such assets, and in preference to the firm creditors of Linforth, Kellogg & Co. Ordered that prayer of the petition of the assignee be denied.

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LOW et al. v. BLACKFORD et al.

(Circuit Court of Appeals, Fourth Circuit. May 3, 1898.)

No. 246.

1. MORTGAGES—PROVISIONS BINDING UPON BONDHOLDERS.

A mortgage and the bonds and coupons secured thereby are to be construed as one contract, and provisions in the mortgage as to the method of distribution of the proceeds in case of foreclosure sale, although not found in the bonds, will bind the bondholders where there is nothing in the bonds inconsistent therewith.

2. SAME—FORECLOSURE SALE—DISCRETION OF COURT.

Where a mortgage is foreclosed in equity, the court is not bound to decree a sale in strict accordance with the terms prescribed in the mortgage for the execution of the power of sale therein contained, but should exercise a sound discretion, having due regard to the interest of all parties.

3. SAME—METHOD OF SALE—APPORTIONMENT OF PROCEEDS.

Where a single mortgage, given by a railway company to secure three series of bonds, each of which constituted a first lien upon one of the three divisions of the road, and a second lien upon the other two, was foreclosed in equity, *held*, that the three divisions should not be sold separately, nor should the property be offered both in separate divisions and as an entirety, and the most advantageous bid accepted; but the entire property should be sold as an entirety, and the proceeds apportioned among the bondholders of the three classes according to the relative value of the three divisions as found from the evidence. 82 Fed. 344, affirmed.

Purnell, District Judge, dissenting.

Appeal from the Circuit Court of the United States for the Eastern District of North Carolina.

Charles Steele, for appellants.

Cowen, Cross & Bond, for appellees Wm. H. Blackford and others.  
Turner, McClure & Rolston, for appellee Farmers' Loan & Trust Co.

R. O. Burton and Watson & Buxton, for appellee John W. Fries.

George Rountree, for appellee W. A. Lash.

Before GOFF, Circuit Judge, and BRAWLEY and PURNELL, District Judges.

GOFF, Circuit Judge. The Farmers' Loan & Trust Company, trustee, instituted this suit in the circuit court of the United States for the Eastern district of North Carolina in March, 1894, for the purpose of foreclosing the first mortgage, dated June 1, 1886, executed by the Cape Fear & Yadkin Valley Railroad Company. The Mercantile Trust Company of Baltimore, the trustee in the second mortgage, known as the "consolidated mortgage," dated October 1, 1889, was made a party defendant, and subsequently, when it resigned its trust, William A. Lash was substituted as trustee under the mortgage and as defendant in the suit. A cross bill was filed by said Lash

as trustee of the second or consolidated mortgage, in which he prayed that it also might be foreclosed. The first mortgage covers all of the railroad lines except the branches, while the second or consolidated mortgage embraces all of the lines in the first, and also includes the branch lines. The first mortgage is given to secure three separate series of bonds, designated, respectively, as "Series A," "Series B," and "Series C" bonds. Each series of bonds has a first lien upon a certain designated division of the railroad and a second lien upon the other two divisions. The main line from Wilmington to Mt. Airy is 248½ miles long. Division A is that portion of the road which lies between Greensboro and Fayetteville and Fayetteville and the South Carolina line, about 144 miles in all, of which 46¾ miles is made up of the line from Fayetteville to the South Carolina line. On this division Series A bonds are a first lien, and they are also a lien in common with Series C bonds, but subordinate to Series B bonds, upon that portion of the road situated between Greensboro and Mt. Airy, and also a lien in common with Series B bonds, but subordinate to Series C bonds, on that portion of the road between Fayetteville and Wilmington. Division B is that portion of the road situated between Greensboro and Mt. Airy, about 70 miles in length. On this division Series B bonds are a first lien, and they are also a lien in common with Series C bonds, but subordinate to Series A bonds, upon that portion of the road which lies between Greensboro and Fayetteville and Fayetteville and the South Carolina line, and also a lien in common with Series A bonds, but subordinate to Series C bonds, on that portion of the road between Fayetteville and Wilmington. Division C is that portion of the road between Fayetteville and Wilmington, about 81 miles in length. On this division Series C bonds are a first lien, and they are also a lien in common with Series B bonds, but subordinate to Series A bonds, on that portion which lies between Greensboro and Fayetteville and Fayetteville and the South Carolina line, and also a lien in common with Series A bonds, but subordinate to Series B bonds, on that portion of the road located between Greensboro and Mt. Airy.

The Cape Fear & Yadkin Valley Railway Company is the successor to the Western Railroad Company, a corporation created by the act of December 24, 1852, passed by the general assembly of North Carolina. That portion of the Cape Fear & Yadkin Valley Railway now known as "Division A" had been constructed and operated by the Western Railroad Company. Those parts of the road now called Divisions B and C were built by the Cape Fear & Yadkin Valley Railway Company, whose corporate existence dates from March 1, 1879. It also constructed a number of branch lines in aid of both its local and through business, now known as the "Factory Branch," the "Madison Branch," the "Granite Branch," the "Furnace Branch," the "Aldrich Quarry Branch," and the "Buff Quarry Branch." The South Carolina Pacific Railway, which is 10½ miles long, running from Bennettsville to the North Carolina line, has been leased, and is now operated by the Cape Fear & Yadkin Valley Railroad Company. On the day that the bill was filed in the court below, John Gill was appointed receiver of the Cape Fear & Yadkin Valley Rail-

way Company, and he has been in the custody and control of all its property, under the orders of the court, from that date. On the 2d day of May, 1894, the answer of said railway company was filed, in which all of the allegations of the bill were admitted to be true. William A. Lash, the substituted trustee under the consolidated mortgage of October 1, 1889, filed his answer to the bill on the 28th day of September, 1894. The receiver of the North State & Improvement Company filed his answer on the 28th of September, 1894, by which it appears that said company is the owner of \$1,608,000 par value of the stock of the Cape Fear & Yadkin Valley Railway Company, and also of \$1,848,000 of the bonds of said railway company executed on the 1st day of October, 1889, and secured by the second or consolidated mortgage. It is claimed by the receiver that the bonds so held are secured by a first lien upon several of the branch lines of the railroad company, and by a second lien upon all the property of said company, subject only to the lien of the first mortgage. The appellants Charles Adolphe Low, George F. Baker, and William E. Strong, claiming to be a committee of Series A bondholders, asked permission of the court below to intervene, and their request was granted on the 20th of December, 1895. These petitioners were known as the "New York Committee." The appellees William H. Blackford, William H. Perot, John A. Tompkins, Frank T. Redwood, Basil B. Gordon, and J. W. Middendorf, claiming to be a committee of holders of the bonds of the three different series, asked like permission to intervene, and their petition was also favorably passed upon by the court. They are called the "Baltimore Committee." The contention of the New York committee was and is that the railroad should be offered for sale, both by divisions and as an entirety, and the most advantageous offer accepted; while the claim of the Baltimore committee was and is that it should be sold as an entirety. The case, having been duly matured, came on to be finally heard, when the court below directed that the Cape Fear & Yadkin Valley Railway, it appearing that it was in default and insolvent, should be sold at public auction as an entirety, and that the proceeds of sale should be apportioned among the bonds as follows: To Division A, 55 per cent.; to Division B, 19 per cent.; to Division C, 19.4 per cent.; and to the bonds having the first lien on the branches, 6.6 per cent. This method of division was found by the court below from the master's report and from the testimony of a number of experts filed therewith, who had carefully examined the road, its reports, receipts, and disbursements. So far as the questions raised on this appeal are concerned, it is not deemed necessary to refer to the other provisions of the decree of sale, which bears date March 31, 1897, and from which the appeal we are now considering is prosecuted.

The first assignment of error is in these words:

"Because in and by said decree of March 31, 1897, the proceeds of the sale of the premises covered by the first mortgage of June 1, 1886, therein directed, are ordered to be distributed first to the payment of the coupon interest of the several series of bonds mentioned in the said decree in preference and priority to the principal of said bonds."

The part of the decree on which this assignment is based, provided that the portion of the proceeds of sale allotted to Series A bonds should be distributed as follows:

"First, to the payment of the coupon interest, which may be due on each of said outstanding Series A bonds (including interest on said coupons), if said amount be sufficient to pay the same, or, if not sufficient, then to the payment of the same pro rata; and after the full and complete payment of said coupon interest as aforesaid, then to the payment of the principal of said Series A bonds, if sufficient to pay the same in full, and, if not sufficient to pay the same in full, then to the payment of the same pro rata."

The decree also in like manner provides for the distribution of the allotment made to the Series B bonds and to the Series C bonds, directing in each case that the principal of the bonds shall be paid only after the coupon interest, with the interest thereon, has been paid in full. The mortgage provides that the proceeds of the trust fund in case of a sale of the railroad shall be applied first to the payment of interest, and then to the payment of the principal of the bonds. No such provision is found in the recitals of the bonds, and the claim of the appellants in this regard is that the terms of the bonds must control, and that they are not to be affected by inconsistent statements found in the mortgage. As a matter of fact, is there anything found in the mortgage inconsistent with or contradictory of the provisions of the bonds? We think not. The provisions found in the mortgage, not included in the bonds, are not contradictory of the latter, but supplemental thereto. And it is well established that in cases of this character the bonds, coupons, and mortgages are to be read together, and construed as constituting one contract; and if the bond refers to the mortgage, as in this case, then the holder of the bond will be presumed to be aware of the terms of the mortgage. *Thomp. Corp.* §§ 6075, 6110; *Manufacturing Co. v. Howard*, 28 Fed. 741; *Gregory v. Marks*, 8 Biss. 44, Fed. Cas. No. 5,802; *Stanton v. Railroad Co.*, 2 Woods, 523, Fed. Cas. No. 13,297; *Skiddy v. Railroad Co.*, 3 Hughes, 320, Fed. Cas. No. 12,922; *Caylus v. Railroad Co.*, 10 Hun, 295, affirmed 76 N. Y. 609; *McMurray v. Moran*, 134 U. S. 150, 10 Sup. Ct. 427. Each of the bonds secured by the mortgage referred to in this case contains the following, differing only as to the series to which they respectively belong:

"This bond is one of Series A, issued under, secured by, and subject to all of the provisions of a first mortgage executed by the said railway company to the said the Farmers' Loan and Trust Company, bearing even date herewith, to which said mortgage reference is hereby made for the more detailed provisions thereof."

This provision of the foreclosure decree is founded on the direct and positive terms of the mortgage itself, which are usually adopted by the courts in cases where the trust or contract provides for it. It is not uncommon in such decrees to direct that the proceeds of foreclosure shall be applied to the payment of coupons which matured before a general default in preference to the bonds from which they were taken, if there is nothing in the mortgage requiring a distribution in another and special manner. If the deed of trust or mortgage provides that the interest coupons must be paid before the principal of the bonds, then the decree will be so drawn. *Stevens*

v. Railroad Co., 13 Blatchf. 412, Fed. Cas. No. 13,406; Cutting v. Tavares, 23 U. S. App. 363, 9 C. C. A. 401, and 61 Fed. 150; Burke v. Short, 24 C. C. A. 422, 79 Fed. 6; Railroad Co. v. Fosdick, 106 U. S. 48, 1 Sup. Ct. 10. It is, therefore, well established that the manner of distributing funds realized from the sale of property under foreclosure proceedings is to be determined from the terms of the mortgage. In cases where it has been held that the proceeds shall be divided ratably between the bonds and the past-due coupons, reference has been made to the mortgage to show that no requirement to the contrary is contained therein. *Duncan v. Railroad Co.*, 3 Woods, 567, Fed. Cas. No. 4,138; *Ketchum v. Duncan*, 96 U. S. 659, 671; *Dunham v. Railway Co.*, 1 Wall. 254. The case of *Duncan v. Railroad Co.*, above referred to, and relied upon by counsel for appellants, is not in conflict with the views we now express, although it was there held that the overdue coupons were not entitled to priority in payment over the principal of the bonds. It is clear that the court reached the conclusion announced in that case because the mortgage contained no provision giving preference to the interest coupons. It may be well to quote in this connection the terms of the mortgage relating to this matter, which are as follows:

"And after deducting from the proceeds of such sale proper allowances for all expenses thereof, including attorney and counsel fees, and all other expenses which may have been by it incurred, as well as reasonable compensation for its own services, it [the trustee] shall apply the residue of the proceeds of sale to the payment, first, of the interest due on the said bonds outstanding secured, or intended to be secured, hereby, and, secondly, of the principal of said bonds in full, if the said purchase money, after deducting the expenses above mentioned, be sufficient; but, if not, then pro rata."

We find no error in the decree complained of, so far as the questions raised by the first assignment of error are concerned, and we now proceed to the consideration of the next, which is in the following words:

"Because the said decree of March 31, 1897, directs the sale of the mortgaged premises therein described only as a single parcel and an entirety, and not in divisions, and further directs that the proceeds of such sale be divided among the holders of the several series of bonds therein mentioned according to the percentages fixed by the court and specified in said decree."

This brings in review by this court not only the conclusion reached by the court below to sell the railroad as an entirety, but also the relative value of the different liens as found and established by that court. Is the contention of the appellants that under the terms of the mortgage they are, as holders of bonds secured thereby, entitled to a separate sale of each division of the road, or to have it offered for sale as an entirety and then in divisions, according to "the double method of sale," well founded? The first mortgage was made to secure three different series of bonds. That it does so, and that it is a valid mortgage, we have no doubt. Two mortgages were authorized by the stockholders at a meeting of the same held May 6, 1886, the details to be arranged by the board of directors, covering the entire property and franchises of the company. The first mortgage covering the property owned by the company in existence at the date of the same was to secure bonds to the amount of \$10,000 per mile

upon the road then constructed and to be thereafter constructed, and the bonds were to be divided into three series, the liens of the same to attach as the board of directors should determine. The second mortgage was also to be upon the entire property,—an income mortgage to the amount of \$5,000 per mile. The board of directors, at their meeting on May 6, 1886, passed, among others, the following resolutions:

“First. That this company make and execute a first mortgage upon its franchises and entire property, as is more particularly hereinafter described, to the Farmers’ Loan and Trust Company of New York, and issue bonds thereunder to an amount not exceeding ten thousand dollars per mile of completed road, which bonds shall be of the denomination of one thousand dollars each, payable in gold coin of the United States of America, and shall be of three series, as is more particularly hereinafter specified. They shall bear date the first day of June, one thousand eight hundred and eighty-six, and shall bear interest from the first day of June, one thousand eight hundred and eighty-six, at the rate of six per centum per annum, payable semiannually at the agency of this company in the city of New York on the first days of June and December in each and every year as evidenced by the interest coupons thereto attached, and shall become due and payable on the first day of June, one thousand nine hundred and sixteen.

“Resolved, secondly, that the property to be conveyed by the said mortgage shall be all and singular the railroad of said company between the Virginia line from the point near Mt. Airy, where the road now being constructed shall intersect that line, via Greensboro and Fayetteville to the South Carolina line, where the road now intersects that line, and also the road from Fayetteville to Wilmington to be hereafter built, now owned or hereafter acquired, together with all sidings, station houses, real estate along the line herein described, and all equipment, tolls, and income thereof, all the corporate rights and franchises of said company, and all other real and personal property to it belonging and appurtenant to the line here described, whether now owned or hereafter acquired; and this mortgage shall be in trust for the benefit and security of the holders of the bonds issued hereunder without preference, priority, or distinction as to the date or time of issue, so that each of such bonds shall have the same security hereunder as though they had all been executed and delivered simultaneously: provided, however, that the said bonds be divided into three series of bonds, that is to say, Series A bonds, Series B bonds, and Series C bonds, and they shall attach as liens upon the property hereby mortgaged in the following manner, that is to say: Series A bonds shall be a first lien on that portion of the railroad which lies between Greensboro and Fayetteville and Fayetteville and the South Carolina line, together with all station houses, sidings, and other property of whatever nature appurtenant thereto; and a lien in common with Series C bonds, but subordinate to Series B bonds, upon that portion of the road now being constructed between Greensboro and the Virginia line via Mt. Airy, together with the property appurtenant thereto; and also a lien in common with Series B bonds, but subordinate to Series C bonds, on that portion of the road between Fayetteville and Wilmington, when the same shall be constructed, together with the property appurtenant thereto. Series B bonds shall be a first lien upon that portion of the road which is now being constructed between Greensboro and the Virginia line via Mt. Airy, together with all station houses, sidings, and other property of whatever nature appurtenant thereto; and a lien in common with Series C bonds, but subordinate to Series A bonds, upon that portion of the road which lies between Greensboro and Fayetteville and Fayetteville and the South Carolina line, together with the property appurtenant thereto; and also lien in common with Series A bonds, but subordinate to Series C bonds, on that portion of the road between Fayetteville and Wilmington, when the same shall be constructed, together with the property appurtenant thereto. Series C bonds shall be a first lien upon that portion of the road between Fayetteville and Wilmington, when the same shall be constructed, together with all station houses, sidings, and other property of whatever

nature appurtenant thereto; and a lien in common with Series B bonds, but subordinate to Series A bonds, on that portion of the road which lies between Greensboro and Fayetteville and Fayetteville and the South Carolina line, together with the property appurtenant thereto; and a lien in common with Series A bonds, but subordinate to Series B bonds, on that portion of the road which is now being constructed between Greensboro and the Virginia line via Mt. Airy, together with the property appurtenant thereto. And in case of a default and foreclosure as is hereinafter provided for, all rolling stock and movable and other property which belongs to the road as an entirety, and is not specially appurtenant to any one of the three divisions of the road hereinbefore made, shall be apportioned among the said three series of bonds in proportion to the amount of such bonds as may be outstanding at the time of such default and foreclosure."

This action of the stockholders and directors was copied into and made part of the mortgage. Other resolutions of the directors, also included in the mortgage, fixed the form of the bonds, and divided them into the series before described. The mortgage then grants in trust the entire railroad from Greensboro to Fayetteville, and from Fayetteville to the boundary line between North Carolina and South Carolina, and from Fayetteville to Wilmington, and also the road then being constructed from Greensboro to the boundary line between North Carolina and Virginia. It then provides for a sale at public auction, by the trustee, of the mortgaged property, in case of default in the payment of interest, and specifically directs the mode of procedure of said sale in the following language:

"The said party of the second part shall, in case of such default as is referred to hereinbefore in this article, upon the written application of holders of one-tenth of the bonds hereby secured or intended to be secured, declare the whole principal sum of all the bonds secured or intended to be secured by this mortgage to be due and payable, whereupon the whole principal sum of each and all of said bonds then outstanding shall forthwith be due and payable, notwithstanding that the time therein limited for the payment thereof may not then have elapsed; and the said party of the second part shall, in that case, upon like security and indemnity, proceed, with or without taking possession, to sell and dispose of at public sale all and singular the said railroad, estate, real and personal, corporate rights, franchises, and premises hereby mortgaged, or agreed or intended so to be, to the highest bidder offering the same first as an entirety; and, in case no acceptable bidder is forthcoming for the said property as an entirety, then the said trustee shall proceed to sell separately the three divisions of the road hereinbefore made, and upon which the several series of bonds are hereby made or intended to be made first liens."

This special direction was to the trustee, and was limited to the sale to be made under the provision of the mortgage last quoted. But the trustee did not act under this clause. The holders of one-tenth of the bonds secured by the mortgage did not ask it to proceed under the same, and therefore, after the default by the railroad company, it sought the aid of a court of equity, filing therein the foreclosure bill usual in such cases. Surely, it will not be seriously contended that this special instruction to the trustee for his guidance in a contingency that, in fact, never happened, is also to be considered as a direction to a court of equity, called upon years after to dispose of the property in such manner as will best protect the interests of all the parties, and guard the equities presented by the conflicting claims that have their existence from causes originating since the mortgage was executed. There is no "iron rule" upon this subject, and while

the general practice is to follow as closely as may be proper the mode of procedure desired by the parties, and as may be set forth in the mortgage, yet still the court must, in its discretion, determine from the facts of each case the manner of sale that will subserve all interests, produce the best results for all concerned, and not enhance the value of one class of securities involved at the cost of another which is equally entitled to its care and protection.

Appellants' claim that the mode of sale provided for in the mortgage is to be exclusive of all others has not been favorably received by the courts, and has met with the disapproval of the supreme court of the United States, which, speaking by Mr. Justice Brown in the case of Guaranty Trust & Safe-Deposit Co. v. Green Cove Springs & M. R. Co., 139 U. S. 137, 143, 11 Sup. Ct. 512, 514, said:

"This clause, however, is open to the objection of attempting to provide against a remedy in the ordinary course of judicial proceedings, and oust the jurisdiction of the courts, which, as is settled by the uniform current of authority, cannot be done. *Hope v. Society*, 4 Ch. Div. 327; *Edwards v. Insurance Soc.*, 1 Q. B. Div. 563; *Horton v. Sayer*, 4 Hurl. & N. 643; *Scott v. Avery*, 8 Exch. 487; s. c. 5 H. L. Cas. 811; *Thompson v. Charnock*, 3 Term R. 139; *Mitchell v. Harris*, 2 Ves. Jr. 129; *Tobey v. Bristol Co.*, 3 Story, 800, Fed. Cas. No. 14,065; *Noyes v. Marsh*, 123 Mass. 286; *King v. Howard*, 27 Mo. 21; *Conner v. Drake*, 1 Ohio St. 166; *Trott v. Insurance Co.*, 1 Cliff. 439, Fed. Cas. No. 14,189; 2 Story, Eq. Jur. § 1457."

It is true that the mortgage in that case referred to provided that the method of sale set out in it should be exclusive of all others, but still the reasoning of the court and the authorities cited sustain the conclusion that the parties to a contract cannot, by its terms, deprive a court of equity of its right, in the due course of its proceedings, to adopt such plans concerning the sale of property as the peculiar circumstances of the case before it shall suggest to be proper for the protection of the interests of all the parties. Again, the supreme court in the case of *Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co.*, 137 U. S. 171, 192, 11 Sup. Ct. 67, said, referring to a similar provision:

"There was nothing in the mortgages which took away the inherent right of resort to the courts, and this clause did not impart what existed without it; but its insertion, evidently out of abundant caution, made it perfectly clear that the provisions relied on by appellants did not apply to foreclosure by bill in equity, but to the cumulative remedy specified. It is easy to see why taking possession and selling without intervention of the court should be guarded against, and the trustee not be required or allowed to proceed in that summary manner except on the request of a certain percentage of the holders of the bonds. Such proceedings might result in injury, which could not be predicated of those regularly taken in a court of equity. Arbitrary procedure by the trustee was not deemed desirable, in view of the interests of both mortgagor and the bondholders as a class, while each would find the protection to which it might be entitled at the hands of the court. *Mercantile Trust Co. v. Missouri, K. & T. Ry. Co.*, 36 Fed. 221."

It is clear that the trustee in such a mortgage may waive the cumulative remedy provided in it, and apply to a judicial tribunal for a foreclosure; and frequently it is for the interest of all concerned that he should do so. If the court is resorted to, the procedure must be according to the established rules of law, and the chancellor is not bound to direct a sale in strict accordance with the terms of the mort-

gage, but should exercise a sound discretion, having due regard for the rights of the debtor and of all the creditors, respectively. Undoubtedly, there are cases where it will be entirely just and equitable to adopt in the decree of foreclosure the plan of sale suggested by the mortgage, but certainly it will not be error going to the validity of the decree not to do so if the rights of all the parties have been fully recognized and duly guarded.

The court below not being compelled by the terms of the mortgage to sell the railroad by divisions, it remains yet to be ascertained whether or not the direction that it be sold as an entirety was, under the circumstances of this case, the proper exercise of judicial discretion. A connected railroad, one of the length, character, and importance of the Cape Fear & Yadkin Valley, involving as it does such large sums of money to its bondholders and its stockholders, and in which the people of the state to which it owes its existence are so deeply interested, should, if at all practicable, be kept together as one system, and sold as an entirety. The onus is on those who insist that it should be disrupted and sold in parcels to show the necessity for it, and to make it clear to a court of equity that good conscience and fair dealing demands it. Have the appellants succeeded in doing this? Giving due consideration to the facts they have marshaled, and to the arguments submitted in support thereof, we are forced to answer the question propounded in the negative. In proceedings of this character courts will, if at all practicable, regard the railroad as an entirety, will decree it to be sold as such, and will prevent its severance into parcels, even though it may be subject to partial mortgages. *Muller v. Dows*, 94 U. S. 449; *Bank v. Shedd*, 121 U. S. 74, 87, 7 Sup. Ct. 807; *Railroad Co. v. Lewton*, 20 Ohio St. 401; *Compton v. Railroad Co.*, 31 U. S. App. 486, 597, 15 C. C. A. 397, and 68 Fed. 263, 327. We quote with approval the following portion of the opinion of the court below, filed by Judge Simonton, in disposing of the particular point we are now considering:

"The proceedings for foreclosure having been instituted in this court, and a receiver having been appointed, and the time having arrived for a final decree, the first question which is met at the threshold is, how shall the road be sold? In divisions, or as an entirety? How shall the proceeds of sale be apportioned among the several classes of bonds in case, as is more than probable, a sum sufficient to pay the entire sum due, with expenses, be not realized from the sale? This railway company derives all its powers and privileges from the state which created it, and the bondholders enjoy the security of the mortgage, because the act of the legislature granted this power to the railway company. The purpose and intent of the state was to secure an entire line of railway from its principal seaport to the Virginia line. It granted the franchise to the company as an entirety,—one indivisible franchise, granted for the purpose of constructing and continuing an entire continuous line of road. The mortgage is also a single instrument of an entire line intended to secure interest of all bonds and then the principal, giving to each of them as part of its security the franchise of the whole line and an interest in the entire road and its property. Over the action of the trustee, each bond, without distinction, has an equal voice with every other bond. The trustee must see to it that the interest on every bond is paid. One-tenth of all the bonds, without distinction, can secure a declaration that all of the bonds are payable at once, and can require the trustee to enter and take possession of the whole mortgaged property. Every part of the railway property is dependent upon and connected with the others, and this interde-

pendence constitutes a part of the value of each of its several parts. Division B, for instance, has a value in its bed, iron, cross-ties, stations, etc. Besides all these, it has a clearly recognized value, because it is a part of a continuous line operated by one set of agents from its western terminus to the sea. The same intrinsic and incidental value exists in each division. If, therefore, the property were offered for sale at auction in separate divisions, it could—probably would—result in a disruption of the entire system, against the purpose of, and defeating the ends sought by, the state, for which the corporation was created, and to which it owes its existence and its powers; will be inconsistent with the general tenor of the mortgage itself; and will utterly destroy an important incident in the value of each division. Besides this, during the operation of this railway as a whole system, it has become possessed of certain property rights secured for the benefit of the whole system. These are, the lease of the South Carolina Pacific, connecting at the South Carolina line, and extending to Bennettsville, South Carolina,—a valuable feeder. If the road be sold in divisions, this connection would be valuable to, and could be purchased by, the purchaser of Division A only, at its own price. From time to time branch roads have been constructed, connected with Division A and with Division B. They are valuable because of this connection, because of this connection only, and are only valuable to the purchaser of the division with which they are respectively connected, who will get each of them at his own price. The franchise cannot be divided. A sale by division would destroy it entirely. It is true that under the statute law of North Carolina (section 1936 of the Code of North Carolina) the purchasers of any railroad can form a new corporation, and, if the divisions are sold separately, each set of purchasers can do this. But the present franchise for a line continuous from the northwestern boundary of the state to the sea would be absolutely lost, unless the road and its property be sold as an entirety. In that case only could the purchasers organize a corporation with this franchise. The rolling stock is used on the whole system. It is not needed by any division separate from the whole. A sale by division would greatly impair its value. Every bond is entitled to its share of the value of each of these items of value. It would be unjust, it could almost be said would impair the obligation of a contract, to deprive any of them of this incident of value. It would, perhaps, be improper, at least premature, to say that this railroad property could not or should not, under any circumstances, be sold except as an entirety; not in divisions. But this course—a sale of the property as a whole—should not be abandoned, if abandoned at all, except as a last resort, after it has been demonstrated that it is not practicable, due regard being had to the rights of the bondholders of each or any class. For the present, under the stress of the reasons given, it is best to exhaust the effort to sell the whole property as an entirety. But if the property be sold as a whole, we are met by a grave problem. How shall the proceeds be apportioned? There is a marked difference in the value of the bonds on each division, and of the real value of each division. Division A meets at Greensboro, one of its termini, the Southern Railway, and at Fayetteville it crosses the Atlantic Coast line. At its other terminus it meets a valuable feeder, the South Carolina Pacific. Division B has fewer advantages, and is less valuable. So with Division C still less. This difference must be ascertained, and the proceeds of sale apportioned. Ordinarily putting up property at auction in open market is the best test of value. This, however, is not the case with railroad property under mortgage. The holders of the bonds control the sale, and can make the price bid suit their views. This is almost the universal experience. The South Carolina Railway Company, at the end of a foreclosure suit involving questions of liens of five orders of priority, was put up for sale, and was purchased by a controlling syndicate of first consolidated mortgage bonds at the upset price of \$1,000,000. The purchasers resold it within two weeks for over \$5,000,000. It has been suggested that the separate divisions could be put up at an upset price regulated by the money value of their respective bonds as indicated by recent sales. But as there is, and has not been, any great demand for these bonds, their value cannot be fixed by any casual or isolated sales. If this be a safe guide, why adopt the form of a sale when the proportionate value could be fixed by the market value of

the bonds? If an upset price cannot be fixed in this way, there is no way of fixing it without some further information. The practice of this court furnishes a mode of getting such information. Let the special master, E. S. Martin, take testimony, and report facts proved before him as follows: (1) What has been the relative earning capacity of these separate divisions for a period of five years; that is to say, what is the value of the aggregate of freight going over such division between its terminal, and the value of its passenger traffic, and what are the necessary operation expenses. (2) What is the cost of repair of its roadbed and track. (3) What is the comparative estimate of the value of the respective divisions by disinterested persons who have had experience in railroads, furnishing such estimate under oath under cross-examination and giving the grounds for the estimate. (4) Any other facts bearing on this question of actual and relative value. Let the report contain only the facts given in evidence, so that the court can reach its own conclusion."

The court must determine from the particular facts of each separate case, keeping in view the rights of the mortgagor and the bondholders, as well as the claims of intervening creditors, and all the equities involved, the method of sale that will produce the best results to all parties in interest. When the court has so found, its decree should stand, unless the wrong and injustice attributed to it is made plainly to appear. Many of the cases reported, involving questions similar to those we are now considering, some of which have been cited and are relied upon by the appellants, are complicated by facts from which this case is free. Here the mortgages cover the entire property, and there is but a single franchise involved. We have here but one corporation, and not several consolidated companies with separate mortgages and various underlying liens upon distinct portions of the road. In such cases the courts have found it proper in some instances to sell separate portions of the road, or to offer it for sale both by divisions and as an entirety, accepting the offer most advantageous to the parties in interest. In other cases such sales seem to have been acquiesced in, no suggestion having been made that any particular interest involved in the suit would be prejudiced by the mode adopted. The case of *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, 6 Sup. Ct. 809, relied upon by appellants, does not sustain the contention that, where distinct portions of the property to be sold are subject to separate mortgages or liens, that the decree of sale must provide for offering the same both as an entirety and in parcels; but it simply holds that under the circumstances of that case such manner of sale was entirely proper, and just to all parties in interest. That such a decree was rendered in that case is not surprising, and it would have been more than strange if the supreme court had not given it its approval.

*Bank v. Shedd*, 121 U. S. 74, 7 Sup. Ct. 807, and *Gibert v. Railroad Co.*, 33 Gratt. 586, are cases where decrees directing sales as entireties were sustained on appeal, because it did not appear that separate sales would have been more advantageous to the divisional bondholders. In the case we are now disposing of we think it is clearly shown that all of the divisional bondholders will obtain, in the distribution of the proceeds of the mortgaged property, a proportion more favorable to their interests from a sale made as an entirety than they would from one made in parcels and divisions. It might be possible that the holders of one series of bonds may be able, on

account of the peculiar and favorable location of the division of the road on which their lien attaches, to hereafter make most desirable arrangements concerning it for purposes of their own, provided they can secure it at a separate sale; but that is a matter that did not impress the court below, and that will not influence this court in disposing of the questions that directly affect not only the bondholders of that particular division, but those of all other portions of the road. It is true that the appellants do not ask for a sale by division alone, but that the road shall be offered both as an entirety and by divisions, and the most advantageous bid accepted. As the decree appealed from directs a sale as an entirety, and as it would also be offered in that way if the present insistence of appellants should prevail, their idea must be that the sale by divisions will, in the aggregate, realize the greatest sum; and yet there is, in our opinion, an utter failure on their part to show by the evidence that such will be the result. If the sale by divisions should be made to realize more than the sale as an entirety, it can only be accomplished by abnormal bids on Division A, or on that division in connection with Division B, if we are to rely on the values placed on the property by the testimony returned with the master's report, which would result most disastrously to the Series C bonds, causing the holders thereof to depend on that division alone for their payment, destroying, in effect, their liens on Divisions A and B, and depriving them of their interest in the great value of the road as a unit. The court would not confirm such a sale, at least without first readjusting the ratio of apportionment of the proceeds so as to produce relatively the result that will be accomplished by the present decree. The court should not allow, by its decree of sale or by its method of distribution, the relative rights of any of the bondholders to be impaired, be the extent of their interests great or small. In the present contention there is but one mortgage, one railroad, and one franchise, but there are three series of bonds, differing greatly in value because of the location and intrinsic worth of the separate sections of the road by which they are secured, the least valuable being made still less valuable by the effort to debar them of the right to participate in the benefits to be derived from the sale of the mortgaged property as a whole. And this is to be effected, if at all, on the claim that the Series A bondholders are entitled to a separate sale of that division, not only as a matter of equity practice, but also under the terms of the mortgage. In our opinion, neither the practice referred to nor the contract mentioned will justify this court in directing a mode of procedure that will evidently produce injurious results to one set of bondholders, even if it causes desirable consequences to another.

In *Campbell v. Railroad Co.*, 1 Woods, 368, Fed. Cas. No. 2,366, cited by appellants as a notable instance of the sale of separate divisions of the same road, the court (Mr. Justice Bradley on the circuit), while so holding under the peculiar facts there presented, took occasion nevertheless to say that:

"Cases often occur when a sale of the property out and out, and a subsequent adjustment of claims upon the fund, is the only just method which can be pursued. But whenever a specific property on which a separate incum-

brance exists can be sold separately, *without injury or sacrifice of that or other property*, it ought to be thus sold, so as to secure to every incumbrancer, if practicable, the right of protecting his security without involving himself in onerous engagements, or being subjected to onerous conditions."

This conclusion of that eminent jurist, far from being overlooked or disregarded by us, has aided us materially in our investigation of this case, and his words that we have placed in italics have had much to do in aiding us in reaching the result we now announce. Concluding, as we do, that a sale by divisions would, under the circumstances of this case, be inequitable, it follows, we think, that the "double method" insisted upon by the appellants would be improper, for the reason, among others, that, as the court would not confirm a divisional sale, the bids could only be used as a mode of ascertaining the relative values of the different interests, for which purpose they would, in our opinion, for the reasons already given, be useless.

The duty of the court in directing the method of sale in a case like this is both difficult and delicate. The interests appealing to it, each and all of them entitled to the same careful consideration, are many and conflicting. Here is a struggle between the holders of the three series of bonds, a contest as to a part of the property between those claiming under the first mortgage and those under the consolidated mortgage, an effort by the bondholders under the latter to save from the general wreck some little part, if possible, of their unfortunate investments, and here also, in submission to the court's decree, are the interests of the mortgagor and the rights of the public.

An extended discussion of the question of the valuation of the several divisions of the road, of the different branches, and of the interest of the Cape Fear & Yadkin Valley in the South Carolina Pacific Railroad, as shown by the master's report and the evidence returned with it, is not deemed essential by us. The matter was carefully examined by the court below, after full argument by counsel, and the values then fixed and the apportionments then made will not be disturbed by this court. Our investigation has involved the study of the master's report, including the testimony filed therewith, and the application of the same to the conceded facts of this case, and we reach the conclusion that the method adopted by the court below for the distribution of the proceeds of sale is one that, if it works injustice to the appellants, neither they, with their financial experience, nor their counsel, with all their legal ability, have been able to point out.

The assignments of error not specifically referred to have been in substance disposed of in the discussion of the general questions involved herein.

Counsel, in their oral arguments and on their briefs, discussed the proper construction, as well as the constitutionality, of the act of the general assembly of North Carolina of the 8th day of March, 1897, entitled "An act to amend section 698 of the Code," but we have not found it necessary to consider that legislation in connection with the questions raised in this case. The decree appealed from is affirmed.

PURNELL, District Judge (dissenting). I concur in the reasoning and conclusion that the coupons of the bonds must be paid before

the bonds themselves, but cannot concur in the conclusion as to the method of sale. The holders of the different series of bonds, and especially of Series A, have never accepted the terms of the mortgage of 1889, and their rights must be adjudicated under the terms of the mortgage of 1886. Since the adoption of the state constitution in 1868 the policy and law of North Carolina in regard to corporations has been materially changed. Charters granted prior to 1868 were held to be contracts, which the legislature could not change without the consent of the corporation. In *Mills v. Williams*, 33 N. C. 561, Pearson, J., afterwards chief justice, speaking for the supreme court of the state, in a very learned opinion, after stating the difference between public and private corporations, says:

"The expectation of benefit to the public is the moving consideration on the one side, and that of expected remuneration for the outlay is the consideration for the other. It is a contract, and, therefore, cannot be modified, changed, or annulled without the consent of both parties."

This is in accord with many decisions of the supreme court of North Carolina and of the supreme court of the United States, following the decision of the latter court in the *Dartmouth College Case*, 4 Wheat. 518. The same doctrine is held in *Railroad Co. v. Reid*, 13 Wall. 264, which was a writ of error from the supreme court of the state reversed by the supreme court of the United States. The constitution since 1868 (article 8, § 1), reserves to the state the right to alter from time to time, or to repeal, all acts of incorporation other than municipal, and it is held that a corporation which has accepted an amendment to its charter since 1868 is under this provision. The large number of acts of incorporation passed at every session of the legislature shows the facility with which franchises are obtained, notwithstanding there is a general corporation law and a provision in the article of the constitution quoted that "corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes and in cases where, in the judgment of the legislature, the object of the corporation cannot be obtained under general laws." Whether the reservation in this article of the constitution would place charters granted by the legislature upon the same legal footing with charters with the right to diminish or impair the rights granted without the consent of the grantees, it is unnecessary to decide, but it would not give to the legislature power to disturb vested rights acquired in pursuance of a charter granted or former act of the legislature. A state legislature cannot impair the obligation of a contract or disturb vested rights in violation of the constitution of the United States. With the incorporators the legislature may deal; but when third parties, putting faith in an act of the legislature, have made contracts and acquired rights of property, the legislature cannot disturb them. Therefore the act of 1897, referred to, would be declared unconstitutional and inoperative if attempted to be applied to the mortgage made or the bonds issued in 1886 in pursuance of the act of the legislature of 1883. It is well settled that the laws which are in force at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of the contract as much as if they were incorporated in

its terms. This principle embraces the acts which affect its validity, construction, discharge, and enforcement, or the remedies under the contract. *Von Hoffman v. City of Quincy*, 4 Wall. 535; *Walker v. Whitehead*, 16 Wall. 314; *Barnitz v. Beverly*, 163 U. S. 118, 16 Sup. Ct. 1042; *Edwards v. Kearzey*, 96 U. S. 595. Notwithstanding the constitutional provisions in article 8, before quoted, and a general railroad law in the state, it appears from the acts of the legislature—the only source from which courts can derive any authentic evidence of a state policy as to corporations (*Swann v. Swann*, 21 Fed. 301)—parties building or buying railroads in North Carolina almost invariably go to the legislature for a new franchise, it is reasonable to suppose that a purchaser at a sale of this property, either as an entirety or in divisions, would apply to that body for a new charter. The act of 1897, subject to all these objections and others, should not, therefore, “chill the sale,” as said by the circuit judge, or in any way affect it; nor should its passage have any weight with a court of equity in determining the best method of sale for this important property. Lobbyists should not be permitted to affect pending litigation, especially when they are inadvertent to constitutional provisions.

Courts of equity do not make contracts. There can be no doubt about the principle contended for by appellees that under a deed of trust containing a power of sale application may be made to the court to decree a sale, but a court of equity will follow, as nearly as may be, the provisions of the deed itself. The application to the court does not change the contract made by the parties themselves, and, upon this principle that the parties have so contracted, preference is given to the holders of the coupons to the bonds themselves. To hold otherwise is, in effect, to hold that the court may do what the lawmaking power cannot,—impair the obligation of a contract.

The original purpose of this railroad seems to have been to establish railroad communication between Fayetteville, at the head of navigation on the Cape Fear river, and the coal beds of Chatham county, near the center, and not in the western part of the state, as is erroneously stated. From this original purpose the Cape Fear & Yadkin Valley Railroad has been formed by additions from time to time. At the date of the mortgage (1886) only that part known as “Division A” had been built, and the mortgage was on all the road then in esse to secure this series of bonds. I agree with the learned circuit judge that the usual and the best mode of ascertaining the value of property is by public auction, and, where the parties have by their own deed and contract established a method of sale, a court of equity should follow that method prescribed by the parties themselves. Expert testimony and estimates may be biased and influenced by circumstances of which the court can know nothing. They do not make values. The safest test of the value of property is what it will bring in the open market. The parties contracted as to how this property should be sold, and how its value should be ascertained, and that contract seems to me to be binding even on a court of equity. The mortgage provides that the property shall be sold “first as an entirety, and in case that no acceptable bidder is forth-

coming for the said property as an entirety, then the said trustee shall proceed to sell separately the three divisions of the road hereinbefore made, and upon which the several series of bonds are hereby made or intended to be made first liens." Who is to determine what is an acceptable bid for the road as an entirety is left in doubt, and there is no means for determining how this question was to be settled. Is the bid to be acceptable to the trustee? To the bondholders? If so, to which class, or to the party of the first part? Or was it to be acceptable to all of these parties? A satisfactory answer to either question is not possible. Disregarding, then, this language, doubtful and ambiguous, the mortgage provides for the sale of the property first as an entirety and then by divisions, the bid to be accepted that realizes the best price for the parties directly interested in the property on which they hold the first lien,—what is known among auctioneers (an every-day practice at public sales) as an upset sale. The sole object of the court, keeping in view well-established principles, must be to secure to the parties in this cause the best result for the property in which they have an interest. This, it seems to me, will be accomplished by following the contract made by the parties themselves, and not invoking any of the extraordinary or extrajudicial powers of a court of equity.

Where there is a well-established rule of property in a state, the courts of the United States will follow that rule. *Barber v. Railway Co.*, 166 U. S. 83, 17 Sup. Ct. 488, and cases cited. The rule in North Carolina in regard to mortgages and deeds of trust is well settled by a number of decisions of the supreme court of that state. The doctrine that a mortgage is a mere incident to the debt has never been favorably considered by the courts of the state, but these courts hold, with a rare exception, to the better doctrine that it is a direct appropriation of the mortgaged property to the payment of the debt, and a direct proceeding may be maintained to subject the property to the payment of the debt for which it is appropriated as a security. *Murphy v. McNeil*, 82 N. C. 221; *Capehart v. Dettrick*, 91 N. C. 344. It is equally as well settled that the grantor in a mortgage or deed of trust cannot, after execution, vary in any way the trust. *Ingram v. Kirkpatrick*, 41 N. C. 463; *Hogan v. Strayhorn*, 65 N. C. 279.

Applying these well-established rules of property to the case under consideration, the conclusion must be that the mortgage of 1886 was an appropriation of the road then constructed from Greensboro to the South Carolina line, known as "Division A," to the payment of the series of the bonds known as the "A" bonds; and of Division B, from Greensboro to Mt. Airy, not completed, to the payment of the series of bonds known as the "B" bonds; and Division C, from Fayetteville to Wilmington, not commenced, to the payment of the series of bonds known as the "Series C" bonds; and that after the execution of this mortgage neither the railroad company, the trustee, nor the legislature could vary the trust. Three years after, the debt being still unpaid, there remained in the company only an equity of redemption as to this property to be appropriated to the payment of the debt secured by the mortgage of 1889. Registration being legal notice, those claiming under this latter mortgage took with notice of the provi-

sions of the mortgage of 1886, and it appears from the mortgage itself they had actual knowledge, and were well advised as to all of its provisions. They cannot now be heard to vary any of the trusts, remedies, or rights under the prior mortgage. Equity may grant them a hearing as to the distribution of the surplus funds after the debts secured by the prior mortgage are satisfied, and as to the best method of realizing the largest returns from a sale of the property, but they should not be heard to question the validity of prior liens subject to which they accepted a second lien. *Bronson v. Railroad Co.*, 2 Wall. 283.

The mortgage provided for a distribution of the proceeds in the event of sale in language easily understood and constituting a part of the contract. The provisions are as follows:

"It [trustee] shall apply the residue of the proceeds of said sale [after paying certain expenses] to the payment, first, to the interest due on said bonds outstanding secured or intended to be secured hereby; and, secondly, to the principal of said bonds in full, if the said purchase money, after deducting the expenses above mentioned, be sufficient; but, if not, then pro rata."

"Pro rata" here means that creditors are to be paid or to prorate with those of the same class, and the holders of A bonds would be paid out of the funds arising out of the sale of the road as an entirety according to the bids for the property especially appropriated as a security for this series of bonds; and this rule would apply to the other divisions of the road, and the payment of the bonds for which they are appropriated as a security. There should therefore be a sale of the road first as an entirety, and then by divisions. It is so provided in the contract. With great deference, I dissent.

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#### OLIVER FINNEY GROCERY CO. v. SPEED et al.

(Circuit Court, W. D. Tennessee. March 26, 1898.)

#### 1. CONSTITUTIONAL LAW—STATE TAXATION—INTERSTATE COMMERCE.

The revenue law of Tennessee of 1897 (chapter 1), imposing upon all merchants an "ad valorem tax upon the capital invested in their business equal to that levied upon taxable property," and which provides that the amount assessed against the merchant shall not be less than the average of his stock during the preceding year, to be ascertained by adding together the highest and lowest amounts of stock on hand at any time, and dividing the sum by 2, is not a tax upon the goods, and not an interference with interstate commerce.

#### 2. SAME—PRIVILEGE TAX.

The privilege tax also imposed on merchants by chapter 2 of the act, to the extent of 15 cents "on each \$100 worth of taxable property," is not an interference with interstate commerce.

This was a suit in equity by the Oliver Finney Grocery Company against R. A. Speed and others. The cause was heard on an application for a temporary restraining order.

Henry Craft, for complainant.

Geo. B. Peters, C. D. M. Green, and W. B. Eldridge, for defendants.

HAMMOND, J. The application for a temporary restraining order until the motion for a preliminary injunction can be heard must be

refused. The bill seeks to raise the question whether or not a "license" or "privilege" tax levied upon a merchant importing goods from other states and foreign countries for sale in this state in original packages is in violation of the constitution of the United States, as an impost or duty upon imports, or it is a regulation of foreign or interstate commerce forbidden to the states. But, in my judgment, this question is not presented by the facts of this case, since the Tennessee act for the assessment and collection of revenue for the state for county and municipal purposes, of April 30, 1897 (chapter 1), and its companion act, to provide revenue for the state (chapter 2, pp. 1-50, Pub. Acts 1897), do not levy a license or privilege tax, at least not to the extent claimed by this bill. Neither is the tax complained of a direct or an indirect impost upon the goods so imported, in any sense whatever. It is for the most part simply a tax upon the capital of the "merchant," the defendant company in this case, employed in the business in which it is engaged, namely, that of buying and selling interstate, domestic, and foreign merchandise. The revenue act does provide for a privilege tax of 15 cents on each \$100 "of taxable property." But the bill, as drawn, makes no separation or distinction between this part of the tax and the 40 cents on the \$100 "upon the average capital invested" of the main tax increased by a subsequent act of April 10, 1897 (chapter 3, p. 81, Pub. Acts), to 45 cents, if that act applies to this tax at all. Neither does the bill show any separation or distinction, in the levies made and complained of by the bill, between the amount of taxes claimed upon foreign and interstate merchandise and those claimed upon mere domestic merchandise. It is true, the bill shows that a return for taxation or assessment was made only of domestic goods as to which the taxes were paid; but the increased assessment made by the taxing officials under the authority of these acts, as presented by the bill, takes no note of either of the above distinctions, and the levy seems to have been made in a lump sum upon assessments, so far as we can see from the bill, wholly ignoring these distinctions. Therefore, in the present condition of the bill, it would be impossible to consider any differences of legal right to the tax based on these distinctions if any such differences there be. The bill quotes so much of the legislation as was deemed necessary to present the question made by the bill, commencing with section 19 of the assessment act; but its proper construction requires a full reading of all the sections of both of the acts, to develop the scheme of taxation contained in them, and from this it abundantly appears that it is an entire misapprehension of their effect to suppose that the assessment complained of in this bill is wholly either a "license" tax or a "privilege" tax upon the importer, or a direct or indirect tax upon the goods imported. Forty-five per cent. of it is "an ad valorem tax upon the capital invested in their business," levied upon "merchants" by section 18 of the assessment act (chapter 1, p. 15), and section 3 of the revenue act (chapter 2, p. 50), as increased by the supplemental act (chapter 3, p. 81), if this increase applies to the "merchant's tax." It is perhaps a misnomer to call it an "ad valorem tax," but that is not material. The confusion arises out of the peculiar process provided in the act for levying the merchant's tax.

As before stated, it does impose a privilege tax upon merchants, which is measured in the same way as the so-called "ad valorem tax" upon capital, namely, by a percentage upon the capital or property, whichever is used as a basis of computation. But in order to secure this tax, both as to the assessment and collection, the act requires "merchants" to be licensed as other privileged occupations are to be licensed, and seemingly the same protection is extended by the act to the tax upon the merchant's capital as that upon his privilege. But, manifestly, the tax upon the capital does not thereby become a privilege or license tax; the separation between the two, both in the levy and assessment of the tax, being carefully provided for by the act.

Section 1 of the assessment act declares that all property, real, personal, and mixed, shall be assessed for taxation. Section 2 declares exemptions, and section 3 provides that the assessment for all purposes, of personal property, privileges, and polls, shall be assessed annually, and real estate every four years. Section 7 provides that personal property shall be assessed under enumerated heads, including "(2) stocks of merchandise, wares, goods, and chattels, kept on hand, or in store, for sale, trade or traffic; but the value of the same shall not be included in the tax values," etc. The act then proceeds to direct how assessments shall be made, *seriatim*, under these various heads, numbering 11. It reaches "merchants" at section 18, thus:

"That merchants shall pay an ad valorem tax upon the capital invested in their business, equal to that levied upon taxable property; and the term 'merchant' as used in this act includes all persons, copartnerships or corporations engaged in trading or dealing in any kind of goods, wares, merchandise, either on land or in steamboats, wharf-boats or other craft, stationed or plying in the waters of the state, and confectioners, and whether such goods, wares, and merchandise be kept on hand for sale or the same be purchased and delivered for profit, as ordered; but nothing in this act contained shall in any way affect the collection of privilege taxes upon the avocations declared by this act to be privileges."

Then follow sections 19 et seq., as quoted in the bill, and they need not be quoted here. Section 19 and those following are designed to regulate the assessment and collection of license and privilege taxes, but they include also a regulation for the assessment and collection of the "merchant's capital tax" provided for in section 18, as above quoted; plainly because the merchant is paying both a capital tax and a privilege tax, each being ascertained by the same method of procedure. This bill gratuitously assumes that it is all a privilege or license tax. The scheme seems to be that the merchant's capital tax assessed shall be levied upon his own return by a true statement under oath "of the amount of capital invested in such business, during said twelve months" (section 20); and "levied the amount of capital invested in his business to be assessed for taxation" (section 22, subsec. 1).

It is to be noted that this is not at all a tax upon the goods or their value, but upon the amount of the capital, as shown by the merchant under oath. It is entirely true that subsection 1 of section 22, in order to checkmate any underassessment by the merchants under their statement of the amount of capital invested in the business,

declares that under no circumstances shall the amount to be assessed against the merchant be less than the average value of the amount of stock on hand during the preceding year, which average amount is to be ascertained by adding together the highest and lowest amount of stock on hand at any one time, respectively, during the year, and dividing the aggregate by two, which average amount "shall be deemed the taxable value of the capital of such merchant, upon which he shall pay the taxes levied for state, county, and municipal purposes. It is also true that, in a subsequent requirement of section 22, the clerk of the court and the district attorney are authorized, upon citation and notice, to correct any untrue statement made by the merchant under oath where it is considered not just and correct by the clerk, so as to conform the assessment to the facts, and to truly ascertain the capital, as defined in subsection 1, § 22, above quoted. But it is obvious from these provisions and the whole act that no assessment is made upon the goods directly or indirectly, either by way of import tax or otherwise, and that this valuation of the stock on hand to ascertain the average capital is only a method of determining the amount of capital that the merchant has invested in his business for taxation, whenever it becomes necessary to ascertain it otherwise than by his own sworn statement of that amount. If his own statement is satisfactory to the officers, there may be no valuation of the goods at all, for it is only in the event of a disagreement between them that it is necessary to make this valuation. Of course, the merchant, in making his sworn statement of the capital he has invested in the business, may adopt the rule of the statute for ascertaining it, but he is required to make a true statement, irrespective of that rule. Besides, it is directly provided in subsection 2, § 22, that if the average stock on hand, ascertained by the valuation of the highest and lowest quantity during the year, and dividing by two, shall be less than the capital stock invested, the merchant shall pay on the capital stock, and not on the lesser valuation. It is also provided by that subsection that "the word 'capital,' as used in this and the foregoing section, shall be construed to mean the average amount of stock on hand during the year in which it was offered for sale, the amount to be ascertained as provided in the first section hereof." So that it is wholly a misapprehension of the bill in this case to treat this scheme of taxation as one levied directly or indirectly upon the goods. The valuation made of them is only for the purpose of fixing under certain circumstances the amount of the capital stock for taxation, and the legislature might have resorted to any other convenient method of determining that amount in the event the taxing officers were not satisfied with the sworn statement of the merchant. They might have directed that it should be ascertained by summing up the amount due or paid on the invoices of the purchaser of the goods, or, as is done in cases of insurance, by taking the amount of the sales, and deducting the profits, or by any other convenient and just method of determining the amount of money which the citizen engaged in the business of selling merchandise has invested in that business.

That this is a proper construction of the act, and that this method of a special assessment upon merchants by segregating their mer-

chandise from their other property is intended, is shown by subdivision 2 of section 7 of the assessment act, which says distinctly that stocks of merchandise shall not be included in the tax values assessed on other personal property, this evidently being reserved for the special methods of assessment and collection subsequently provided for in the section already noticed. And there are other indications not necessary to note, all through the act, showing that this is a tax upon the capital of the merchant invested in his business, and not in any sense a tax upon the goods on hand or their value, either directly or indirectly; and the argument used to convert it into a tax upon goods imported from another state or foreign countries might just as well be used to resist the poll tax, as being also a tax upon the importations, because it is a tax upon the person of one engaged in the business of an importer. This is a tax upon capital engaged in the business of merchandising, and there is not a line in the whole act which in any sense makes any discrimination in the process between capital invested in foreign or interstate transactions and that invested in domestic transactions in this process of taxation. As before stated, the merchant is required to take out a license, and to conform to certain provisions about giving bond and securing the proper assessment and collection of his merchant taxes, in a similar manner to that required of those who are engaged in the occupations which are denominated "privileges," and taxed only as such; and by section 3 of the revenue act (chapter 2, p. 50), when the legislature comes to fix the rate of taxation, a merchant is taxed 40 cents on the \$100, as "an ad valorem tax upon the average capital invested in his business," and he is also taxed 15 cents on each \$100 of "taxable property." Whatever that may mean, whether on his taxable merchant's capital, or on that and all his other taxable property, we need not here inquire. While this is called a "privilege tax," and the amount is ascertained by computation of a percentage upon the taxable property precisely as the 40 cents is ascertained, by computation on "taxable capital," it is really an arbitrary tax levied upon the business of the merchant, without any discrimination as to the character of the business in which he is engaged as between domestic and foreign or interstate goods or transactions. As before stated, this bill only shows that a large lump sum has been assessed upon the plaintiff in this case, and it discloses or complains of no distinction between anything which may have been assessed as privilege taxes and that which may have been assessed as taxes upon the merchant's capital, so that we do not now know what the facts may be in relation to that assessment; but certainly the whole tax should not be enjoined because a part of it might be unlawful, while the illegality does not appear upon the bill as it is now drawn, even if it be conceded that a privilege tax, however the amount may be fixed, which is levied upon a merchant engaged in the importation of foreign or interstate goods, is a tax upon interstate commerce, which the court is not now at all prepared to admit. Therefore this application for a restraining order and a preliminary injunction must be denied upon the construction of the act itself, the tax assessed and levied being, as appears by the bill, only a tax upon the capital of the merchant which is invested

in his business, and not a tax upon interstate or foreign commerce, nor a restriction or a discrimination against the commerce.

It would not be improper, however, to say a word as to the argument made upon the adjudications of the supreme court of the United States which are supposed to avoid this tax if it could be construed to be a tax upon imported goods from foreign countries and other states, directly or indirectly, as a license or privilege tax. The argument made in the brief of counsel assumes that the case of *Woodruff v. Parham*, 8 Wall. 123, has been overruled by the case of *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681. This latter case was not one involving the question of taxation at all, and, even in its relation to the exercise of the police power of a state over articles of interstate commerce, it has been said in the subsequent case of *Blumley v. Massachusetts*, 155 U. S. 461, 474, 15 Sup. Ct. 154, that that case must be restrained in its application to the case actually presented for determination; and it is very doubtful if it may be used, as is sought to be done in this case, to maintain the broad position that all articles of imported goods, while remaining in the original packages, are exempt from taxation, direct or indirect, for that is what this bill means in its contentions. It is still more doubtful if that principle can be held to have been established by that case in the light of the subsequent cases of *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. 367, *Coal Co. v. Bates*, 156 U. S. 577, 15 Sup. Ct. 415, and *Coal Co. v. Louisiana*, 156 U. S. 590, 15 Sup. Ct. 459, in which the cases of *Leisy v. Hardin*, *supra*, *Woodruff v. Parham*, *supra*, *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, *Brown v. Maryland*, 12 Wheat. 419, and many of the other cases relied upon by plaintiff's counsel in this case, are cited by the court; and there is no intimation that the case of *Woodruff v. Parham*, *supra*, is regarded by that court as having been overruled. In *Emert v. Missouri*, *supra*, it was distinctly held that a statute of a state by which peddlers were required, under a penalty, to take out and pay for licenses, making no discrimination between residents or products of the taxing state and those of other states, is not repugnant to the constitution of the United States. And in *Coal Co. v. Bates*, *supra*, it was held that a tax upon coal in the original barges, in which it was shipped from one state to another, was subject to local taxation in the state where it was found; and in neither of these last-cited cases was there any dissent among the judges who differed so widely in *Leisy v. Hardin*, *supra*, and *Blumley v. Massachusetts*, *supra*, showing that it was not considered by the court that *Leisy v. Hardin* applied to the cases of taxation of imported goods held in their original packages unsold. In the cases involving the power of taxation, the determination of the question of legality or illegality as affected by the interstate commerce clause of the federal constitution seems to depend largely upon the question of unjust discrimination between the products of the taxing state and the products of other states introduced by importation; and it is conceded by the brief of counsel in this case that no such discrimination has been made by the acts of the Tennessee legislature we have now under consideration. It is not necessary, in my judgment, to give any technical attention to any of these decisions, for the reason that it ap-

pears upon the face of the bill and the acts of the legislature that the taxes assessed and levied are not assessed and levied upon the imported goods directly, indirectly, or remotely in any legal sense, but are "a valid exercise of the power of the state over persons and business within its borders," to use the concluding language of Mr. Justice Gray in the case of *Emert v. Missouri*, *supra*. Application denied.

#### Addendum.

The bill as amended sets out section 3 of the act of 1897 (chapter 2, known as the "Revenue Act,") levying a privilege tax on merchants of 15 cents "on each one hundred dollars worth of taxable property," etc. And it claims that, at least as to this "privilege tax," the act is obnoxious to the federal constitution, as a tax or restriction on interstate commerce. But I do not think so. There is in the act no possible discrimination as against that kind of commerce. The computation for the privilege tax is not made on the values of interstate articles of commerce more than on the values of domestic articles of commerce, nor on the capital invested in one more than on the capital invested in the other. In my judgment, it is not levied on either, as goods or as commerce, but, like a poll tax, is levied on the persons engaged in the business of merchandising for the privilege of exercising the vocation of a merchant, not that of an importer or dealer in interstate or foreign merchandise, but upon all domestic dealers as well. Section 18 of the assessment act declares in terms that it is a tax on the vocation. The amount assessed for this privilege varies according to the amount of the dealings as shown by the "worth of taxable property"; whether of all the merchant's taxable property, real, personal, and mixed, or only that known in the act as "merchant's capital," we need not say. Certainly, it is not levied alone on interstate commerce articles or dealers, and, as before suggested, is not more a tax on interstate commerce than a poll tax on the merchant might be.

In the case of *Robbins v. Taxing Dist.*, 120 U. S. 496, 7 Sup. Ct. 592, it is remarked that the mere calling the business of a drummer a "privilege" cannot make it so. So, the mere calling a tax a "privilege tax," or declaring an occupation a privilege, cannot make it an unlawful tax on interstate commerce, if in fact that kind of commerce be not especially burdened or injured or restricted by it in favor of domestic commerce, where it has no unfavorably discriminating quality against the citizens or products of other states. As said in *Freight Tax Case*, 15 Wall. 232, the constitutionality or unconstitutionality of a state tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid,—the ultimate burden. Here it is not laid on the importations of the plaintiff, but upon all its property, of every kind, possibly if we look only to the mere form of words in making the levy, and certainly so if we look only to ultimate results; for it is an amount to be paid out of its general funds, and surely not out of the proceeds of importations more than out of any other class of merchandise or other property whatever. If we look only at the

person paying the privilege tax, or at the occupation of that person, it is not levied on an importer qua importer, as in the Robbins Case, supra, but upon every one alike engaged in that occupation of buying and selling goods of each and every kind, foreign and domestic. It can be held a tax on importations from other states only by holding to the broad proposition that there is a sanctity about imported articles exempting them from all taxation, whether equally with domestic articles or differently from them by an inequality, arising out of unfair discrimination against importations and importers. No case has held to such a proposition.

In *Emert v. Missouri*, supra, this construction of the Robbins Case is denied, and upon the force of language quoted from that case itself, as follows:

"When goods are sent from one state to another for sale, or in consequence of a sale, they become part of the general property, and amenable to its laws; provided that no discrimination be made against them as goods from another state, and that they be not taxed by reason of being brought from another state, but only taxed in the usual way as other goods are."

Here they are taxed in the remotest way, incidentally, if at all, and not in the least unlike all other goods are taxed belonging to the merchant, nor indeed not unlike all his other taxable property, of whatever kind, for that seems to be the burden of the statute. And it is said in *Coal Co. v. Bates*, supra, that it cannot be seriously contended, at least in the absence of congressional legislation to the contrary, that goods which are the products of other states are to be free from taxation in the state to which they might be carried for use or sale; provided, always, that the assessment does not discriminate between the products of different states. The application for a temporary restraining order and for a preliminary injunction are denied, both upon the original and the amended bill. Ordered accordingly.

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#### FAIRFIELD FLORAL CO. V. BRADBURY.

(Circuit Court, D. Maine. April 19, 1898.)

##### 1. INJUNCTION—MANDATORY—WHAT CONSTITUTES.

Where a government officer has interrupted the usual course of business of his office, an injunction to prevent the continuance of such interruption, although it would incidentally compel the officer to do certain minor acts necessary in the ordinary course of business, is not mandatory.

##### 2. SAME—CONSTITUTIONAL QUESTION—INJUNCTION PENDENTE LITE.

Where an injunction is asked to restrain a government officer from continuing in a course of action, entered upon in pursuance of a federal statute, and the court on preliminary hearing is in doubt as to the constitutionality of the statute, a temporary injunction will issue when that appears to be the best way of doing justice pending the final hearing.

##### 3. COURTS—DECISION BY COURT OF APPEALS—DIFFERENT CIRCUITS.

In general, the courts of one circuit should follow the decisions of the court of appeals in another circuit, where the point in question has not been passed upon by the supreme court.

This was a suit in equity by the Fairfield Floral Company against W. J. Bradbury, postmaster at Fairfield, Me. The cause was heard on a motion for injunction pendente lite.

The Fairfield Floral Company was carrying on at Fairfield, Me., a business described in its circular advertisements as the "manufacture of artificial flowers," in the prosecution of which it received through the United States mails a very large number of letters, post-office money orders, and packages of merchandise; and it forwarded through the same channels large numbers and quantities of letters, circulars, and materials. The attention of the postmaster general having been called to this business, he caused investigation of the same to be made, and became satisfied that it was so tainted with fraud as to make the matters and things so received and sent through the mails nonmailable under the statutes of the United States, and accordingly, by what is known by postal authority as a "fraud order," he forbade the transmission thereof by the post offices and mails. The postmaster at Fairfield was ordered to withhold from delivery all letters and packages coming to that office directed to the Fairfield Floral Company, and to pay no post-office money orders drawn in their favor. He was further directed to return to the senders, where they were known, all letters and packages received and directed to the Fairfield Floral Company, and to return to the dead-letter office all of which the senders were unknown. Pursuant to such direction from the postmaster general, the local postmaster refused payment of money orders, withheld delivery of the matters received, and returned letters and packages to the senders, or to the dead-letter office. The Fairfield Floral Company, after unsuccessfully demanding from the local postmaster delivery of all things received at his office and directed to it, and also after in vain presenting for payment post-office money orders drawn payable to it, brought its bill in equity, praying that the local postmaster be enjoined from so withholding letters and refusing to pay orders. Upon motion, the court directed a restraining order to issue according to such prayer of the bill, and there-after, upon hearing of a motion, a temporary injunction was granted.

J. T. Boynton and William J. Haines, for complainant.  
Isaac W. Dyer, U. S. Atty., for respondent.

PUTNAM, Circuit Judge (orally). The question whether or not this would be a mandatory injunction, if granted to the entire extent asked for, affords no difficulty. The post office department, through the postmaster at Fairfield, or, so far as we are concerned here, the postmaster at Fairfield, has interrupted the usual course of business, and the injunction is to prevent the continuance of that interruption. If, incidentally, this would compel the postmaster to perform some minor things which, in the ordinary course of business, he would perform, this would not render it a mandatory injunction. This is well expressed in *Lennon's Case*, 166 U. S. 548, 556, 17 Sup. Ct. 658.

The statutes might have provided that the postmaster general, on evidence sufficient to him as to what was and what was not nonmailable matter,—as to what matter in the mail formed a part of the alleged fraudulent scheme of the complainant in this case,—should direct that such matter should not be delivered to the complainant. The statute might have provided—I do not say that it might constitutionally, but it might have provided—that all matter which was properly nonmailable should be withheld, and that the postmaster general, or his subordinates, should determine, by some rules satisfactory to themselves, as to what was mailable matter and what was nonmailable. It might have thus sought only to purge the mails from what, in the judgment of the officers connected with the post office department, was nonmailable. We would then have had the postmaster general dealing with what was explained by Mr. Justice Field in *Ex parte Jackson*, 96 U. S. 727, 733, to the effect that the United States have

no right of search or seizure without proper process, and therefore no right to open the mails to ascertain whether or not matter is mailable or nonmailable. And it is possible that the vesting a special discretion in the postmaster general to enable him to determine, as between mailable and nonmailable matter, might have been within the power of congress. On the other hand, congress might have provided—I do not say constitutionally provided, but it might have provided—that, on the conviction of a person for violating the post office laws by a jury, after a proper trial at common law, the court should have power, as a part of the penalty imposed upon him, to prohibit the use of the mails for a definite, or perhaps an indefinite, period of time. Congress might have done either one of these two things; and, if it had done so, we would have had a very different question from what we have with the statute as it now comes to us. The statute neither requires the verdict of a jury, nor does it discriminate between what is mailable and nonmailable. It enables the postmaster general to prohibit the delivery of a letter to the complainant corporation from the clerk of this court, notifying the corporation that it should appear to answer on its order, or a letter from the counsel of the corporation concerning its affairs, and, perhaps, of vital consequence to it. The statute also authorizes the postmaster general to prevent an honest debtor of the corporation, owing an honest debt, and desiring honestly to pay his debt, from using the mails for that purpose. So the provisions of the statute are very far-reaching, and recognize none of the discriminations which would be recognized if it had been of either class of legislation which I have supposed. As the statute stands, it practically enables the postmaster general to impose upon a person singled out by him according to the statute, for good reasons in his own opinion, a penalty beyond the proper subject-matter to which the statute relates.

If I were free to follow my own judgment, I should say that congress, neither directly, nor through the postmaster general or any one else, has any constitutional authority to impose the penalty of forfeiture of the use of the mails of the United States, at least without a trial. But I am not sure that I will be able to follow my own convictions in this case, even if on a final hearing they remain as they now stand. I am not sure that I will not be bound by the decision of the court of appeals in the Sixth circuit (*Association v. Zumstein*, 15 C. C. A. 153, 67 Fed. 1000), when the case comes to a final hearing. My own view is that the decisions of the court of appeals in one circuit should ordinarily be followed quite implicitly by the courts in other circuits. The case in the Sixth circuit does not seem to have been taken to the supreme court. I cannot find anything to indicate that it was taken up by writ of error or otherwise, and it seems to have been left on the decision of the court of appeals; so that it stands to-day the highest judicial authority which we have on the validity of the statute.

However, the case at bar, with the aid of the special orders which I propose to ask the parties to consent to, can be brought so quickly to a final hearing that I do not feel that equity justifies me in permitting this mail to accumulate meanwhile. Moreover, I must remember

that the only ground on which I can now put the case, will probably leave it so that neither party can appeal from an order granting a temporary injunction, as the question is one of constitutionality; so that, whether I grant or refuse a temporary injunction, my decision would probably not be appealable to the circuit court of appeals, and must await a final decree before an appeal can be taken to the supreme court. I am satisfied that I can best do justice by following at present my own views of this statute, which I now regard as unjust and unconstitutional, and by expediting a final hearing of the case, reserving till then the question whether or not I am bound to follow the decision in the Sixth circuit.

Now, if the complainant can give the court to understand how rapidly it can expedite this case, I can give my conclusions on the motion for a temporary injunction. If the bill cannot be brought to a speedy hearing, I will simply let the restraining order stand; but, if the complainant will expedite the case, a temporary injunction will be granted as moved.

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#### ATLAS GLASS CO. v. BALL BROS. GLASS MFG. CO.

(Circuit Court, N. D. New York. June 1, 1898.)

##### 1. PRINCIPAL AND AGENT—WHEN RELATION EXISTS—PARTICULAR CASE.

An agreement by which A. is to sell the goods of B. at specified prices, receiving a commission for his services, and to report all orders to B., who is to enter them as sales to A., creates the relation of principal and agent under a *del credere* commission, and not that of vendor and purchaser.

##### 2. PROCESS—SERVICE ON CORPORATION—MANAGING AGENT.

A person appointed by a corporation to sell its goods at fixed prices, receiving a fixed commission, and having no authority outside of such sales, is not a "managing agent," within the meaning of Code N. Y. § 431, and service of process upon him is not service upon the corporation.

This was a bill in equity by the Atlas Glass Company against the Ball Bros. Glass Manufacturing Company. The cause was heard on a motion to set aside the service on defendant.

William L. Pierce, for complainant.

Frederick G. Fincke, for defendant.

COXE, District Judge. The defendant is a New York corporation. The certificate filed with the secretary of state gives the office of the company at Buffalo, N. Y., where the factory and place of business of the company were formerly located. In 1893 the business was removed to Muncie, Ind., where it now is. The subpoena was served upon R. G. Wright, of Buffalo, as agent of the defendant. When the defendant removed its business to Indiana it retained an office at Buffalo until December, 1896, when it sold its property there to the said Wright.

Two letters appear in proof, dated respectively May, 1897, and January, 1898, written by Wright upon the paper of R. G. Wright & Co. on which appears a lithographic picture of the "Muncie Works" and a

statement that the firm are the "successors to and agents for Ball Bros. Glass Mfg. Co." Immediately prior to the commencement of this suit the counsel for the complainant telegraphed to Wright & Co. asking for the Buffalo address of the defendant and received a reply as follows: "Ball Bros. Glass Mfg. Co., 52 Terrace, Buffalo." On the 18th of January, 1898, the defendant entered into a contract with Wright & Co. in which it says, "We hereby appoint you our selling agents for the Eastern market." Pursuant to this agreement the firm were to sell the Mason fruit jars manufactured by the defendant according to its prices attached to the agreement. They could make no profit except their "selling commission" and were to report all orders to the defendant who was to enter them as sales to the firm. The agreement continued in force for about four and a half months. This agreement superseded all prior arrangements and must be regarded as establishing the legal relations of the parties at the time the process was served. The declarations of Wright & Co., assuming that they have any bearing upon the question in issue, were made prior to this agreement and when a different status existed. The statement in the telegraphic dispatch was made afterwards, but so far as appears was wholly unauthorized by the defendant.

It is argued by the defendant that the agreement of January 18th did not create an agency of any kind but was simply a contract of sale. The agreement is unique in several respects and much may be said in favor of this contention, but it is thought, considering the paper in its entirety, that it did not create the relation of vendor and purchaser, but rather that of principal and agent. Wright & Co. were to sell, for a short period, the defendant's goods under a del credere commission and receive for their services 5 per cent. of the invoice price. The provision that the goods were to be charged directly to Wright & Co. was but another way of saying that they agreed to guaranty the sales. The question is not what the parties intended to do but what they actually did do.

It appears, then, that at the time the subpoena was served Wright & Co. were the agents at Buffalo to sell for a brief period a particular line of goods manufactured by the defendants under a strict and limited agreement. The question for decision may be stated as follows: Can a New York corporation, having no officer or director within this state, be sued in this court by serving process upon an agent who has no other relation to the corporation than to sell its goods in the capacity above indicated?

Section 914 of the United States Revised Statutes has no application as "equity and admiralty causes" are expressly excepted from its provisions, but both counsel, apparently, agree that section 431 of the New York Code is applicable, the power which called the defendant into being having the authority to prescribe the method by which it shall be brought into court. Section 431 provides that service upon a domestic corporation may be made by delivering the process "to the president or other head of the corporation, the secretary or clerk of the corporation, the cashier, the treasurer, or a director or managing agent." No authority cited by counsel or fa-

miliar to the court holds that the facts established here are sufficient to constitute one a "managing agent."

In construing the statute the doctrine of *noscitur a sociis* is applicable; the term "managing agent" is found associated with "president," "secretary," "clerk," "cashier," "treasurer" and "director," and it is to be presumed that the lawmakers intended to describe an agent possessing powers analogous to those of the executive officers of the corporation. He must be an agent employed by the corporation, representing it in some capacity and acting for it to a limited extent at least. A person appointed to sell at a fixed price and for a fixed commission a single class of goods manufactured by a corporation for a period of four months, is not a "managing agent." He manages nothing. He is invested with no power requiring the exercise of judgment or discretion. He does not even possess the power of an ordinary agent; he is tied hand and foot. He is a mere commission merchant or consignee, the single sphere in which he represents his principal being restricted to the narrowest limits. It is well known that many of the large manufacturing companies have arrangements with merchants in the large cities similar to the agreement in proof. It has never been decided that a mere factor who acts as the medium through whom the soap, or flour, or glass manufactured by his principal, reaches the public, is the managing agent of that principal. R. G. Wright & Co. were not the managing agents of the defendant in any legal sense. The motion is granted.

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#### CHAMBERLAIN v. PIERSON.

(Circuit Court of Appeals, Fourth Circuit. May 17, 1898.)

No. 226.

**1. ACTION FOR INJURIES RECEIVED IN WRECK—RECORD OF CONVICTION OF WRECKERS—ADMISSIBILITY OF EVIDENCE.**

In an action against a railroad company to recover for injuries received in a wreck caused by the derailment of a train through the alleged negligence of the company, the record of the trial and conviction of persons charged with murder by feloniously derailing the train is not admissible in evidence on behalf of the defendant.

**2. CONTRACT FOR TRANSPORTATION OF EMPLOYEES—EFFECT ON RIGHTS OF EMPLOYEES.**

Employees of an express company, who had no knowledge of a contract between such company and a railroad company to the effect that such employees were to be furnished free transportation over the railroad at their own risk while in the service of the express company, are not bound thereby.

**3. LICENSEE ON RAILROAD TRAINS—RIGHT TO RECOVER FOR NEGLIGENCE.**

One who accepts free transportation on a railroad at his own risk can nevertheless recover for injuries caused by negligence of the railroad company or its employees, not his fellow servants.

In Error to the Circuit Court of the United States for the District of South Carolina.

J. E. Burke, for plaintiff in error.

W. Perry Murphy, for defendant in error.

Before GOFF, Circuit Judge, and JACKSON and PAUL, District Judges.

PAUL, District Judge. This was an action brought by the defendant in error against the plaintiff in error for damages resulting to the defendant in error while traveling as an express messenger on the railroad of which the plaintiff in error was receiver. The complaint filed in the court below alleges:

"That on the 28th day of November, 1891, the said plaintiff was in the employ of the Southern Express Company as messenger, and in such capacity was on board of the train of the South Carolina Railway Company, operated by the defendant as aforesaid, which left the city of Columbia about the hour of 7:50 o'clock on the said 28th of November, 1891, and was on said train when, through the carelessness, negligence, wrongful act, and default of said Chamberlain as receiver as aforesaid, he sustained serious injuries," etc. "That the said carelessness, negligence, wrongful act, and default of the said defendant lay in the fact that he so carelessly, negligently, and wrongfully conducted himself in the management of said railroad that, through the negligence, carelessness, and unskillfulness of himself and his servants, certain bolts were left out in the rails on the roadbed of the said company near the nineteen-mile post, near Lincolnton, S. C., by reason of which the train upon which plaintiff was riding did on said 28th day of November, 1891, without any fault on the part of the plaintiff, become derailed and wrecked at or near the said nineteen-mile post, in the county of Berkeley, in the state of South Carolina, inflicting the injuries upon the plaintiff above mentioned, from which injuries the said plaintiff has both suffered great bodily pain and been deprived of the means of future support, to his great loss and damage, to wit: \* \* \*."

The amended answer of the defendant to the complaint is as follows:

"First. For a first defense, that he denies each and every allegation in said complaint contained. Second. And for a second defense this defendant says that the derailment referred to in the third paragraph of the complaint did not occur through the negligence of this defendant or his servants, but through the unforeseen and unexpected act of certain malicious and ill-disposed persons, whose names this defendant is informed and believes are Peter Bruno, alias Dick Bruno, and Grant Bennett, in removing bolts and fastenings of the rails at the place where said derailment occurred, without the knowledge of this defendant or any of his servants, and notwithstanding due care and diligence on the part of this defendant in the operation and maintenance and inspection of said railway. Third. And for a third defense this defendant says that said plaintiff was permitted to enter upon and into the car of this defendant only as the agent and servant of this defendant, and was given free transportation upon the car of this defendant only on condition that, in so transporting the said plaintiff, said plaintiff should be at his own risk of loss or damage through personal injury received during such transportation."

The record shows that on the trial of the case the defendant, to sustain the second ground of defense stated in his answer—

"Offered in evidence an exemplification of the record of the court of general sessions, Berkeley county, state of South Carolina, duly authenticated, in the case of State of South Carolina v. Peter Bruno and Grant Bennett, showing the indictment, final conviction, and sentence of said Peter Bruno and Grant Bennett on the charge of murder of said Mason Parker on 28th November, 1891, near Lapson's, in Berkeley county, S. C., by feloniously breaking, injuring, removing, and destroying certain joints, plates, and bolts from the railway track of the South Carolina Railway Company, by reason of which a certain railway train was derailed and thrown from said track, and whereby the said Mason Parker was crushed, and received a mortal wound, of which mortal wound the said Mason Parker died; and thereupon plaintiff objected

to the introduction of the same on the ground that the evidence was irrelevant, and as being *res inter alios acta*, when his honor, the presiding judge, sustained the objection, and excluded the testimony. To all of which the defendant then and there, and before the jury had withdrawn from the bar, did except, and the court noted the exception."

An exception to this ruling of the trial judge is the basis of the first assignment of error.

An agreement between the defendant railway company, of the first part, and the Southern Express Company, of the second part, was also introduced by the defendant. So much of that agreement as appears to be relevant to the issues is stated in the record as follows:

"That whereas, the party of the first part desires that all express business conducted on and over its lines, as they now or hereafter may exist, shall be under the sole control and direction of the party of the second part, for the mutual benefit and account of the parties hereto, the revenue from which shall be apportioned as hereinafter defined and agreed; and whereas, the aim and object of this agreement is to promote mutual interests, and secure for the parties hereto the best obtainable results therefrom, each will co-operate fully with the other for the attainment of that end: Now, therefore, it is hereby agreed as follows: \* \* \* Eighth. The said party of the first part hereby recognizes as its employes all officers, agents, and servants of the party of the second part, while engaged in the business contemplated by the agreement, and will accord free transportation for them at their own risk. Ninth. Employes of the party of the second part shall be subject to the rules of the party of the first part, made for the government of its employes while on the trains; but said rules shall not conflict with the proper duties of said employes, or unnecessarily interfere with them in the discharge of their duties. \* \* \* Fourteenth. No responsibility shall attach to the party of the first part for any goods, money, or other articles that may be transported on or over its lines, for or in the custody of the party of the second part, except for losses of or damage to freights which may result from the neglect of the party of the first part, its agents or servants; provided, that no such responsibility shall attach to the party of the first part for freight or other matter on which the party of the first part receives no compensation."

At the conclusion of the evidence the court instructed the jury as follows:

"It is not necessary to decide whether the plaintiff, as messenger of the express company, had all the rights of a passenger on this train, or whether he was bound by the terms of the contract between the two companies, although he did not know of the contract, or whether he stood in the place of an employe of the railroad company. I charge you that if he was injured in this train by reason, perchance, of the negligence of the boss track minder and his gang, the railroad company is responsible to him, whether he was a passenger, or bound by the contract between the two companies, or was an employe of the railroad company. The boss track minder and his gang were not fellow servants of the plaintiff, if we treat him as an employe of the railroad company; and their negligence was not one of the risks he assumed, if he assumed any risks."

To this instruction the defendant excepted, and this is made the second and third grounds of assignments of error.

The fourth assignment of error is that the court erred in—

"Instructing the jury that in this case there was no burden of proof on either side, but the jury should come to their conclusion from all the facts and circumstances of the case. That the court erred in said instruction, inasmuch as, notwithstanding the granting of the first request to charge, this instruction impaired the force and meaning thereof, and was calculated to mislead the jury."

The instruction on which this assignment of error is based is shown by the record as follows:

"His honor, the presiding judge, further instructed the jury that in this case there was no burden of proof on either side, but that the jury should come to their conclusion from all the facts and circumstances in the case. To which instructions the defendant there and then, before the jury had withdrawn from the bar, excepted, and the court noted the exception."

In settling this bill of exceptions, the judge states that he has no doubt some such expression was used; that what he meant was that, both parties having offered proof as to the disputed facts, the question was as to the preponderance of evidence,—the burden having been accepted, and the evidence being intended to remove it. As he had not refused the first request to charge by defendant, he did not feel that he was misleading the jury. This first request was as follows:

"(1) That the foundation of the action is negligence, and the plaintiff, Pier-son, cannot recover from the defendant unless plaintiff proves, by the preponderance of the evidence, that the defendant has been guilty of negligence; that is to say, that, under the circumstances proved in this case, he has omitted to do what a prudently conducted railroad company would have done, or that he has done what a prudently conducted railroad company would not have done."

The record does not show that the instruction here complained of was given in the usual form, which is in writing, and in which it is apparent the other instructions were given. The record shows that the verdict of the jury was rendered more than 12 months before the bill of exceptions was settled, and the indefinite and uncertain character of this instruction is shown by the language of the presiding judge, that he has "no doubt some such expression was used," and states what he meant by it. If we apply with strictness rule 11 of this court, such an indefinite statement of the instruction should be rejected. The rule provides:

"When the error alleged is to the charge of the court, the assignment of error shall set out the part referred to totidem verbis, whether it be in instructions given or instructions refused. Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard, except at the request of the court, and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned." 21 C. C. A. cxil., 78 Fed. cxil.

But there is no real necessity for discussing this assignment of error, in view of the first instruction asked by the defendant and given by the court. If true, as the trial judge says, "no doubt some such expression was used," which counsel for the defendant insists was an instruction to the jury, and calculated to mislead it, the law is so clearly and correctly stated in the first instruction asked by the defendant and given by the court, and so completely covers the principle involved, that the jury could not have been misled as to the law. If there was error in the verbal, and, as appears to us, uncertain, expression of the court, to which exception is taken, it was corrected by the written instruction. This written instruction negatives the contention that the court erred in making a statement calculated to mislead the jury.

The fifth, sixth, and seventh assignments of error are based on the following instructions requested by the defendant, which the court refused to give as asked for, but gave as qualified by the court:

"The defendant further requested his honor, the presiding judge, to charge the jury as follows: 'That if the jury find from the evidence that the plaintiff was an express messenger on defendant's train, under a contract which was made between the express company, of which the said plaintiff was an agent, and the defendant, which provided that the plaintiff should be considered as an employé, officer, agent, or servant of the defendant, Chamberlain, and should be accorded free transportation at his own risk, then plaintiff cannot recover from defendant, and the jury must find for the defendant,'—which request his honor declined to give, except with this qualification, 'Unless the injury was caused by the negligence of an agent of defendant who was not a fellow servant of plaintiff,' to which refusal the defendant then and there, and before the jury had withdrawn from the bar, did except, and the court noted the exception. The defendant further requested his honor, the presiding judge, to charge the jury as follows: 'That, as between employer and employé, negligence on the part of the employer is not to be inferred from the existence, or occurrence of the accident which caused the injury complained of,'—which request his honor declined to give, to which refusal the defendant then and there, and before the jury had withdrawn from the bar, did except, and the court noted the exception. The defendant further requested his honor, the presiding judge, to charge the jury as follows: 'That an employer does not become an insurer of the life or safety of his employées, but the duty of the employer to the employé is to furnish and keep the machinery and appliances about which the employé is required to perform his work in a reasonably safe condition,'—which request his honor declined to give, to which refusal defendant excepted."

The action of the court in refusing to admit in evidence on behalf of the defendant the record of the conviction of Bruno and Bennett in the court of general sessions of Berkeley county, S. C., for the murder of Parker by removing and destroying the plates and bolts of the railroad company, was clearly correct. It was properly rejected as being *res inter alios acta*. This principle is so familiar and fixed in the law of evidence as to scarcely demand discussion. A few citations of authorities will be sufficient to show the correctness of the ruling of the court below. The plaintiff in the circuit court was not a party to, or interested in, the prosecution and conviction of Bruno and Bennett, and could not be bound or in any wise affected by the evidence or judgment in that case. The general doctrine on this subject is thus stated in 2 Black, Judgm. § 529:

"Since the parties to a criminal prosecution and those in a civil suit are necessarily different, and as the objects and results of the two proceedings, and the rules of evidence which apply to them, respectively, are equally diverse, it follows that the judgment in the former cannot be used by way of estoppel in the latter, save for the single purpose of proving its own existence, if that becomes a relevant fact."

In *Wood v. Davis*, 7 Cranch, 271, the supreme court held that the record of a judgment that a woman was born free was not conclusive evidence of the freedom of her children, in a suit by them against one not a party or privy to the defense in the mother's action. In an action of trespass by a marine in an exploring expedition, against the commander, for causing him to be whipped, the proceedings of a court-martial, acquitting the commander of the charge, were held not admissible in evidence. *Wilkes v. Dinsman*, 7 How. 89.

The second, third, fifth, sixth, and seventh assignments of error

will be considered together. They are all made on the theory that Pierson, the plaintiff in the court below, was bound by the contract between the railroad company and the express company; that he was on the railroad train by virtue of that contract; that by said contract he was regarded as an employé of the defendant, the railroad company; and that by said contract he was accorded free transportation at his own risk. The position taken by counsel for the railroad company, and insisted upon in the instructions asked on behalf of the company, was that the plaintiff was not entitled to recover, even though the evidence showed that the injury which he suffered was caused by the negligence of an agent of the defendant who was not a fellow servant of the plaintiff. The learned judge of the trial court held (what we regard as a correct announcement of the law) that, if the plaintiff was injured by reason of the negligence of the boss track minder and his gang, the railroad company was responsible to him, whether he was regarded as a passenger, or was bound by the contract between the two companies, or was an employé of the railroad company; that the boss track minder and his gang were not fellow servants of the plaintiff, if he was to be treated as an employé of the railroad company; and that their negligence was not one of the risks he assumed, if he assumed any risks. The discussion of this feature of the case presents the question: Was the plaintiff below, as a messenger of the express company, bound by the contract between the railroad company and the express company to assume all risks to life and limb to which he was exposed in performing his duties on the train, as an express messenger? He was not a party to the contract, never ratified it, and in his testimony, when asked if he knew of this provision of the contract, "that the said parties of the first part hereby recognize as its employés all officers, agents, and servants of the second part," etc., and you were accorded free transportation at your own risk?" answered, "If I had known that, I wouldn't have gone." The authorities cited by defendant's counsel to sustain the contention that the plaintiff was bound by the contract between the railroad and the express company are based on the theory that the party affected by the contract had knowledge of its provisions, and acquiesced in its terms. *Wiggins Ferry Co. v. Ohio & M. Ry. Co.*, 142 U. S. 396, 12 Sup. Ct. 188; 2 Pom. Eq. Jur. § 965. The view of the trial judge was that notwithstanding the plaintiff, under the contract between the railroad company and the express company, should be considered an employé of the railroad company, and accorded free transportation at his own risk, yet the railroad company was liable if the injury to the plaintiff was caused by the negligence of an agent of the defendant who was not a fellow servant of the plaintiff. That the plaintiff, an express messenger, was not a fellow servant of the track minder and those under him, is not questioned. If it be conceded, as claimed by the railroad company, that the contract between it and the express company accorded the plaintiff free transportation at his own risk, yet it is well established that such a contract will not relieve the railroad from responsibility for an injury resulting from the negligence of its agents. One of the earliest decisions of

the supreme court on this question is *Railroad Co. v. Derby*, 14 How. 468. In this case the plaintiff below was president of another company, and a stockholder in the road on which he was riding. He was on the road by invitation of the president of the company,—not in the usual passenger cars, but on a small locomotive car used for the convenience of the officers of the company,—and paid no fare for his transportation. The railroad company defended on the ground that no cause of action can arise to any person by reason of the occurrence of an unintentional injury while he is receiving acts of kindness which spring from mere social relations, and as there was no contract between the parties, express or implied, the law would raise no duty as between them, for the neglect of which an action can be sustained. The supreme court said:

"The liability of the defendants below for the negligent and injurious act of their servant is not necessarily founded on any contract or privity between parties, nor affected by any social relation, or otherwise, which they bore to each other."

*Railroad Co. v. Lockwood*, 17 Wall. 357, is a leading case on this subject. The court there held:

"(1) That a common carrier cannot lawfully stipulate for exemption from responsibility, when such exemption is not just in the eye of the law. (2) That it is not just and reasonable, in the eye of the law, for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants. (3) That these rules apply both to carriers of goods and carriers of passengers for hire, and with a special force to the latter. (4) That a drover traveling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire."

In *Waterbury v. Railroad Co.*, 17 Fed. 671, the doctrine is thus stated (syllabus):

"The right which a passenger by railway has to be carried safely does not depend on his having made a contract, but the fact of his being there creates a duty on the part of the company to carry him safely. It suffices to enable him to maintain an action for negligence if he was being carried by the railroad company voluntarily, although gratuitously, and as a matter of favor to him."

The principles recognized in the cases we have cited, and in numerous other decisions, were correctly applied by the judge who presided in the court below. The plaintiff Pierson, as an express messenger, was rightfully on the train of the defendant, in the performance of duties which the railroad company had, by its contract with the express company, agreed that he should perform, and which, the contract states, were "for the mutual benefit and account of the parties thereto." Whatever his relation to the railroad company,—whether that of a passenger or employé,—he had a right to maintain an action for any injuries he suffered by reason of the negligence of the defendant company, its agents and servants.

The sixth and seventh assignments of error are based on the refusal of the court to give the following instructions asked by the defendant:

In declining to instruct the jury as follows: "That, as between employer and employé, negligence on the part of the employer is not to be inferred from the existence or occurrence of the accident which caused the injury complained of." In declining to instruct the jury as follows: "That an

employer does not become an insurer of the life or safety of his employes, but the duty of the employer to the employe is to furnish and keep the machinery and appliances about which the employe is required to perform his work in a reasonably safe condition."

These requests are mere abstract propositions of law correctly stated, but we fail to see the relevancy when applied to the evidence in this case. The court below correctly stated the law to the jury. The law, as stated, properly applied to the evidence. We find no error in the rulings of the court below, and the judgment of that court is affirmed.

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CENTRAL TRUST CO. OF NEW YORK et al. v. INGERSOLL.

(Circuit Court of Appeals, Sixth Circuit. May 16, 1898.)

**1. CREDITORS' BILL—ATTORNEY'S FEES.**

After the sale of railroad property under a mortgage foreclosure suit consolidated with a creditors' bill, an order of reference was made to ascertain what property was not covered by the mortgage. In this order the special master was directed to notify appellee as counsel for the unsecured creditors. *Held*, that such order, made in the presence of counsel for other unsecured creditors, was sufficient to justify him in representing the creditors in the proceeding before the master, and to entitle him to fees out of the funds made, subject to the payment of the unsecured creditors.

**2. SAME.**

The fact that the parties opposing such allowance owned a very large proportion of the unsecured debts allowed out of such fund was of no effect, where such claims were not filed until after the special master had ascertained and reported the property subject to the unsecured debts. Nor was it material that such opposing parties had bought or owned part of the debt which the counsel represented.

**3. ATTORNEY'S FEES—REVIEW.**

Where an allowance of \$2,500, as attorney's fees, was recommended by the special master, but the sum was increased by the court to \$3,300, *held*, that the allowance, though liberal, would not be disturbed on appeal.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

This was a creditors' bill by Samuel Thomas against the East Tennessee, Virginia & Georgia Railway Company, which suit was consolidated with the foreclosure suits of the Central Trust Company of New York against the same defendant. Henry H. Ingersoll filed an intervening petition for attorney's fees. From the decree allowing such compensation, this appeal is taken.

The record is a voluminous one in this case, but the facts material to the disposition of the present appeal are, briefly, these: Samuel Thomas filed his bill against the East Tennessee, Virginia & Georgia Railway Company, June 24, 1892, in which he claimed that he was a creditor of that company, owning a floating debt of over \$400,000, and alleged, also, that he was a large stockholder. The bill was brought as a creditors' bill for all those who chose to come in. It alleged the hopeless insolvency of the railway company, and that it was liable to be seized for debt, and the railway system dismembered thereby, and the value of the property materially impaired, and asked for a receiver for the railroad property. Receivers were appointed under this bill, and took possession of all the defendant's railway and other property, and operated the road. Subsequently, on the 3d day of March, 1893, the Central Trust Company of New York filed two bills in the same court to

foreclose mortgages on the property of the East Tennessee, Virginia & Georgia Railway Company. The suit of Thomas was consolidated with these suits for foreclosure of the mortgages, and the cause proceeded to judgment, and the property was sold by order of court. At the sale of the property under the decree it was bought in by the committee of reorganization, and the sale confirmed to a new corporation, called the "Southern Railway Company," on the 14th of July, 1894. The suit of Thomas was not prosecuted in the interest of the general unsecured creditors, and nothing seems to have been done in that direction. That bill seems to have been brought and controlled solely to have a receiver appointed, and to prevent waste and the depreciation of the property, and in the interest of the mortgagees, and the compensation of counsel who filed that bill was paid out of the purchase money of the mortgaged property. Prior to the sale of the railway property a number of creditors had intervened in the consolidated cause, and, upon the suggestion of counsel for the unsecured debts that there was property in the hands of the receiver which was not covered by the mortgages, the court, on the day on which the sale of the mortgaged property was confirmed, made an order of reference to Joshua W. Caldwell, Esq., as special master, with direction to ascertain and report what property was not covered by the mortgages and the value of said property, both real and personal. In this order the special master was directed, after notifying W. A. Henderson, counsel for the receivers, and H. H. Ingersoll, counsel for the creditors not secured by mortgage, to hear any proofs offered by either party, and report the result of the investigation. The special master under this reference made investigation, and reported a considerable amount of real and personal estate which had not been covered by either of the mortgages foreclosed, and included therein a short road, about six miles in length, and known as the Tennessee Valley Railroad. The par of the stocks and bonds thus reported was a very large amount, but it was really of little value. The property which was thus reported and subsequently made subject to the unsecured debts was sold, and realized about \$50,000. On the 17th of September, 1895, the appellee filed an intervening petition, asking compensation for his services as attorney out of the fund made subject to the payment of the unsecured creditors. This intervening petition was answered by the East Tennessee, Virginia & Georgia Railway Company and the Central Trust Company of New York, in which it was denied that the appellee was entitled to any compensation out of the fund. The court on the same day the petition was filed referred it to H. H. Taylor, as special master, to hear proof and report on the matters of the petition,—whether or not he was entitled to any compensation, and, if so, the amount thereof. The special master, Taylor, heard evidence, and reported on July 3, 1896, that the appellee was entitled to compensation, and fixed it at \$2,500. Exceptions were filed to this report by the appellee, and also by the Central Trust Company and the Southern Railway Company and C. H. Coster. The several exceptions were subsequently heard by the court, and the exceptions of the Central Trust Company and others were overruled, and the exception as to the amount of the allowance to appellee sustained, and his compensation increased to \$3,300, and that sum allowed him. From this decree allowing said compensation the present appeal has been taken.

H. L. Welcker, for appellants.

T. L. Webb, for appellee.

Before HARLAN, Circuit Justice, TAFT, Circuit Judge, and BARR, District Judge.

BARR, District Judge, after stating the facts as above, delivered the opinion of the court.

The assignment of error raises two questions. It is insisted—First, that the appellee, Ingersoll, is not entitled to any compensation out of the general fund; and, second, if he is entitled to compensation, the compensation allowed is excessive. It seems to us that the order directing the special master, Caldwell, to notify the petitioner, Inger-

soll, as counsel for the creditors not secured by the mortgages, was a recognition by the court of his representative character; and, as it appears that this order was made in the presence of counsel for other unsecured creditors, we think it was sufficient to authorize petitioner, Ingersoll, in the absence of objections from other counsel, to go on and represent the unsecured creditors before the special master, which he did. There is much evidence taken before the special master showing what was done and what was not done by the petitioner, Ingersoll; and the result, we think, is to show that Caldwell, the special master, was himself exceedingly familiar with the whole matter which he was directed to investigate, and that he did some of the work which might have been properly done by counsel, but that Ingersoll was the representative counsel before the special master, and argued the exceptions upon the report, and prepared the necessary orders to subject the property. During this reference the appellants had not filed their claims as unsecured creditors; and the appellants, especially the Southern Railway Company, were claiming as purchasers adversely to the interest of the unsecured creditors. This being true, he is entitled to a reasonable compensation to be paid out of the fund which has been subjected to the payment of the unsecured creditors. *Trustees v. Greenough*, 105 U. S. 527.

In regard to the amount of the compensation allowed, it would seem from the record before us to be quite liberal; but as the special master reported \$2,500, which was the smallest amount proven by any of the witnesses before him, and as the learned trial judge has increased the same to \$3,300, we think we should not disturb it. The supreme court, by Justice Bradley, in the case of *Trustees v. Greenough*, above, said, in speaking of such allowances (page 537):

"The allowances made for these purposes we have examined, and do not find anything therein seriously objectionable. The court below should have considerable latitude of discretion on the subject, as it has far better means of knowing what is just and reasonable than an appellate court can have."

The earnest contention of appellants, that the unsecured debts which they own embrace nearly all of the debt allowed as unsecured debts to participate in the fund arising from the property reported by Caldwell as not being covered by the mortgages, and that, therefore, no allowance should be made out of the fund, should not, we think, have weight. It is true that it appears in the record that over \$15,253,000 was allowed as unsecured debts against this fund, and that a very large amount of this—\$15,000,000 or over—is owned by the appellants or those in their interest; yet, as almost all of this large debt is composed of mortgage bonds and came in under the supplemental bill filed by the Southern Railway Company, Coster, and others, January 30, 1896, and after the special master, Caldwell, had ascertained and reported the property subject to the unsecured debts, we think the ownership of this large amount of the unsecured debts should not affect the question. It is quite clear that the owners of none of the bonds represented by the trust company and none of the bonds or debts owned or represented by the Southern Railway Company and its associates took part in ascertaining and subjecting the property which was reported and subjected to the unsecured debts;

nor should the fact that the appellant C. H. Coster has bought or owns part of the debt which the petitioner represented make his compensation any the less. The decree of the circuit court should be affirmed, and it is so ordered.

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BOWEN v. NEEDLES NAT. BANK (MURPHY, Intervener).

(Circuit Court, S. D. California. May 2, 1898.)

No. 652.

1. CHECKS—NONPRESENTMENT—EFFECT.

Default in presenting a check, as distinguished from a bill of exchange, is excused by absence of prejudice to the drawer.

2. SAME—DISTINGUISHMENT FROM BILL OF EXCHANGE—PARTICULAR INSTRUMENT.

An instrument drawn by the cashier of a national bank in California upon a national bank in New York, in the following form: "Pay to the order of ———, ——— dollars,"—*held* to be a check, not a bill of exchange.

3. NATIONAL BANK—POWERS—GUARANTY OF DEBT.

An agreement by a national bank, to guaranty the payment of a debt of a third party, solely for his benefit, is ultra vires.

4. GUARANTY—WHAT CONSTITUTES—PARTICULAR CASE.

A promise by a bank to pay any checks that may be drawn upon it by a certain person is not a certification of such checks, but a guaranty.

5. CHECKS—CERTIFICATION WITHOUT FUNDS—LIABILITY.

A bank certifying a check without funds is not liable except to a bona fide holder.

6. NATIONAL BANK—ACCOMMODATION INDORSEMENT.

Accommodation indorsements or acceptances by a national bank are ultra vires, and void in the hands of holders with notice.

7. SAME—ULTRA VIRES—ESTOPPEL TO RAISE DEFENSE.

A bank is not estopped to deny its authority to make an ultra vires promise, where it has not received the fruits of the transaction, and where the promisee had notice of the facts giving rise to the illegality.

8. ILLEGAL CONTRACTS—MEANS OF EXECUTION.

Negotiable instruments executed as a means of carrying out an illegal contract are void in the hands of holders with notice.

9. NATIONAL BANK—ULTRA VIRES CONTRACT.

The defendant, a national bank in California, agreed with the plaintiff in New York to pay any checks drawn upon it by one B. Upon the faith of this promise, plaintiff honored several such checks, which were paid in the following manner: Defendant made its cashier's checks upon the C. Nat. Bank, in New York, at which bank it had no funds, and sent them to plaintiff, at the same time sending the C. Nat. Bank drafts on B. to cover its checks. Later, certain of these cashier's checks proved worthless, the drafts not being collectible, and were not presented to the C. Nat. Bank; but no prejudice to defendant by reason of such nonpresentment was shown. *Held*, the promise of the defendant bank was ultra vires, and void as to the plaintiff, he being chargeable, under the circumstances, with notice of the facts giving rise to the illegality.

This was an action at law by Abner T. Bowen against the Needles National Bank to recover the amount of certain checks. For decisions on motions, see 76 Fed. 176, 79 Fed. 49.

Works & Lee, for plaintiff.

Gardiner, Harris & Rodman and Henry C. Dillon, for defendant.

WELLBORN, District Judge. In this case there was waiver of jury, and trial by the court. The action was originally brought against the Needles National Bank, May 8, 1895. Some months prior thereto said bank had become insolvent, and was, by the controller of the currency, placed in the hands of a receiver, Daniel Murphy, who intervened in this action, August 22, 1896. Plaintiff unites in his complaint four causes of action, each of the first three stated under three separate counts, so drawn as to meet the various legal aspects of the case. The first cause of action is an instrument in writing, as follows:

"N. N. B.	The Needles National Bank.	No. 2,307.
"Duplicate	\$8,775.	Needles, California, Sept. 10, 1894.
"Unpaid.		
"Pay to the order of A. T. Bowen and Co.		\$8,775.00
eighty-seven hundred and seventy-five and no/100 dollars.		
	"W. S. Greenlee,	4
		7
	"Cashier.	3
"To Chase National Bank,		
"New York, N. Y."		

Said instrument, termed in the complaint a "bill of exchange," is, accurately speaking, as shown later on, a check; and, since the distinction indicated is a material one, I shall hereafter, in alluding to said instrument, observe its appropriate designation.

The second and third causes of action are in all respects the same as the first, except that the checks therein mentioned were drawn, respectively, September 12, 1894, for \$8,300, and September 17, 1894, for \$5,364.

The fourth cause of action is thus stated in the complaint:

"That on the 25th day of April, 1894, the plaintiff having theretofore advanced moneys to one Isaac E. Blake upon checks drawn by said Blake upon the plaintiff as A. T. Bowen & Co., and not being willing to advance further sums without some guaranty from the defendant, the said defendant, on the said 25th day of April, 1894, in writing, promised and agreed with plaintiff that it would pay all checks signed by the said Blake and drawn upon the plaintiff as A. T. Bowen & Co. That, acting upon the said written promise of the defendant, the plaintiff thereafter, upon checks drawn by the said Blake for the following sums, and upon the following dates, respectively, to wit, September 4, 1894, September 5, 1894, September 10, 1894, and September 11, 1894, for the sums of \$8,750, \$8,300, \$5,300, and \$3,500, respectively, advanced to the said Blake the said sums of money upon the dates mentioned, and thereupon presented to the defendant the said checks for said sums, and upon receipt by said bank of the said three first-named checks the defendant issued its three several drafts for the sums above mentioned, payable to the order of this plaintiff, upon the Chase National Bank of New York, and delivered the same to this plaintiff; but that at the time said drafts were drawn and delivered to the plaintiff, and ever since, there has been no money on deposit or in the hands of the said Chase National Bank out of which said drafts could be paid, and the same have become dishonored, and remain wholly due and unpaid. That the said sums of money, respectively, not having been paid by and through said drafts drawn by the defendant, the plaintiff thereupon demanded payment of the defendant of said sums, including the said sum of \$3,500, but the defendant has wholly failed and refused to pay said sums or either of them, or any part thereof, and the whole thereof is now wholly due and unpaid."

The defenses relied on, and stated in the order in which it will be convenient for me to consider them, are, substantially: First. A conspiracy between Blake and the plaintiff to defraud the defendant through certain false representations and practices, particularly set forth in the complaint in intervention. Second. That before the checks sued on were drawn it was agreed between plaintiff, defendant, and the said Blake that said checks were to be paid by counterdrafts on Blake in New York City, and not otherwise; and that the defendant was to be saved and kept free from harm by this arrangement. Third. That on September 12, 1894, said Blake gave the note of himself and wife to plaintiff for \$37,100, and that plaintiff accepted said note in full payment and satisfaction of all the demands sued on. Fourth. That the checks mentioned in the first three causes of action, and the written promise mentioned in the fourth, were without consideration. Fifth. That said checks were never presented to the drawee for acceptance or payment. Sixth. That said written promise was, in effect, a guaranty of the payment of the debt of a third person, made solely for his benefit, and therefore ultra vires; or, if said promise be considered an original undertaking, still Blake, as was known to plaintiff, had no funds on deposit with the defendant to pay his drafts, and therefore said promise, viewed as an original undertaking, was made without authority, and is void; and that, since the checks mentioned in the first three causes of action were drawn in attempted execution of said promise, without funds, and solely for the benefit of Blake, they likewise are void. The intervener filed a cross complaint, but abandoned it at the trial. Defendant also filed a cross complaint, claiming balance of \$69.45, and asks judgment on the same.

Some of the facts of the case are admitted; others are in dispute. As to the latter, the evidence is voluminous, and I shall not undertake to review it, but simply state my findings therefrom, together with the admissions of the pleadings. The material facts thus appearing are these: Defendant drew the checks sued on in settlement of drafts for corresponding amounts drawn by Blake on itself, and payable to the order of A. T. Bowen & Co., the name under which plaintiff conducted a banking business in the city of New York. Plaintiff, as he testifies, advanced to Blake the various amounts of money called for by said drafts on or about their respective dates, to wit, the 4th, 5th, and 10th of September. When Blake drew said drafts, he had no funds on deposit with the defendant for their payment. The checks sued on were not paid by the drawee, nor were they presented for payment. Defendant did not, at the time or subsequent to the dates of said checks, have funds with the Chase National Bank to meet them, but at the time of forwarding said checks to plaintiff also drew and forwarded to the Chase National Bank drafts for corresponding amounts on said Blake. From the promises of Blake and his previous compliances therewith defendant had reason to believe that said drafts on him would be paid, and that the Chase National Bank, thus provided with funds, would honor the checks issued to plaintiff. The defendant has suffered no loss or injury from the failure to present said checks for payment. The

checks sued on were drawn pursuant to a written promise of defendant, referred to in the fourth cause of action, and evidenced by the following telegrams and letters:

"Received at the Western Union Building, 195 Broadway, N. Y., April 25, 1894. Dated Needles, Calif., 25.

"To A. T. Bowen & Co., 71 Broadway, New York: We will pay checks signed Isaac E. Blake by W. L. Beardsley.

"Needles National Bank."

"The Needles National Bank, Needles, California, April 25th, 1894.

"A. T. Bowen & Co., New York City—Gentlemen: We hereby beg leave to confirm our telegram to you of even date, 'We will pay checks signed Isaac E. Blake by W. L. Beardsley.' signed 'Needles National Bank.'

"Yours, truly,

W. S. Greenlee, Cashier."

"The Needles National Bank, Needles, Cal., August 22nd, 1894.

"A. T. Bowen & Co., New York City—Gentlemen: I am in receipt of telegraph communications from Chase National Bank that our draft No. 2,200 for \$7,500, payable to the order of Bowen & Co., has been refused payment until advices received from us guarantying the amount received. I immediately guarantied the amount to be \$7,500, and I trust I have put you to no great inconvenience. It is simply a clerical error, which happens to us all some time or other, and in future we will endeavor to be more careful. I have telegraphed you to please pardon our error, and that we wish you to still continue your friendly relations with Mr. Blake and Mr. Beardsley, and that we guaranty absolutely the payment of Mr. Blake's checks as heretofore. I am truly sorry the mistake has occurred, and can venture the assertion that it will not happen again. The Keystone Mine has just uncovered a large body of high-grade ore, and, if the vein continues as it is now for the next thirty days, it will make a big showing. Again asking your pardon, I remain, with best wishes,

"Very truly yours,

W. S. Greenlee, Cashier."

Plaintiff's advances to Blake commenced in January, 1894, and continued down to September following. During this period, many checks, aggregating thousands of dollars, were drawn by Blake on the defendant, payable to the order of the plaintiff, and checks issued therefor by the defendant on the Chase National Bank. The means by which defendant supplied the Chase National Bank with funds to meet said bills of exchange were, as hereinbefore stated, drafts drawn by defendant, through said National Bank, on Blake. All of said checks and drafts down to and excepting those specifically mentioned in said complaint were duly honored and paid. The first communication between plaintiff and Greenlee, cashier of the defendant, probably about the time the first check was drawn, was a letter dated January 22, 1894, stating the inclosure, and that there would be no charge for remitting. On February 10, 1894, another check of \$1,900 was forwarded by plaintiff to the defendant, with the added inquiry:

"Please give us what information you can relative to Mr. Isaac E. Blake's financial standing. Is he always prompt in meeting his financial obligations, and absolutely reliable in every way? Is he careful, capable, conservative, or the opposite?"

To this inquiry the bank, over the signature of its president, responded as follows:

"Replying to your kind letter of inquiry regarding Mr. I. E. Blake, I am pleased to state that he has been one of the foremost men of his city [Denver]

for many years, and his reputation for credit and absolute reliability is unquestioned."

Then follows the statement of Blake's investments "in this vicinity," which were likely to prove a great fortune, etc. On the 4th of August, defendant's cashier, by letter, gives a renewed assurance of Blake's financial standing and credit, with a reference to the particular properties in which he was interested, and which promised large returns. On September 5th the plaintiff wrote to the bank as follows:

"Do the drafts drawn by Mr. Blake represent the amount of products of the Keystone Mine or the receipts of Nevada Southern Railroad, and are the amounts of money deposited with you to meet them before drafts are drawn, or are they drawn on you as they wish?"

The bank responds to this inquiry, September 12th, as follows:

"I can say this: That the money is deposited in New York to cover all checks drawn on this bank by Mr. Blake, and Mr. Blake's checks will be paid by this bank as heretofore."

On September 12, 1894, Blake executed to the plaintiff, in settlement of the advances theretofore made to Blake by plaintiff, the note of himself and Agnes N. Blake, as shown by the following agreement:

"New York, Sept. 12, 1894.

"Whereas, Isaac E. Blake and Agnes N. Blake have given their note dated Sept. 12th, 1894, for thirty-seven thousand one hundred dollars (\$37,100.00), and Isaac E. Blake has given his note for one hundred seventy-seven and  $\frac{52}{100}$  dollars (\$177.52), being the amount of the following:

W. L. & M. E. Beardsley note (balance).....	\$ 296 73
W. J. Mann note.....	606 90
Isaac E. Blake's draft Needles Nat. Bk. at 9/1/94.....	25 00
Isaac E. Blake's draft Needles Nat. Bk. at 9/4/94.....	8,750 00
Isaac E. Blake's draft Needles Nat. Bk. at 9/5/94.....	8,300 00
Isaac E. Blake's draft Needles Nat. Bk. at 9/10/94.....	5,300 00
Isaac E. Blake's draft Needles Nat. Bk. at 9/11/94.....	3,500 00
I. E. Blake, two notes dated 5/15/94, \$5,000.00 each.....	10,195 00
Overdraft on account.....	303 89

\$37,277 52

"It is understood and agreed that A. T. Bowen & Co. are to have the privilege of holding drafts that may be issued by the Needles National Bank (for drafts on said bank drawn by I. E. Blake) to retain all the security possible on said claims, but, when the amount of said notes are paid, then such drafts are to be surrendered to said Blake.

"Isaac E. Blake."

"N. Y., Sept. 12th, 1894.

"This certifies that Isaac E. Blake and Agnes N. Blake have abandoned and given up their legal residence in Colorado, and are now residents of New York City and state of New York.

Isaac E. Blake."

If defendant is not liable on any of the causes of action set up in the complaint, then there is a balance of \$69.45 due the defendant from the plaintiff.

The conclusions which I have reached as to the several defenses relied on are as follows:

1. A large amount of testimony has been introduced for the avowed purpose of showing collusion between the plaintiff and Blake to defraud the defendant; but the testimony, I think, is insufficient

for that purpose. Besides, so far as concerns the statement of plaintiff to the Bradstreet Company, touching the value of the stock of the Utah Nevada Company, and the values of the properties owned by said company, the defendant's witness Mr. Greenlee testified positively that that statement did not influence the defendant in the issuance of the checks sued on.

2. The evidence fails to show any agreement between plaintiff, defendant, and Blake that Blake's checks were to be paid by means of counterchecks on Blake in New York City, and defendant thus saved harmless.

3. The notes of Isaac E. Blake and Agnes N. Blake executed to plaintiff September 12, 1894, were not given in satisfaction of the alleged liabilities sued on. The agreement of that date, signed by Isaac E. Blake, expressly provides to the contrary, as follows:

"It is understood and agreed that A. T. Bowen & Co. are to have the privilege of holding drafts that may be issued by the Needles National Bank (for drafts on said bank drawn by I. E. Blake) to retain all the security possible on said claims, but, when the amount of said notes are paid, then such drafts are to be surrendered to said Blake."

4. The advances of money by plaintiff to Blake, while it is true the defendant received no part of the same, were sufficient consideration for the checks sued on, and also for the written promise, which is the basis of plaintiff's fourth cause of action. The law is too well settled to require any citation of authority that detriment to the promisee, as well as benefit to the promisor, is sufficient consideration to support a contract.

5. Whether or not said instruments ought to have been presented for payment depends, it seems to me, under the peculiar facts of this case, upon the question whether or not said instruments are to be classified as checks or bills of exchange. While, according to some authorities (1 Daniel, Neg. Inst. § 1567; Civ. Code Cal. § 3254), checks are a species of bills, yet, in this opinion, for the purpose of convenient and clear statement only, I shall, as do some of the text writers (1 Morse, Banks, § 380), treat the check as an independent and distinct instrument from the bill of exchange. While, perhaps, an occasional case may be found holding otherwise, the great weight of authority is to the effect that want of prejudice or injury to the drawer of a bill of exchange never excuses default in making presentment. 2 Daniel, Neg. Inst. p. 207, § 1170. The rule in California as to what does excuse such default is as follows:

"Presentment of a bill of exchange for acceptance or payment, and notice of its dishonor, are excused as to the drawer, if he forbids the drawee to accept, or the acceptor to pay the bill, or if, at the time of drawing, he had no reason to believe that the drawee would accept or pay the same." Civ. Code Cal. § 3220.

"Among the circumstances under which the drawer has a right to expect that his bill will be honored, and consequently to require strict presentment and notice, may be named: \* \* \* Where a third party has promised to provide the drawee with funds." 2 Daniel, Neg. Inst. § 1076.

See, also, *Id.* §§ 1074-1078. The last paragraph of the latter section is as follows:

"But the bona fide expectation of the drawer, based upon his relations with the drawee, and the provision he has made, or intends to make, and does

make, are, it seems to us, the circumstances to be regarded. If he has no funds in the drawee's hands when he draws, and yet provides them before presentment, he should have notice. If he had funds when he drew, but withdrew them before presentment, he forfeits the right to it. If the drawer has any arrangement by which, at the time the bill is presented, he has a right to expect it to be honored, we should say he should have demand and notice; for it would be presumed that such arrangement was contemplated when he drew."

*Lafitte v. Slatter*, 6 Bing. 623, s. c. 31 Rev. Reports, 510, is strongly in point. In that case it was held that:

"The drawer of a dishonored bill is entitled to notice of dishonor, although he knows the bill will not be paid by the acceptor; provided he has reason to expect it will be paid by another person, or has a remedy over against that person."

See, also, *Tied. Com. Paper*, p. 615, § 355, note 1.

The rule enunciated in the above quotations, and the reasons therefor, have been clearly stated as follows:

"It is conceded on both sides that there were no funds in the hands of the drawee. The fact of drawing without funds, in the absence of other proof to explain it, is a fraud, for the bill is negotiated under the faith that the drawer has or will place effects in the hands of the drawee to meet the bill; and if he had no effects in the hands of the drawer, and knew that none would be placed there, and that the drawee would not meet the bill, the whole transaction is deemed fraudulent on the part of the drawer. Another, but subordinate, reason is given for this exception,—that the drawer cannot, in such case, be in any way injured for want of notice of nonpayment. But it is the fraud in drawing and delivering such a bill upon which the exception substantially rests, for bankruptcy or notorious insolvency of the drawee, or proof that in fact no injury resulted from want of notice, will not excuse the holder from giving the drawer notice. Notice, therefore, under this exception, is to be dispensed with in those cases where the drawer had no reason to expect, when he drew the bill, that it would be paid. Thus, in the case of *Rucker v. Hiller*, 16 East, 43, it was laid down that the drawer is entitled to notice if he have reasonable ground to expect the bill will be paid, although he have no assets in the acceptor's hands. So, in the case of *Lafitte v. Slatter*, 6 Bing. 623, in which the defendant drew a bill on one *Tebbs*, under the expectation that a third person, not a party to the bill, who owed him, would provide funds for its payment, but neglected to do so, it was held that the defendant was entitled to notice of nonpayment. Indeed, the rule is too well settled, both by English and American cases, to admit of question, that if the drawer has reasonable grounds to expect that the drawee will receive, through the transactions of the drawer, or from some one else, funds to meet the bill, although the drawer had no assets in the hands of the drawee, the drawer is, notwithstanding, entitled to notice of nonpayment. 2 *Smith, Lead. Cas.* (Hare & W. Notes) 55." *Miser v. Trovinger's Ex'rs*, 7 Ohio St. 286.

See, also, *French's Ex'x v. Bank*, 4 Cranch, 141, *Dickins v. Beal*, 10 Pet. 572, and *McRae v. Rhodes*, 22 Ark. 315.

With reference to checks, however, the rule is quite different, and is thus declared in California:

"A check is subject to all the provisions of this Code concerning bills of exchange, except that: (1) The drawer and indorsers are exonerated by delay in presentment, only to the extent of the injury which they suffer thereby.  
\* \* \* Civ. Code Cal. § 3255.

This rule as to checks is elsewhere stated as follows:

"But there is this difference between bills and checks as to the consequences of negligence or delay in demand and notice: The failure to make a prompt presentment on the day of maturity, and to give promptly the notice of dis-

honor, in the case of bills, will discharge the drawer and indorsers, even though they have not suffered in any wise by the delay or neglect; but in the case of checks the drawer is not discharged by such neglect or delay, if he has not suffered any injury in consequence of it." Tied. Com. Paper, p. 723, § 442.

See, also, 2 Daniel, Neg. Inst. §§ 1587, 1588.

Thus it will be seen that the vital question on this branch of the case is whether or not the instruments sued on in the first three causes of action are checks; for, if checks, failure to present would be excused, because no injury or loss resulted therefrom. If, however, they were not checks, but bills of exchange, default in presentment would not be excused; for, although no injury or loss resulted from the failure to present, yet when the instruments were drawn the defendant had reason to believe that they would be paid. In California a check is defined thus:

"A check is a bill of exchange drawn upon a bank or banker, or a person described as such upon the face thereof, and payable on demand, without interest." Civ. Code Cal. § 3254.

The definition given by one of the text writers already mentioned is as follows:

"A check may be defined to be a draft or order having essentially the characteristics of a bill of exchange, and differing from the bill (1) in being drawn on a bank or banker, (2) apparently and presumptively against a deposit of funds, and (3) payable on demand without grace. The attempt to define checks by comparing them with bills of exchange is frequently criticised as furnishing an incomplete definition. But the definition given in the text is sufficient to point out the essential characteristics of a check, without requiring a second discussion of those principles which are common to both bills and checks; while the points of differentiation between the two kinds of paper are more clearly and prominently set forth." Tied. Com. Paper, § 430.

Another definition is as follows:

"A check is (1) a draft or order (2) upon a bank or banking house, (3) purporting to be drawn upon a deposit of funds (4) for the payment, at all events, of a certain sum of money (5) to a certain person therein named, or to him or his order, or to bearer, and (6) payable instantly on demand. \* \* \* Any instrument fulfilling the above description may, we think, be safely denominated a bank check; and the definition given is sustained by many authorities, though not in the language of the text. Writers upon negotiable instruments have differed in their definitions of this species of commercial paper, some falling short of giving all its distinguishing qualities, and some ascribing to it qualities which it is not absolutely necessary that it should possess. And there is none which can be safely relied on as a guide in answering the question, is this paper a check?" 2 Daniel, Neg. Inst. § 1566.

The same author, elaborating this definition, says further:

"Sixthly, a check is payable instantly on demand. This is, as we conceive, the touchstone by which a check is tested. Usually no time of payment is expressed upon its face, but all commercial instruments in which no time of payment is expressed are understood to be, and impliedly are, payable on demand; and, when so payable by implication or in express terms, they are payable instantly, without the allowance of grace, which pertains to those payable on a particular day. The whole theory and use of a check points to its immediate payability as its distinguishing feature, and its name imports it. A person deposits money with his bank or banker, where it is subject at any time to his order. By an order he appropriates so much of it to another person, and the bank or banker, in consideration of its temporary

use of the money, agrees to pay it in whole or in parcels, to the depositor's order, when demanded. But he does not agree to contract to pay at a future day by acceptance, and the depositor cannot require it." 2 Daniel, Neg. Inst. § 1572.

The two chief characteristics of checks are found in the instruments here sued on. They are drawn, and purport to be drawn, on a bank; and, in the next place, are payable instantly, on demand. They do not specify on their face the times of payment; but when this is the case the instrument is presumed to be payable on demand. Tied. Com. Paper, § 24; 1 Daniel, Neg. Inst. § 599; 2 Daniel, Neg. Inst. § 1572. The fact that they are payable in another state than the one in which they are drawn does not change their character as checks. 1 Morse, Banks, § 375. A draft drawn in one state on a bank in another is nevertheless a check, and, in point of fact, checks are very much used in the United States in transmitting money from one state to another. 2 Daniel, Neg. Inst. § 1567. My conclusion is that the instruments sued on possess the characteristics of, and are, checks, and that, inasmuch as the defendant was in no way injured or prejudiced by plaintiff's failure to present said checks, presentment is excused. See, also, *Bull v. Bank*, 123 U. S. 105, 8 Sup. Ct. 62; *Marbourg v. Brinkman*, 23 Mo. App. 513; *Story, Bills*, §§ 472, 473; 1 Daniel, Neg. Inst. §§ 469, 472, notes.

6. The remaining questions to be determined are whether or not the written promise mentioned in the fourth cause of action was unauthorized, and, if unauthorized, whether or not the defendant is estopped from asserting such want of authority. If the defendant was without authority to make said promise, and is not estopped from pleading such want of authority, then it follows not only that there can be no recovery on the fourth cause of action, but also that there can be no recovery on the first three causes of action, because the checks respectively mentioned in said three causes of action were simply means whereby the defendant, without funds having been provided by Blake, attempted to execute the promise set up in the fourth cause of action. It is well settled that a national bank has no authority to guaranty the payment of a debt of a third person, solely for his benefit; and a promise of that sort, whether made by the cashier or board of directors, is ultra vires. *Seligman v. Bank*, 21 Fed. Cas. 1036; *Bank v. Pirie*, 27 C. C. A. 171, 82 Fed. 799. The latter is doubtless the latest case to be found on the subject, having been decided September 13, 1897. In that case the court says:

"The act of congress under which the bank was organized confers no authority upon national banks to guaranty the payment of debts contracted by third parties; and acts of that nature, whether performed by the cashier of his own motion or by direction of the board of directors, are necessarily ultra vires. A national bank may indorse or guaranty the payment of commercial paper which it holds when it rediscounts or disposes of the same in the ordinary course of business. Such power, it seems, a national bank may exercise as incident to the express authority conferred on such banks by the national banking act to discount and negotiate promissory notes, drafts, bills of exchange, and other evidences of debt (*People's Bank v. National Bank*, 101 U. S. 181, 183; *U. S. Nat. Bank v. First Nat. Bank*, 49 U. S. App. 67, 24 C. C. A. 597, and 79 Fed. 296); but it has never been supposed that the board

of directors of a national bank can bind it by contracts of suretyship or guaranty which are made for the sole benefit and advantage of others. The national banking act confers no such authority in express terms or by fair implication, and the exercise of such power by such corporation would be detrimental to the interests of depositors, stockholders, and the public generally. *Norton v. Bank*, 61 N. H. 589; *State Bank v. Newton Nat. Bank*, 32 U. S. App. 52, 58, 14 C. C. A. 64, and 66 Fed. 691, 694; *Bank v. Smith*, 40 U. S. App. 690, 23 C. C. A. 80, and 77 Fed. 129. In contemplation of law, therefore, the vendors knew, when they sold the goods in controversy, that the guaranty in question was of no avail as a security, even though they supposed that it had been executed with the sanction of the board of directors. It results from this view that, if we were able to admit that the presentation of the guaranty to Carson, Pirie, Scott & Co. carried with it an implied representation that it had been executed by direction of the board of directors, and that the bank was in a sound financial condition, yet we would not be able to concede that either of these representations was material, inasmuch as the plaintiffs below must be presumed to have known that the guaranty imposed no legal obligation upon the guarantor." *Bank v. Pirie*, 27 C. C. A. 171, 82 Fed. 801.

See, also, *Bank v. Smith*, 23 C. C. A. 80, 77 Fed. 129, and *Flanagan v. Bank*, 56 Fed. 959.

It is true that in the last-mentioned case Judge Ross, who decided it, says, in the course of his opinion, that if the promise of the defendant had been a promise to pay a check drawn on itself, and plaintiffs had parted with their money on the strength of the promise, defendant would have been held liable; citing *Garrettson v. Bank*, 47 Fed. 867. This, however, was merely a passing observation, outside of the facts, and, moreover, the case cited in its support—*Garrettson v. Bank*—did not involve any question as to the powers of a national bank. It should be further noted that the supposed promise which Judge Ross said would have been enforced was a promise to pay a stated check for a given amount, and there were no circumstances to put the promisee upon notice; that the promise was merely matter of accommodation to the drawer. The same is true of the *Garrettson Case*.

In *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y. 128,—one of the cases cited by plaintiff,—the court says:

"The defendant is a banking corporation, organized under the general banking law of this state; and it is, I think, a sound position that such a corporation exceeds its powers when it becomes the mere surety for another upon a contract in which it has no interest, or lends its credit in any form for the exclusive benefit of other parties. Such a contract is *ultra vires*, and cannot be enforced against the bank by any person cognizant of the facts."

Plaintiff, however, contends that the written promise mentioned in the fourth cause of action, being a contract to pay checks drawn on itself, was, in legal effect, the certification of said checks, and an original undertaking, binding upon the defendant,—citing a number of cases; among others, *Merchants' Bank v. State Bank*, 10 Wall. 604, 648, and *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, supra, wherein the power of a bank to certify checks is upheld. While the rule enunciated in plaintiff's citations, that a bank has power to certify checks, is now well established,—indeed, so far as national banks are concerned, has been legislatively declared (Rev. St. U. S. § 5208; *Merchants' Nat. Bank v. First Nat. Bank*, 7 W. Va. 544),—it does not apply here. The promise of the

defendant in the case at bar differs as widely in substance as it does in form from the certification of a check. In *Merchants' Bank v. State Bank*, supra, the court, referring to the certification of a check, says:

"It implies that the check is drawn upon sufficient funds in the hands of the drawer, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment."

No such implications were possible here, for the reason that defendant's promise did not relate to existing checks for fixed sums, but to future dealings, without limit as to time or amount. It was a broad promise to pay all advances of money which plaintiff might thereafter make to Blake on the latter's checks, i. e. checks drawn by Blake on the defendant. The allegation of the complaint is:

"That on the 25th day of April, 1894, the plaintiff, having theretofore advanced moneys to one Isaac E. Blake upon checks drawn by said Blake upon the plaintiff as A. T. Bowen & Co., and not being willing to advance further sums without some guaranty from the defendant, the said defendant, on the said 25th day of April, 1894, in writing, promised and agreed with plaintiff that it would pay all checks signed by the said Blake and drawn upon the plaintiff as A. T. Bowen & Co."

The statement in this quotation that the checks therein mentioned were to be drawn on plaintiff, I think, was inadvertently made by the pleader, since the evidence shows, and such is plaintiff's contention in his brief, that the checks which defendant promised to pay were checks payable to plaintiff as A. T. Bowen & Co., and drawn, not on A. T. Bowen & Co., but on the defendant; and, if plaintiff were entitled to recover on such a promise, the court would direct or permit the complaint to be amended so as to conform to the evidence. Treating the promise of defendant as a promise to pay checks drawn on itself, it will still be observed that plaintiff counts upon that promise as a guaranty, and, moreover, the defendant, in its letter to plaintiff of August 22, 1894, says: "\* \* \* We guaranty absolutely the payment of Mr. Blake's checks as heretofore." Now, men do not guaranty their own debts, nor do they employ that word to designate an original undertaking. "A guaranty is a promise to answer for the debt, default or miscarriage of another person." Civ. Code Cal. § 2787. When, therefore, we find that the defendant, in a letter written to the plaintiff before the transactions sued on took place, refers to its promise as a guaranty, and that the plaintiff, when he comes to sue the defendant upon the promise, adopts, in his pleading, the same designation, it is fair to conclude that both the plaintiff and defendant considered said promise, not an original undertaking, but precisely what they called it, a guaranty; that is, a promise to answer for the debt of another person,—Blake. In determining whether a promise is a guaranty or an original undertaking, the language made use of, the situation and surroundings of the parties, and every other fact and circumstance bearing upon the question, should be taken into consideration (*Brandt*, Sur. § 64); and where a promise is, in substance, a promise to pay the debt of another, no matter what its form, it is a guaranty, not an original undertaking (*Id.* § 60 et seq.). If, however, as contended by plain-

tiff, defendant's promise to pay Blake's checks was, in legal effect, a certification of the checks covered by said promise, and therefore an original undertaking, still the defendant would not be liable thereon, for the reason that Blake did not have on deposit with defendant funds to pay said checks, and plaintiff, as I shall show later on, was at least constructively notified of that fact. That a bank certifying a check without funds is not liable thereon to any one except a bona fide holder has been decided in numerous cases. *Cook v. Bank*, 52 N. Y. 96; *Claffin v. Bank*, 25 N. Y. 293; 1 *Morse, Banks* (3d Ed.) § 413, subd. "C." It is true that the act of congress of March 3, 1869, above referred to as section 5208 of the Revised Statutes of the United States, after providing that "it shall be unlawful for any officer, clerk, or agent of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check," further provides that "any check so certified by duly authorized officers shall be a good and valid obligation against the association." This latter provision, however, I am satisfied, does not apply where the check is in the hands of the original payee, who knows, or is chargeable with constructive notice, that the check was drawn in violation of law. In *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y. 132, one of the cases cited by plaintiff, the court says:

"Hence it cannot be pretended that a person who should take and pay value for a check, with knowledge that the bank had no funds of the drawer to meet it, would acquire any valid claim against the bank, although such check was certified by the cashier himself."

From the circumstances of the case at bar, I am satisfied that plaintiff is chargeable with constructive notice of the fact indicated. He knew that the checks which he received from the defendant were not always promptly paid by the Chase National Bank, and that the deposits with the Chase National Bank to meet the checks were sometimes made after such checks were drawn. Mr. Mills, cashier of the Chase National Bank, in his deposition testified that: "Messrs. A. T. Bowen & Co.'s representative called upon me from time to time, and made inquiry in regard to certain deposits received from the Needles National Bank, and he informed me that they had discounted or purchased drafts drawn by Isaac E. Blake on the Needles National Bank, and that the Needles National Bank remitted their checks on the Chase National Bank in payment; and that, as certain checks were not good, he informed me that they received Nevada Southern bonds as collateral to the indebtedness." He further says: "The drafts on Isaac E. Blake, which were sent us drawn by the Needles National Bank, were entered for collection by us, and occasionally there was a delay in their payment; and Messrs. A. T. Bowen & Company had checks for similar amounts drawn on us, which we declined from time to time, for the reason that the drafts on Isaac E. Blake were not promptly paid." Referring to these transactions and conversations, the witness further testifies, "At one time A. T. Bowen & Co.'s representative called, I should say, daily." Answer-

ing the question whether these things occurred before the 12th of September, witness says, "Yes; refusals were made by us, I think, in August." These matters, thus testified to by Mr. Mills, together with the general course of dealing between the plaintiff and Blake and the defendant, were, I think, sufficient to put the plaintiff on inquiry as to whether or not Blake was drawing against funds actually on deposit with the defendant. However this may be, plaintiff, by his own letter of September 5th, hereinbefore copied, shows himself chargeable with constructive notice that Blake had no funds on deposit with the defendant. In that letter he inquires: "Do the drafts drawn by Mr. Blake represent the amounts of products of the Keystone Mine, or the receipts of Nevada Southern Railroad, and are the amounts of money deposited with you to meet them before drafts are drawn, or are they drawn on you as they wish?" This letter, it will be observed, was written before plaintiff had advanced any of the money involved in this suit, except that covered by the check mentioned in the first cause of action, and only one day after that advancement was made. Of course, there must have been circumstances within the plaintiff's knowledge to put him upon this inquiry, otherwise it would not have been made; and the rule is well settled that "every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact." Civ. Code Cal. § 19. While the language above quoted is that of the legislature of California, yet it may be accepted, I think, as the general rule on the subject of constructive notice. To plaintiff's letter of inquiry defendant replies, September 12th, as follows:

"I can say this: That the money is deposited in New York to cover all checks drawn on this bank by Mr. Blake, and Mr. Blake's checks will be paid by this bank as heretofore."

This reply was but a confirmation of the suspicion which plaintiff obviously entertained; and clearly informed him that Blake had no funds on deposit with the defendant to meet his drafts, but that provision for their payment was made by deposits in New York. Had this reply of the defendant been received by the plaintiff before he advanced money on Blake's checks, plaintiff would have had actual notice that the checks were drawn without funds to meet them. As the reply was not received, however, until after said advances, it cannot be said, as to said checks, that the facts communicated in said reply were within plaintiff's actual knowledge; but, as I have already stated, his own letter of September 5th shows that he did have constructive notice of said facts. This interpretation of said letter is confirmed by plaintiff's attorneys in their brief, on page 9, lines 18 to 22, inclusive, where they say:

"It is evident that the plaintiff had for some reason become uneasy, and desired to get all the security he could. He had written to the bank on the 5th for definite information on the question whether Blake was drawing on funds actually in the bank, and other particulars, but had received no reply."

So that, under the facts of this case, even if the defendant had certified Blake's checks, it would not have been liable thereon.

Plaintiff further insists that the undertaking of the defendant, being a promise to pay checks drawn on itself, was an original undertaking, and that defendant had authority to bind itself in that way. This contention is closely allied to the one last considered, and what I have there said in reference to the lack of power in a bank to certify checks where there are no funds to pay them is equally applicable here. To the authorities which I have already cited may be added the following extract:

"It may be stated, however, with entire confidence, that the cashier of a bank has no power to involve its funds by indorsing or accepting for the accommodation of third parties. As already seen, the treasurer of a corporation has no such power; nor can the directors themselves involve the funds of the stockholders, and what may ultimately become a trust fund for creditors, by thus obliging strangers. But as cashiers have a general power to indorse negotiable paper, such indorsements would be good against the bank in favor of an innocent purchaser of the paper before maturity." 4 Thomp. Corp. § 4800.

See, also, *Bank v. Wells*, 79 N. Y. 498.

Plaintiff further contends that, inasmuch as he advanced moneys on Blake's drafts, the defendant is estopped from denying its authority to make the promise set up in the fourth cause of action. This contention, in my opinion, is vulnerable. Without reviewing the numerous cases cited by plaintiff in his brief, it is sufficient to note, as a material distinction between most of them and the case at bar, that here the defendant's promise was given solely for Blake's accommodation; and, furthermore,—which is a more conclusive answer to plaintiff's contention,—he is not in the position of a bona fide holder without notice. He knew that he was dealing with a national bank, which had no power to bind itself by a guaranty, or by a promise to pay checks drawn on it, in the absence of deposits to meet such checks; and he had constructive notice that Blake had no funds on deposit with the defendant, and, therefore, that the defendant's promise to pay Blake's drafts, whether considered as a guaranty or an original undertaking, was in violation of law. The cases cited by plaintiff in support of the alleged estoppel, namely, *People's Bank v. National Bank*, 101 U. S. 183, and *American Nat. Bank v. National Wall-Paper Co.*, 23 C. C. A. 33, 77 Fed. 85, are inapplicable. In each of these two cases the decision of the court rested upon the fact that the bank against whom the estoppel was asserted had received and appropriated the fruits of the transaction in question. Besides, in the former of said two cases, the bank had authority to make the guaranty there sued on, since it was made in transferring notes of which the bank was the holder, and, as stated by the court in *Commercial Nat. Bank v. Pirie*, supra, "a national bank may indorse or guaranty the payment of commercial paper which it holds, when it rediscounts or disposes of the same in the ordinary course of business." From all the facts of the case, I am of opinion that the real nature of defendant's undertaking, mentioned in the fourth cause of action, although in form a promise to pay drafts drawn on itself, was a guaranty, and so recognized by both parties. If, however, said undertaking be considered an original promise, still it was in direct violation of law, because Blake

did not have on deposit with the defendant funds to meet his checks, and of that fact plaintiff had constructive notice. For the reasons above indicated, there can be no recovery on the fourth cause of action. Nor can there be any recovery on the first three causes of action, for the reason that the checks therein mentioned were drawn without funds, solely for the benefit of Blake, and were simply the means whereby the defendant attempted to execute the unauthorized and illegal promise mentioned in the fourth cause of action. The defendant is entitled to recover on its cross complaint. Judgment will be entered conformable to this opinion.

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NEW YORK, N. H. & H. R. CO. v. SAYLES.

(Circuit Court of Appeals, Second Circuit. April 15, 1898.)

No. 84.

CONTRACT LIMITING LIABILITY OF CARRIER—CLAUSE IMPRESSED UPON FREIGHT RECEIPT.

A clause limiting the liability of the carrier impressed in red ink upon one corner of the paper upon which the freight receipt is printed in black ink, and at right angles to the text of the receipt, is no part of the contract, unless so brought to the knowledge of the shipper as to imply his assent thereto on his acceptance of the receipt.

This cause comes here on writ of error to review a judgment of the circuit court, Southern district of New York, in the amount of \$3,773.90, entered upon the verdict of a jury. See 81 Fed. 326.

The plaintiff in error was defendant below. The facts are as follows:

The duly-authorized agent of the plaintiff shipped on October 3, 1895, two horses belonging to plaintiff from Portland to Pawtucket. The horses were killed in an accident upon the road of defendant. It was alleged, and not denied, that the accident happened through the negligence of defendant company. There was evidence tending to show that the horses were worth \$3,700. The case was left to the jury to determine what was the contract entered into at the time of shipment, with instructions that, unless they found an agreement to limit amount of recovery, plaintiff was entitled to the full value of the horses. At the time of shipment, plaintiff's agent signed the following document, and delivered the same to the agent of the railroad:

Live Stock Receipt.

"10/3/1895.

"Forward the property mentioned below, marked and numbered as in margin, to F. C. Sayles, at Pawtucket, Rhode Island, subject to the rules and regulations in the freight receipt presented with this, and which are accepted to be just and reasonable."

It is not disputed that defendant's agent signed this, nor that he had authority to sign it, nor that the freight receipt referred to therein was in fact presented to him. It reads as follows:

"Boston & Maine Railroad.

"Live Stock Receipt. [Red ink.]

"10/3/189-

"Received of —, under the contract hereinafter contained, which is accepted and agreed to as just and reasonable, and which is entered into severally with each carrier, the property mentioned below, marked and numbered as per

margin, in apparent good condition (contents and value unknown), viz. 3 horses, 1 R. cart, K. S. consigned F. C. Sayles, at Pawtucket, to be transported," etc. (Here follow certain conditions and regulations, printed in black ink, the receipt being signed by the agent of the railroad company.)

On the upper right-hand corner of the paper on which this receipt appears there is a clause containing, *inter alia*, these words: "The rules for transporting animals are based and intended only for those of ordinary value, viz.: If horses, or mules, not exceeding \$100 each; \* \* \* and in giving this receipt the company assumes no risk for a higher value, unless by special arrangement with the general freight department." This clause is printed over the clauses of the receipt which were in black ink, and at right angles to them. It is itself in red ink, and looks as if it might have been impressed upon the receipt, after the latter was printed, by some hand or power stamp. The coloring is far from bright, and parts of it, by reason of the size of type, and by reason of its being printed across the black lines of the receipt, cannot be read without the most careful inspection.

Henry W. Taft, for plaintiff in error.

F. W. Halls, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. The only question in the case is whether or not the parties, by their respective agents, agreed to a limitation of liability to \$100 for each horse. That such contracts may be made is settled by authority in *Hart v. Railroad Co.*, 112 U. S. 331, 5 Sup. Ct. 151, which holds that:

"Where a contract of the kind signed by the shipper is fairly made, agreeing to a valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations."

The defendant's contention is that such a contract was made in this case, because the plaintiff's agent signed the paper by which he requested the railroad company to forward the property, "subject to the rules and regulations in the freight receipt," and expressly agreed that they were just and reasonable, thereby making the "freight receipt" a part of the contract signed by him. The difficulty with this contention is that the red-ink clause is practically not a part of the freight receipt. It was not originally printed as a part of such receipt, nor is it inserted in a blank space left in such receipt for the purpose. By reason of its being superimposed, as it is, at right angles to the text of the receipt, and in one corner of the paper, it is no more a part of the contract than was the statement on the back of the paper receipt in *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318, where also the statement on the back was referred to in the body of the receipt. In legal effect, it was merely a rule or regulation which did not bind the plaintiff, unless so brought to the knowledge of his agent as to imply his assent upon his acceptance of the receipt. *The Majestic*, 166 U. S. 375, 17 Sup. Ct. 597. Indeed, a person taking such a receipt would seem to be less likely to notice the clause where it is than if it were printed on the back. The question whether or not such notice was brought home to the knowledge of plaintiff's agent was one for the jury upon

the evidence; and, as we find no error in the charge, their verdict should not be disturbed.

The judgment of the circuit court is affirmed.

### GALLOT v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. April 19, 1898.)

No. 647.

**1. ASSIGNMENT OF ERRORS—REFERENCE TO ENTIRE CHARGE—EVIDENCE ADMITTED.**

Under rule 11 of the circuit court of appeals (21 C. C. A. cxi., and 78 Fed. cxi.), requiring the assignment of errors to quote the full substance of evidence alleged to have been erroneously admitted or rejected, and to set out the part of the charge referred to totidem verbis, assignments that "the court erred in permitting evidence as shown in bills of exceptions numbers two and three," which errors can only be ascertained by a careful reading of a voluminous record, and that "the court erred in its charge," etc., referring to marked lines and numbers in the written opinion for instructions erroneously given and refused, will not be considered.

**2. MISAPPLICATION OF NATIONAL BANK FUNDS—AIDING AND ABETTING—DEATH OF PRINCIPAL.**

The death of the principal before indictment is no obstacle to the prosecution and punishment of one charged with aiding and abetting an officer, clerk, or agent of a national bank to abstract, misapply, or embezzle the funds thereof, in violation of Rev. St. § 5209, which makes such offense a misdemeanor.

**3. COMPETENCY OF JUROR—IMPRESSIONS AND OPINIONS—IMPARTIALITY.**

A juror who says he has an impression or opinion as to guilt or innocence of defendant, formed from newspapers and rumors, that it would require evidence to remove it, but that it would yield to evidence, and that he can and will give the defendant a fair and impartial trial according to the evidence that may be adduced before him, is competent.

**4. CRIMINAL TRIALS—READING INDICTMENT.**

Where an indictment contains many counts, all alike, except as to amounts of money and dates of misapplication, it is sufficient to read one count in full to the jury, explain the difference, and state the amount and date charged in each of the other counts.

**5. TWO INDICTMENTS—CASES CONSOLIDATED—NUMEROUS COUNTS—VERDICT.**

One indictment in 36 counts charged defendant with aiding in the abstraction of 36 specified amounts of money, at 36 specified dates. Another indictment charged him with aiding in the misapplication of the same amounts, upon the same dates. The two were tried together, and the jury returned a verdict of "guilty as charged." *Held*, that the verdict was definite, certain, responsive to the issues, and not a double conviction, the sentence imposed by the court being imprisonment for a less term than the maximum under any one count.

Pardee, Circuit Judge, dissenting.

**In Error to the Circuit Court of the United States for the Eastern District of Louisiana.**

The plaintiff in error, Louis Gallot, was indicted, tried, and convicted in aiding and abetting Louis Colomb, a bookkeeper in the Union National Bank, with the abstraction and willful misapplication of the moneys, funds, and credits of the bank. Two indictments were presented against him, which were subsequently consolidated and tried together. Each indictment contains 36 counts charging 36 separate and distinct offenses, and were drawn under section 5209 of the Revised Statutes of the United States, which is as follows: "Sec. 5209. Every president, director, cashier, teller, clerk, or agent of any association, who

embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten." In one indictment he is charged with the aiding and abetting in the abstraction of 36 specified amounts of the moneys, funds, and credits of the Union National Bank upon 36 specified dates. In the other indictment he is charged with aiding and abetting in the willful misapplication of the same amounts upon the same dates as charged in the first indictment. To each of the indictments Gallot filed a plea, pleading the death of Louis Colomb prior to any indictment as a bar against the trial of himself. Demurrers were filed to the pleas, and were sustained, and the pleas overruled. Gallot then filed demurrers to the indictment, again objecting to be tried upon the charges because of the death of Louis Colomb. These demurrers were overruled, and the case went to trial, resulting in a verdict of "guilty as charged." It now comes before this court on five bills of exceptions and twenty-six assignments of error.

J. R. Beckwith, for plaintiff in error.

J. Ward Gurley, for the United States.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

SWAYNE, District Judge, after stating the facts as above, delivered the opinion of the court.

By the nineteenth and twentieth assignments of errors it is set out that the court erred in permitting evidence as shown in bills of exceptions Nos. 2 and 3, which errors, it would seem, this court was expected to ascertain by a careful reading of over 60 pages of record, and an inspection of the questions and objections and the rulings of the court, and exceptions thereto taken by the defendant below, contained therein. By the twenty-third and twenty-fourth assignments of errors we are informed that the court below erred in its charge given to the jury in each portion thereof marked by lines in said written opinion and marked 1, 2, 3, 4, 5, 6, 7, 8, and 9, and shown in the bill of exceptions No. 5, and the court erred in refusing each of the several charges and instructions in Nos. 2 and 5 as shown in the bill of exceptions. Rules 10 and 11 of this court (21 C. C. A. cxi., and 78 Fed. cxi.) are as follows:

(10) "The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court."

(11) "The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment

of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, the counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned."

The assignments of errors Nos. 19, 20, 23, and 24 being in violation of the above rules 10 and 11 of this court, we decline to examine and pass upon the questions attempted to be raised thereby.

The first nine, and the 15th, 16th, 17th, 18th, 22d, 26th, and 27th assignments of errors raise the question so often repeated in the record of the right of the defendant, Louis Gallot, to be tried, under section 5209, as an aider and abettor of Louis Colomb, who was then dead, and had not been indicted or prosecuted during his lifetime. The ingenious and able argument of counsel for plaintiff in error was interesting, and, had it not been for the statute (section 5209) in question, would be effective. He seemed to be thoroughly familiar with and dwelt at length on the decisions at common law, and even extended his argument to the consideration of accessories to crime both before and after the fact. Without attempting to review the numerous cases cited and commented upon, we think a consideration of the statute above quoted and some of the decisions relating thereto will dispose of the question. The act (section 5209) in question was passed by congress for the purpose of sustaining and protecting national banks created by and under its authority, and by its express language the crime charged is made a misdemeanor. Whether this was done to prevent persons charged with crime from availing themselves of the pernicious technicalities that had crept into the common-law decisions and practice in regard to principal and accessory, we are not now called upon to decide; but no one can question the authority of congress to make such classification, or the binding force of it in reference to the application of different rulings that belong thereto. Hence the able argument of counsel for defendant, both oral and printed, directed to the common-law decisions of principal and agent, does not apply to this case. Congress has established the offense here charged to be a misdemeanor, and he who aids or abets in committing such an offense can be tried independently as a principal, irrespective of the presence of the one he aided. The supreme court of the United States, in *U. S. v. Gooding*, 12 Wheat. 475, passes upon a similar statute, and declares:

"The fifth instruction turns upon a doctrine applicable to principal and accessory in cases of felony, either at the common law or by statute. The present is the case of a misdemeanor, and the doctrine, therefore, cannot be applied to it; for in cases of misdemeanor all those who are concerned in aiding or abetting, as well as in perpetrating the act, are principals. Under such circumstances there is no room for the question of actual or constructive presence or absence, for, whether present or absent, all are principals. They may be indicted and punished accordingly. Nor is the trial or conviction of any actor indispensable to furnish a right to try the person who aids or abets the

act. Each, in the eye of the law, is deemed guilty as a principal. In the present indictment, the offense is in the third and fourth counts laid, by aiding and abetting, in the very terms of the act of congress. If the crime, therefore, could be supposed to be of an accessorial nature, it is truly alleged, according to the fact, not merely according to the intendment of law. We do not consider that the terms 'aid' and 'abet,' used in this statute, are used as technical phrases, belonging to common law, because the offense is not made a felony, and therefore the words require no such interpretation. The statute punishes them as substantive offenses, and not as accessorial, and the words are, therefore, to be understood as in common parlance, to import assistance, co-operation, and encouragement."

The plaintiff in error in this case is indicted under a special statute (Rev. St. § 5209), and it is evident upon inspection of this statute that its spirit and purpose is to punish every president, officer, cashier, or agent, etc., and likewise to punish every person who aids or abets said officer or agent in any violation of the section. There is no difficulty about the definition of the word "aid," and "abet" is defined as follows: "To aid, countenance, encourage in, to incite, stimulate, or instigate to a criminal act." Therefore the purpose of this trial was to ascertain whether any such officer, clerk, or agent had violated the act, and whether Louis Gallot, the plaintiff in error, had aided him in doing so; not for the purpose of convicting the officer or agent, but for the sole purpose of ascertaining the guilt or innocence of the plaintiff in error; and the objection that Louis Colomb was dead, and had passed beyond the realm of human courts, so often repeated, without being indicted or tried, and that he could not now be tried because the presumption of his innocence that existed in his lifetime had followed and attached to his record after death, and that he could not be tried as a principal, therefore the question as to whether the plaintiff in error had ever aided him in the commission of such offense was beyond the power of the federal courts to determine, we think was not well taken. The offense charged against the plaintiff in error is a misdemeanor. He was properly tried under the circumstances, and he was the only person on trial; and the only necessity of inquiring into the record of the doings of Louis Colomb was to ascertain whether or not a crime had been committed, not for the purpose of convicting the said Colomb, but for the purpose of enabling the jury to determine whether or not the defendant below had aided in the commission of the offense as charged in the indictments. Plaintiff in error's rights on the trial as to the admission of evidence and in all other respects were equal to and as well protected as if Louis Colomb had been in court and on trial with him. He suffered no disadvantage from his absence, and had no right to complain because he was tried alone.

The next question of law raised by the 10th, 11th, 12th, 13th, and 14th assignments of error is to the competency of certain jurors impaneled in the case, on the ground that they had previous to the trial formed an impression from newspapers and rumors and other sources as to the guilt or innocence of the defendant. They also stated that these impressions and opinions would yield to evidence, and that they could and would give the defendant a fair and impartial trial according to the evidence that might be

produced before them as jurors. Some of them stated that it would require evidence to remove their impressions. It will need but a short review of the cases on this subject to show that these objections are not well taken. In the state of Louisiana the supreme court, in the case of *State v. Covington*, 45 La. Ann. 979, 13 South. 266, in a short opinion announces the settled law of the state as follows:

"The juror against whom the objection is ruled answered on his voir dire, and stated that he had formed an opinion from conversing with one of the witnesses for the state, but that he could lay aside the opinion he had formed, and decide the case on the law and the evidence adduced on the trial. The defendant had exhausted his challenges when he challenged the juror for cause, which was overruled. The answer of the juror disclosed that he was a competent juror, that he was free from bias or prejudice, and his mind in that condition to impartially try the defendant. In the case of *State v. Dugay*, 35 La. Ann. 327, this court said: 'Our last researches on this point were suggested in the case of *State v. De Rancé*, 34 La. Ann. 186, in which we took occasion to make a thorough review of previous opinions on this subject, and in which we reaffirmed the rule, sanctioned in numerous cases, under which jurors who had formed and expressed opinions as to the guilt or innocence of the accused, but who asserted that they felt able to do impartial justice according to the law and the evidence in the case, were ruled to be competent jurors. We distinctly and emphatically reiterate that this is the correct rule, with the reasonable hope that it will be understood by the profession.' *State v. Dent*, 41 La. Ann. 1083, 7 South. 694; *State v. Dorsey*, 40 La. Ann. 740, 5 South. 26; *State v. Ford*, 42 La. Ann. 255, 7 South. 696; *State v. Garig*, 43 La. Ann. 365, 8 South. 934. The answer of the juror brings him within the rulings of the cases cited."

In *Spies v. State*, 123 U. S. 179; 8 Sup. Ct. 30, Chief Justice Waite, speaking for the court, says:

"In *Reynolds v. U. S.*, 98 U. S. 145, we said 'that upon the trial of the issue of fact raised by' a challenge to a juror in a criminal case, on the ground that he had formed and expressed an opinion as to the issues to be tried, 'the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The findings of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest. \* \* \* It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not, in law, be deemed impartial. The case must be one in which it is manifest the law left nothing to the "conscience or discretion" of the court.'"

The language of the late Chief Justice Agnew of Pennsylvania is so appropriate, and expresses our views so correctly, upon this subject, in which some commendable progress has been made in this country during the last half century, that we adopt it in this connection:

"We must either recede, and go back to the practice of an age when ignorance of passing events constituted a characteristic of the time, and exclude every juror who has formed any opinion, even the slightest, or we must stand abreast with the present age, when every remarkable event of to-day is known all over the country to-morrow, and exclude those only whose opinions are so fixed as to be prejudgments, or have been formed on the known evidence in the case. It is needless to say the world moves and carries us with it, and if we lag behind we must commit the trial of the most important causes in life to

those so ignorant their dark minds have never been smitten by the rays of intelligence." *O'Mara v. Com.*, 75 Pa. St. 424, 428.

The twenty-first assignment of errors is as follows:

"(21) The court erred in allowing the district attorney to state the indictments herein to the jury after partial reading thereof, as shown in bill of exception No. 1 herein."

It appears from the record that the first count of each indictment was read to the jury in full. Then it was explained to them that the only difference between the counts read and the remaining counts in the indictment was the respective amounts and dates, and the amount and date charged in each count was then stated in their respective order. This method gave the jurors a perfect and clear understanding of the contents of the indictments,—an understanding that would not have been improved by reading the whole of the indictments in full, with all of the legal verbiage contained therein,—and this was a method which in no way prejudiced the defendant, and gave him no cause of complaint. See *Agnew v. U. S.*, 165 U. S. 44, 17 Sup. Ct. 235, and cases cited therein.

The remaining question of law raised by the twenty-fifth and part of the twenty-sixth assignments of error is that the verdict in the case was not responsive to the issues in the indictments, and was uncertain and indefinite, and was a double conviction on each and every specific sum named in the indictments. As we have already seen, the indictments in this case and the charges contained therein are clear and specific. The verdict of the jury is as follows: "New Orleans, June 29th, '97. We, the jury, find the defendant guilty as charged. Geo. Norton, Foreman." Briefly, it is as clear and positive and emphatic as the English language can express it, and it is in the usual, proper, and legal form. As to the question of double conviction, it has been abundantly established that a verdict of guilty upon the whole indictment must stand if any one of the counts is sustained by competent testimony; and the sentence imposed by the court of eight years in the penitentiary at Columbus, in the state of Ohio, being two years less than the maximum penalty that could have been imposed upon him upon any one count of the indictments, gives him no cause for complaint. For the reasons given in *Gardes v. U. S.* and *Girault v. Same*, 87 Fed. 172, the sentence imposed on the prisoner is modified by striking out the words "at hard labor," and, thus modified, the judgment appealed from is affirmed.

PARDEE, Circuit Judge (dissenting). While congress may have the power to make the aiders and abettors of national bank officials in the embezzlement and misapplication of bank funds principal offenders, and triable as such, yet in section 5209, Rev. St., it has not done so. This appears from the plain reading of the section, and is the construction given by the supreme court of the United States. In *Coffin v. U. S.*, 162 U. S. 664, 669, 16 Sup. Ct. 943, 946, that court, in considering the proper construction of section 5209, says:

"However, the real premise upon which the whole argument rests, is that, if the accused was guilty at all, he was guilty as a principal, and not as an aider and abettor. But it is not necessary to give much time to the consideration of this claim, in view of the clear intent of congress as expressed in the statute under review. It is evident that, no matter how active the co-operation of third persons may have been in the wrongful act of a bank officer or agent, such third person is required to be charged as an aider and abettor in the offense, and prosecuted as such. The primary object of the statute was to protect the bank from the acts of its own servants. As between officers and agents of the bank and third persons co-operating to defraud the bank, the statute contemplates that a bank officer shall be treated as a principal offender. In every criminal offense there must, of course, be a principal, and it follows that without the concurring act of an officer or agent of a bank third persons cannot commit a violation of the provisions of section 5209. If, therefore, a violation of the statute in question is committed by an officer and an outsider, the one must be prosecuted as the principal and the other as the aider and abettor."

There is no warrant in the common law, nor in any statute of the United States, for indicting, trying, and convicting an accessory or aider and abettor, or a subordinate offender, when the principal offender dies before indictment and trial. In the same case the following instruction to the jury was approved:

"The burden of proving Haughey and the defendants guilty as charged rests upon the government, and this burden does not shift from it. Haughey and the defendants are presumed to be innocent until their guilt in manner and form as charged in some count of the indictment is proved beyond a reasonable doubt. To justify you in returning a verdict of guilty, the evidence should be of such a character as to overcome this presumption of innocence, and to satisfy each one of you of the guilt of Haughey and the defendants as charged, to the exclusion of every reasonable doubt."

Without warrant from the common law, and in the absence of statutory authority, and in the teeth of the presumption of innocence, how can a court and jury find a dead man guilty of a crime beyond a reasonable doubt? Congress has seen fit to declare the offenses denounced by section 5209 to be misdemeanors. All the same they are conceded to be infamous crimes, because of the punishment awarded, and offenders under the statute must be tried accordingly. It is submitted that if congress, by naming an offense, can place infamous crimes in the category of misdemeanors, congress can also provide for principal and subordinate offenders in misdemeanors, and intend that the trial and proceedings under the statute shall be according to the well-known and understood rules heretofore governing the trial of subordinate offenders. I do not deem it necessary to further elaborate my reasons. The exhaustive brief of the learned counsel for the plaintiff in error deals with this question in a masterly manner, and the convictions resulting from its study compel me to announce my very respectful dissent from the opinion and judgment of the court.

In re THOMAS.

(Circuit Court of Appeals, Sixth Circuit. April 5, 1898.)

No. 522.

**OLEOMARGARINE—USE IN NATIONAL SOLDIERS' HOME—REGULATION BY STATE.**

The governor of the Soldiers' Home at Dayton, Ohio, in serving to the inmates as food oleomargarine furnished by the government, is not subject to the law of the state prescribing the manner in which oleomargarine shall be used in eating houses. The legislature having no power to regulate the conduct of such institution, the statute is to be construed as not applying thereto.

Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

This was an application by J. B. Thomas, governor of the Soldiers' Home at Dayton, Ohio, for a writ of habeas corpus to release him from imprisonment under state process for alleged violation of the state statutes in serving to the inmates of the Home oleomargarine, without first complying with the state regulations in that regard. The petitioner was discharged by the circuit court (82 Fed. 304), and the present appeal was taken from its order.

C. H. Bosler and D. L. Sleeper, for appellant.

Judson Harmon and D. W. Bowman, for appellee.

Before LURTON, Circuit Judge, and SEVERENS and CLARK, District Judges.

**PER CURIAM.** The facts of this case are stated in the opinion of Taft, circuit judge, who heard the case in the court below. His opinion is reported in 82 Fed. 304. With respect to the question of law involved, we concur in the reasoning upon which Judge Taft's opinion proceeds (and which we are content to adopt as our own), and in the conclusion which he reached, save that we prefer to rest our approval of the order made by the court below upon the ground that, inasmuch as the legislature of Ohio had no power to regulate the conduct of this administrative agency of the national government by such a statute as is here in question, it ought to be presumed that the legislature did not intend it to have such an application, and that the statute should be construed accordingly. The order of the court below is affirmed, with costs.

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**UNITED STATES v. DEAN LINSEED-OIL CO.**

(Circuit Court of Appeals, Second Circuit. April 7, 1898.)

No. 57.

**1. CUSTOMS—DRAWBACK—LINSEED-OIL CAKE.**

Where linseed, on which a duty of 20 cents per bushel had been paid, was manufactured into oil and oil cake, and the oil cake exported, the drawback, under section 22 of the act of August 27, 1894, should be computed in proportion to the value which the oil cake bears to the oil, and not in proportion to the weight which the exported oil cake bears to the weight of the imported linseed. 78 Fed. 467, reversed.

**2. SAME—MANUFACTURE—WASTE.**

Linseed-oil cake, manufactured from imported linseed, is not waste, but is a manufactured article, and was therefore entitled to the drawback provided by section 22 of the act of August 27, 1894 (28 Stat. 551).

Wallace, Circuit Judge, dissenting.

**In Error to the Circuit Court of the United States for the Eastern District of New York.**

This is a writ of error to review a judgment of the circuit court for the Eastern district of New York in an action against the United States, which was brought under the provisions of section 3 of the act of March 3, 1887 (24 Stat. 505), known as the "Tucker Act." The material facts found by the circuit court are as follows: In December, 1894, the Dean Linseed-Oil Company, the petitioner, imported into the United States 11,944 bushels of linseed, or flaxseed, of 56 pounds each, and in that month, and in January, 1895, 23,704 other bushels of linseed, of 56 pounds per bushel, were imported into the United States, partly by the petitioner and partly by other persons, who transferred and delivered the same to the petitioner; and upon these importations the statutory duty of 20 cents per bushel was duly paid. Thereafter the petitioner, which is a corporation for the manufacture of products from linseed, manufactured said linseed into oil, and the by-product known as "oil cake," by the following process: The seed was crushed by being passed through iron rollers. The crushed seed was conveyed to a machine called a "mulling machine." In that machine, heated steam was introduced, and the pressed seed was subjected to the mulling process; that is, it was constantly stirred by revolving wheels. The process was continued until the crushed seed was softened and heated and moistened to a certain extent. It was then placed in screens of duck cloth; one screen being placed above the other, and duck cloths over each screen when filled. These screens were fitted into an hydraulic press, and the arrangement was such that by means of the hydraulic press the oil was pressed, and ran out into troughs or vessels, and was thence conveyed to tanks, where it was allowed to settle. What remained in the press was the oil cake, one cake being the result of the pressure of each of these screens to the form. The edges of the cake were trimmed. It was then piled or corded so that it might dry out, and it was then placed in bags, which were properly marked, and it was then ready to be used. The oil product, after settling, was barreled, and was ready for use. Of the matter composing each bushel of seed, weighing 56 pounds, 35.87 pounds appeared in the cake, and 19.91 pounds appeared in the oil. The treasury regulations of March 29, 1895, state (and the accuracy of the statement seems to be conceded) that the average value of imported oil seed is \$1.62 per bushel of 56 pounds, and that from a bushel of linseed 2.654 gallons of oil are obtained. The value of the oil cake exported by the petitioners was about \$21 per ton of 2,000 pounds, and the value of the linseed oil extracted from the imported seed was 52 cents per gallon. From a bushel of linseed, 35.87 pounds of oil cake are obtained. Thereafter the petitioner exported to England the cake made from said different importations, and presented to the collector of customs at New York a claim or claims for the drawback alleged to be allowed by law on the cake so exported. All the requirements imposed either by the statute or by the regulations of the secretary of the treasury were complied with. Section 22 of the tariff act of August 27, 1894 (28 Stat. 551), provides as follows: "Where imported material on which duties have been paid are used in the manufacture of articles manufactured or produced in the United States, there shall be allowed on the exportation of such articles a drawback equal in amount to the duties paid on the materials used, less one per centum of such duties." A similar section first appeared in section 4 of the act of August 5, 1861 (12 Stat. 293), and was section 3019 of the Revised Statutes, and was contained in the tariff act of 1890; but in the tariff act of July 14, 1870 (16 Stat. 263), it was provided, in the paragraph imposing a duty upon linseed, that no drawback should be allowed on oil cake made from imported seed, and this proviso was continued in the paragraph of each tariff act which imposed a duty upon linseed, until the act of 1894, in which it was omitted. The circuit court found that the number of articles affected by the construction of the law allowing drawbacks, where sev-

eral articles are manufactured from one imported material, is very great; that among them are castor oil and castor pomace, tin plate, locomotives, glass, wire, refined sugar, and syrup which comes from imported raw sugar and refined sugar, and syrup which comes from imported molasses, articles manufactured from tin plate, and articles manufactured from wool, and cleaned rice manufactured from uncleaned rice, and bags made from imported material. From August 5, 1861, down to the present time, the practice of the treasury department, where several articles were manufactured from the same imported material, has always been to calculate and to pay the drawback by distributing the duty paid on the imported material between such articles in proportion to their values, and not in proportion to their weights, as well where the imported material paid a specific as where it paid an ad valorem duty. Such calculation and payment have been under treasury regulations. This question was established after investigation, in 1861, into the values of the various products of raw sugar, of linseed, and of other imported articles. After the provision of the act of 1894, by which a drawback upon oil cake was no longer prohibited, the treasury department issued a regulation, dated March 29, 1895, which instructed collectors to act in accordance with the general practice, and, taking the portion of the imported seed resulting in the oil cake at 35.87 pounds per bushel, and first ascertaining the value of such cake, to calculate the drawback as being such proportion (less 1 per cent.) of the duty paid on the seed as the value of the oil cake was to the value of the oil and oil cake. The collector estimated, in accordance with these instructions, the amount of drawback which was due to the petitioner, and found the aggregate to be \$1,498.46, and tendered to the petitioner debenture certificates for that amount, which it did not accept. If the drawback should be computed in proportion to weights, the aggregate upon the oil cake would be \$4,521.07. The petition was brought to recover that sum, and judgment was rendered in its favor for that amount.

James Byrne and Robert H. Roy, for the United States.

S. B. Clarke and Elihu Root, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge (after stating the facts as above). The immediate question in this case is, shall the total drawback, less the 1 per cent. retained by the government, be divided between the oil and the oil cake in proportion to their weight or their value? Inasmuch as the duty is imposed by weight, the petitioner contends that the drawback shall be divided by weight. The decision depends upon the construction which shall be given to a general statute which has a very large class of articles within its scope, and therefore is an important statute both to the manufacturer and to the government. When an imported material, upon which duties have been paid, is manufactured into two separate products, the statute is silent as to the proportion in which the drawback shall be divided among the respective products. A court, therefore, is permitted to adopt the construction of the statute or the method of division which shall seem to it the most reasonable and just, and therefore the one most in accordance with the probable intention of the legislation. It will be seen, by a glance at the list of articles heretofore given which are affected by the statute in regard to drawback, that, from many imported articles upon which duties are paid by weight, two or more products of different values are manufactured, and that the principal product, and the one of chief value, is often light in weight, while the secondary or by-product is bulky, but cheap. This is noticeable in the products from the castor bean, from sugar, and from tin plate. From a

bushel of linseed, 2.6 gallons of oil are produced, which used 19.91 pounds of the bushel, and are worth at least \$1.36, while 35.87 pounds appeared in the by-product of cake, which is worth a fraction over 1 cent per pound. If the duty of 20 cents per bushel is divided according to weight, each pound will pay  $\frac{5}{14}$  of a cent, and the cheap and bulky secondary product will receive a drawback far disproportionate to its value. This seems unreasonable, and there is also a lack of equity towards the government, in compelling it to return a drawback by the pound upon an article which sells at \$21 by the ton. The purpose of the drawback provision is to make "duty free imports which are manufactured here and then returned" to some foreign country. *Campbell v. U. S.*, 107 U. S. 407, 2 Sup. Ct. 759. The manufacturer from imported seed, who sells his linseed oil in this country, and exports his oil cake, if he receives his drawback on the oil cake by weight, receives an unreasonably large amount of return duty, as between the oil which he sells in this country and the oil cake which he exports. He keeps in this country the valuable part of his imported article, he returns the nonvaluable part, and receives about  $\frac{13}{20}$  of the duty. The same lack of equity would show itself in the case of each by-product throughout the list of manufactured articles which are entitled to be a drawback. The uniform practice of the treasury department, since 1861, has been, where several articles were manufactured from the same imported material, to pay the drawback by distributing the duty paid between the manufactured articles in proportion to their values, whether the original duty was specific or ad valorem. It is true that the drawback on oil cake did not exist between 1870 and 1894, but the general statute existed, and was applicable to a large number of manufactured articles. The importance of adherence to a long-continued and reasonable construction of a statute by the officers of the department whose duty it has been to execute it, when the statute is of an ambiguous character, has been frequently commented upon by the supreme court ever since the case of *Edwards v. Darby*, 12 Wheat. 206, in which the court said:

"In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect."

The uniform construction of the treasury department seems to us reasonable, and equitable to the importer and the government.

The government makes the point that the petitioner is not entitled to any drawback, because oil cake is not a manufactured article, but is waste. The supreme court, in *Campbell v. U. S.*, supra, which was an action to recover drawback upon linseed-oil cake, proceeded in their opinion upon the undisputed theory that it was a manufactured article; and it has been recognized as such by the treasury department from 1861, whenever it was not withdrawn by legislation from the statute in regard to the drawback. The article is a different thing from the tobacco scraps or tobacco clippings, which in *Seeberger v. Castro*, 153 U. S. 32, 14 Sup. Ct. 766, were held not to be a manufactured article; not being fit for

use in the condition in which they were imported, except for a new manufacture. The petitioner is therefore entitled to the amount found due by the collector, viz. \$1,498.46. The judgment of the circuit court is reversed, and the case is remanded to that court, with instructions to enter a new judgment for the petitioner in accordance with this opinion, and for the costs permitted by the act of March 3, 1887.

(April 20, 1898.)

WALLACE, Circuit Judge (dissenting). I am unable to concur in the judgment in this cause.

Imported materials, viz. "linseed," were used in the production here of two manufactured articles, viz. linseed oil and oil cake. The plaintiff, upon exporting the oil cake produced from a given number of pounds of the imported linseed, was entitled to a drawback, under the provisions of section 22 of the act of congress of August 27, 1894, which provides as follows:

"Where imported materials, on which duties have been paid, are used in the manufacture of articles manufactured or produced in the United States, there shall be allowed on the exportation of such articles a drawback equal in amount to the duties paid on the materials used, less one per centum of such duties."

Upon the linseed used in the oil cake the plaintiff had paid a duty of 20 per cent. for every 56 pounds, amounting to \$4,521.09. According to the judgment of the court, the plaintiff is entitled to a drawback of only about 6 per cent. for every 56 pounds, amounting to \$1,498.46, upon the theory that it is to be allowed, not upon the number of pounds of the linseed used in the oil cake, but pursuant to a mathematical formula adopted by the treasury department. The statute gives no sanction for such a mode of computing the drawback. The only inquiry which it permits is as to the quantity of the imported material in the exported article and the duty originally paid thereon. The mathematical formula which has been applied cannot possibly lead to a result which satisfies the statute.

It is true that between 1861 and 1870, while a similar statute was in force, it was the usage of the officers of the treasury department to compute the drawback according to this formula, but the case is not one for the application of the rule that where a statute is ambiguous the practical interpretation given by the executive officers charged with its administration is entitled to great weight. The statute is not ambiguous, but is as plain as language can make it.

In my opinion the judgment of the court below was correct, and should be affirmed.

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COFFMAN v. CASTNER et al.

(Circuit Court of Appeals, Fourth Circuit. May 3, 1898.)

No. 231.

TRADE-MARKS AND TRADE-NAMES—GEOGRAPHICAL NAMES—"POCAHONTAS COAL."

No one has, or can acquire, the exclusive right to use the name "Pocahontas," as descriptive of either the locality or character of coal mined in what is known as the "Great Pocahontas Coal Field of Virginia and West Virginia," but all producers of coal in that section have the right to so

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<sup>1</sup> Rehearing denied May 19, 1898.

use it in common, as the extensive product of that region has become widely known as "Pocahontas Coal." <sup>1</sup>

Appeal from the Circuit Court of the United States for the District of West Virginia.

This was a suit in equity by Samuel Castner, Jr., and Henry B. Curran against W. H. Coffman to restrain defendant from alleged wrongful use of a trade-name. There was a judgment for plaintiffs, and the defendant prosecutes this appeal.

S. C. Graham, for appellant.

Arthur v. Briesen (J. Walter Douglass and Henry E. Everding, on the brief), for appellees.

Before GOFF, Circuit Judge, and BRAWLEY and PURNELL, District Judges.

GOFF, Circuit Judge. This is an appeal from an order of the circuit court for the district of West Virginia entered on the 5th day of May, 1897, in the chancery cause of Samuel Castner, Jr., and Henry B. Curran, trading under the firm name of Castner & Curran, against W. H. Coffman, doing business under the name and style of Pocahontas Coke & Coal Company, and also as W. H. Coffman Coke Company. By such order the defendant below (appellant here) was in his own name, and in the name of the Pocahontas Coke & Coal Company, and also as the W. H. Coffman Coke Company, together with his servants, attorneys, and associates, restrained and inhibited from using the name "Pocahontas" or "Pocahontas Flat Top" in connection with his business, the court being of the opinion that "the complainants have a right to use the said word 'Pocahontas' for the purpose of indicating that the coal was from the Pocahontas field, and that they have the sole right to use said word as indicating the character of coal they sell." From this decree the defendant below, under the provisions of section 7 of the act approved March 3, 1891, entitled "An act to establish circuit court of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," sued out this appeal.

The bill alleges that about the year 1882, in the state of Virginia, a tract or field of smokeless bituminous or semibituminous coal was opened and mined by the Southwest Virginia Improvement Company, a corporation organized and doing business under the laws of the state of Virginia; that shortly thereafter, but still in the year 1882, the said corporation named their mine "Pocahontas," and began selling the coal therefrom as "Pocahontas" coal, having adopted the trade-mark "Pocahontas" as designating its said output; that prior to the 1st day of January, 1884, Castner & Co., Limited, a partnership formed under the laws of the state of Pennsylvania, did purchase from the said Southwest Virginia Improvement Company the coal so mined, and did ship and sell the same principally at tide-water points under the name of "Pocahontas" coal; that they, as such partnership asso-

<sup>1</sup> As to the use of geographical names as trade marks and names generally, see note to Hoyt v. J. T. Lovett Co., 17 C. C. A. 657.

ciation, dealt in, inspected, shipped, and sold from said region or field as "Pocahontas" coal in large quantities, and under the license of the Southwest Virginia Improvement Company advertised, shipped, and billed the same "Pocahontas" coal, uniformly designating it as such coal; that in the year 1889 the complainants became the successors and assigns of said Castner & Co., Limited, and continued the same business under the name of Castner & Curran, dealing in and selling large quantities of said coal under the trade-mark designation of "Pocahontas" coal, shipping, billing, and advertising the same as "Pocahontas" coal, and as "Pocahontas Flat Top" coal, and that they, by reason of the careful inspection and purification of their coal, greatly increased from year to year the sale of the same; that complainants and their predecessor, Castner & Co., Limited, from the year 1883 until the bringing of this suit, during the first 12 years thereof with the license of the Southwest Virginia Improvement Company, and thereafter as owners of the said trade-mark, uninterruptedly carried on said coal business, and have continuously inspected, shipped, and sold large quantities of coal under the said trade-mark of "Pocahontas"; that on April 1, 1895, by an assignment in writing duly executed by the Southwest Virginia Improvement Company, the complainants became the owners of the entire right and title, interest and good will in and to the trade-mark "Pocahontas," with the exclusive right to use said word as a designation for all coal thereafter sold by them from said field, and became vested also with the exclusive right to sue and recover for all gains, profits, and damages arising out of past, present, or future infringements of the same; that they have devoted much time and expended large sums of money in inspecting, selecting, grading, and maintaining the superior quality and purity of the said coal, whereby it has acquired, and now possesses, a great reputation in the markets of the world under the name of "Pocahontas" or "Pocahontas Flat Top" coal, and that it has been and is now much sought after by dealers and the public; that complainants have the sole and exclusive right to the use of the word-symbol "Pocahontas" as a trade-mark for coal, and that it is of great value to them in their business. It is also set forth in the bill that the public and the dealers in coal have generally acquiesced in complainants' exclusive rights to such use, and that they have not knowingly permitted the unlawful use of such trade-mark by others; that prior to November 1, 1896, complainants controlled the output of the various collieries in what is known as the "Great Flat Top Coal Region," including the Indian Ridge Coal & Coke Company; that they sold so much of this output as came up to the grade of "Pocahontas" coal in quantity, purity, and size as "Pocahontas" coal, but that the output of the Indian Ridge Company was impure, and required special care and attention, and yielded but a small proportion of the "Pocahontas" coal, as it was marketed by complainants; that the defendant, W. H. Coffman, is a factor or agent engaged in the sale of coal and coke at Bluefield, W. Va., and elsewhere, selling and advertising for sale bituminous and semibituminous coal from the Indian Ridge colliery, which is inferior in quality and purity to the coal sold by complainants, and is not of the standard as to quality and purity established

by them; that he, intending to deceive dealers and the public, and to cause purchasers of his coal to believe that the same was sold by complainants, or is of the quality sold by them, has at Bluefield and elsewhere offered for sale and sold a very inferior and impure coal under the name and designation of "Pocahontas," and has, in advertising and selling the same, used the word-symbol "Pocahontas," and in letters, notes, and bills has displayed the words "Pocahontas Coal," or "Pocahontas Flat Top Coal," whereby the purchasers of his coal are liable to be and will be deceived, and caused to purchase defendant's coal as that sold by complainants; that as a matter of fact purchasers have been so deceived, and that the reputation of "Pocahontas" coal has been thereby tainted; that the defendant intends to and will continue so to do, unless prevented by the order of the court below. Other statements in the bill are not referred to, the same being unnecessary so far as the questions we are now to consider are concerned. A large number of affidavits were filed by complainants and defendant, which, as well as the answer of the defendant, treated as an affidavit, and the exhibits with it, and the bill, were read and considered by the court in disposing of the motion for an injunction.

Certain propositions of law, now well established, applicable to this case, will be referred to in the outset as guiding us in our investigation of the same, and as plainly indicating, in connection with the facts as we find them, the result we now announce. A trade-mark is intended to designate the origin of the particular article to which it is affixed, or to which it specially refers, and it gives notice to the world who the producer of that article was. A name may be used for this purpose, or a certain mark or peculiar device may be employed, provided they have not theretofore been appropriated by others for the same purpose. But the right to select such names, marks, and devices is governed by certain rules and limitations which have been found and announced by the courts. On this point the supreme court of the United States in *Canal Co. v. Clark*, 13 Wall. 311, 323, said:

"The trade-mark must therefore be distinctive in its original signification, pointing to the origin of the article, or it must have become such by association; and there are two rules which are not to be overlooked: No one can claim protection for the exclusive use of a trade-mark or trade-name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured, rather than protected, for competition would be destroyed. Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trade-mark, and the exclusive use of it be entitled to legal protection. As we said in the well-considered case of *Amoskeag Mfg. Co. v. Spear*, 2 N. Y. Super. Ct. 599: 'The owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms, or symbols that were appropriated as designating the true origin or ownership of the article or fabric to which they are affixed; but he has no right to the exclusive use of any word, letters, figures, or symbols which have no relation to the origin or ownership of the goods, but are only meant to indicate their names or quality. He has no right to appropriate a sign or symbol which, from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose.' And it is obvious that the same reasons which forbid the exclusive appropriation of generic names, or of those merely descriptive of the article manufactured, and which can be

employed with truth by other manufacturers, apply with equal force to the appropriation of geographical names, designating districts of country. Their nature is such that they cannot point to the origin (personal origin) or ownership of the articles of trade to which they may be applied. They point only at the place of production, not to the producer; and, could they be appropriated exclusively, the appropriation would result in mischievous monopolies. Could such phrases as 'Pennsylvania wheat,' 'Kentucky hemp,' 'Virginia tobacco,' or 'Sea Island cotton' be protected as trade-marks; could any one prevent all others from using them, or from selling articles produced in the districts they describe under those appellations,—it would greatly embarrass trade, and secure exclusive rights to individuals in that which is the common right of many. It can be permitted only when the reasons that lie at the foundation of the protection given to trade-marks are entirely overlooked. It cannot be said that there is any attempt to deceive the public when one sells as Kentucky hemp or as Lehigh coal that which in truth is such, or that there is any attempt to appropriate the enterprise or business reputation of another who may have previously sold his goods with the same description. It is not selling one man's goods as and for those of another. Nothing is more common than that a manufacturer sends his products to market, designating them by the name of the place where they were made. But we think no case can be found in which other producers of similar products in the same place have been restrained from the use of the same name in describing their goods. \* \* \* It is only when the adoption or imitation of what is claimed to be a trade-mark amounts to a false representation, express or implied, designed or incidental, that there is any title to relief against it. True it may be that the use by a second producer, in describing truthfully his product, of a name or a combination of words, already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the product; but if it is just as true in its application to his goods as it is to those of another who first applied it, and who therefore claims an exclusive right to use it, there is no legal or moral wrong done. Purchasers may be mistaken, but they are not deceived by false representations, and equity will not enjoin against telling the truth."

In the same case it was held that the word "Lackawanna," the name of a section of the state of Pennsylvania, could not be combined with the word "coal," and made a trade-mark which would be protected by law, for the reason that every one who mined coal in the valley of the Lackawanna was entitled to the right of representing it as coming from that region, and as being Lackawanna coal.

In *Mill Co. v. Alcorn*, 150 U. S. 460, 466, 14 Sup. Ct. 151, the supreme court says:

"The appellant was no more entitled to the exclusive use of the word 'Columbia' as a trade-mark than he would have been to the use of the word 'America,' or 'United States,' or 'Minnesota,' or 'Minneapolis.' These merely geographical names cannot be appropriated, and made the subject of an exclusive property. They do not, in and of themselves, indicate anything in the nature of origin, manufacture, or ownership; and in the present case the word 'Columbia' gives no information on the subject of origin, production, or ownership."

In the same case it was said:

"These cases establish the following general propositions: (1) That to acquire the right to the exclusive use of a name, device, or symbol as a trade-mark it must appear that it was adopted for the purpose of identifying the origin or ownership of the article to which it is attached, or that such trade-mark must point distinctively, either by itself or by association, to the origin, manufacture, or ownership of the article on which it is stamped. It must be designed as its primary object and purpose, to indicate the owner or producer of the commodity, and to distinguish it from like articles manufactured by others. (2) That if the device, mark, or symbol was adopted or placed upon

the article for the purpose of identifying its class, grade, style, or quality, or for any purpose other than a reference to or indication of its ownership, it cannot be sustained as a valid trade-mark. (3) That the exclusive right to the use of the mark or device claimed as a trade-mark is founded on priority of appropriation; that is to say, the claimant of the trade-mark must have been the first to use or employ the same on like articles of production. (4) Such trade-mark cannot consist of words in common use as designating locality, section, or region of country."

In *Laughman's Appeal*, 128 Pa. St. 1, 18 Atl. 415, it was held that when the article to which a geographical name is applied is the product of the place named, the term cannot be used as a trade-name by one to the exclusion of others, owners of like products of the same place; hence the term "Sonman," which has received a distinct geographical recognition from the public, it being the name of a large boundary of land containing a number of private estates owned by different persons, all of whom are engaged in the same business of mining and shipping coal, and having within its limits a village of the same name, cannot be appropriated by one of such persons as a trade-name to the exclusion of the others, although the tract is not an independent region, and cannot be considered a separate coal basin or subbasin.

In the case of *Iron Co. v. Uhler*, 75 Pa. St. 467, the court said:

"Glendon is the name of the town in which the business of each party is located and carried on. It is an incorporated borough. Being, then, the name of an incorporated town, the main question is whether the appellant lawfully has the exclusive right to use it as a trade-mark. It is conceded, as a general rule, that the name of a town or city cannot be so appropriated as the exclusive property of any one. This view is well sustained by authority. *High, Inj.* 673; *Bisp. Eq.* 411; *Wolfe v. Goulard*, 18 How. Prac. 64; *Lead Co. v. Masury*, 25 Barb. 418; *Newman v. Alvord*, 49 Barb. 588; *Candee v. Deere*, 54 Ill. 439; *Canal Co. v. Clark*, 13 Wall. 311. It is contended by the appellant that this case is taken out of the general rule, inasmuch as the trade-mark was adopted prior to the incorporation of the borough, and before there was any town at that place. No authority is cited which supports this distinction. The case of *Waterspoon v. Currie*, 23 Law T. 443, is clearly distinguishable. It is known as the 'Glenfield Starch Case.' It is true, the injunction was there granted, but the complainant and respondent were not both engaged in carrying on the business in the same town or city. There was no town—no city—there. The lord chancellor says: 'Glenfield is not a town; \* \* \* it is not a parish; it is not a hamlet; it is not a district of any special character; but it was an estate of that name upon which some people seem to have erected some houses or manufactories, and upon which now some sixty people are living.' It will not do to apply to an incorporated borough in this state the same rule that may be applicable to an estate in England. Such a borough is essentially of a public nature; the estate is of a more private character. The name which an individual may give to his estate is unlike that which legislative sanction has given to a municipal corporation. The rights of the public in each are radically different. The appellees did not falsely represent the place of their business location. Their pig iron was actually manufactured within the borough of Glendon. \* \* \* The appellees put upon their pigs the initials of their firm and the name of their town. That name was Glendon to the whole world. It cannot be that the previous appropriation by the appellants of the word which now is the name of the town prevents any other manufacturer of pig iron, within its limits, from using the same word. If it be so now, it may continue through all coming time. The boundaries of the town may be enlarged. The borough may grow into a city. The manufactories of pig iron may be multiplied, yet the word most expressive to indicate their location must be denied to all,

save one. \* \* \* We see nothing in the facts of this case, even as found by the master, to take it out of the general rule which denies to one the exclusive use as a trade-mark of the name of the town in which the same kinds of goods are manufactured by others."

In *Connell v. Reed*, 128 Mass. 477, Chief Justice Gray says:

"Although the master reports that there was no evidence that any other person than the plaintiffs or their agents had ever used these words ["East Indian"] in connection with the manufacture and sale of medicines, it is at least doubtful whether words in common use as designating a vast region of country and its products can be appropriated by any one as his exclusive trade-mark, separately from his own or some other name in which he has a peculiar right."

In the case of *Evans v. Von Laer*, 32 Fed. 153, Judge Colt held that, as Montserrat was the name of an island in the West Indies from which both the plaintiff and defendant imported lime juice, the former, in the absence of fraud, was not entitled to the exclusive use of the word "Montserrat" as a designation for lime juice, even though the plaintiff's article may have acquired a high reputation for purity and strength, while that of the defendant was of an inferior quality.

In *Salt Co. v. Burnap*, 20 C. C. A. 27, 73 Fed. 818, 43 U. S. App. 243, 250, the court said:

"It is well settled, and we have just had occasion to decide in this court, that words merely descriptive of the character, quality, and composition of the article or of the place where it is manufactured or produced cannot be monopolized as a trade-mark. *California Fig Syrup Co. v. Frederick Stearns & Co.*, 43 U. S. App. 234, 20 C. C. A. 22, and 73 Fed. 812; *Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. 625; *Canal Co. v. Clark*, 13 Wall. 311. The name 'Genessee,' when used in connection with the complainant's salt, obviously refers to the place of its production. The complainant could, therefore, assert no trade-mark property in it."

In the case of *Candee v. Deere*, 54 Ill. 439, the court held that there can be no trade-mark in the words "Moline Plows," as Moline was the name of the town in which the plows were made, and said:

"Is it possible—can it be tolerated for a single moment—that a maker of plows at Moline shall not be permitted to sell his work as a Moline plow; to advertise them in every form as the Moline plow? Would it not be the truth; and shall a manufacturer be prevented from publishing to the world where his wares are made? \* \* \* Any number of plow makers can go with impunity to Moline, and establish there plow factories, and brand on their plows their own name and the name of the town, and send them broadcast over the country, to the joy of our farmers, and to the common benefit of all."

These cases firmly establish the questions of law applicable to the contention we are now to dispose of, and they clearly indicate the result we have reached. A geographical name cannot be appropriated to the exclusive use of any person or company as a trade-mark, and, if adopted as such, it must be used subject to the right of others doing business in the section of country to which it applies to make like use of it in matters properly pertaining to their business in that locality.

It is clear from the evidence that "Pocahontas" is a word of well-known geographical signification, denoting that large and valuable

section of the Virginias famed the world over for the remarkably valuable and useful coal and coke that it produces. Prior to 1882 this region was comparatively unknown, and entirely in the primeval state in which nature had left it, constituting a part of the Great Flat Top Mountain portion of southwest Virginia and of southeast West Virginia. In the years immediately preceding 1882 this wilderness had been sought out and explored by those who represented the capital and energy by which it was afterwards developed. The experts sent into its theretofore hidden recesses returned with the report of its fabulous wealth and wonderful possibilities. The result was the extension of the Norfolk & Western Railroad into and through the Great Flat Top region, and the organization of the Southwest Virginia Improvement Company, under whose auspices the mines were opened and coal was first shipped. The development inaugurated by this company was commenced during the fall of 1881, continued in the year 1882, and the railroad was completed to the mines in the springtime of the year 1883. The town located at the point where the first mine was opened was early in the year 1882 named Pocahontas, and the post office which was established by the department at Washington on the 30th day of June, 1882, was likewise then called by the same name. The first coal shipped to the tide-water markets left the mines in July, 1883, and it was billed and sold as "Pocahontas" coal. The entire field is now known as the "Pocahontas" and the "Pocahontas Flat Top Coal Field." It embraces large portions of Tazewell and Wise counties in the state of Virginia, and of Mercer, McDowell, Wyoming, and Raleigh counties in the state of West Virginia. It is divided into three sections or working divisions,—the Pocahontas, which includes all the mines around the town of Pocahontas; the Bluestone district, embracing the improvements on the Bluestone river; and the Elkhorn, the country in McDowell county on the Flat Top Mountain. The coal shipped from all this section is known in the markets of the world as "Pocahontas" coal, evidently so called from the town of that name in which the first mine was located, and from which the first shipments were made. The coal beds are above the water level, and range from 5 to 13 feet in thickness, extending through an area of about 500 square miles, or 320,000 square acres. An actual survey of the outcrop of this field discloses that about one-third of the territory is barren, and that there are near 213,000 square acres underlaid with the Pocahontas vein of coal. A moderate estimate gives to each square acre 10,000 tons of marketable coal, or say 2,130,000,000 tons. At the time when this suit was instituted 38 different coal and coke companies were operating in the field, all of them advertising, mining, and selling the coal excavated from the Pocahontas vein, and known as the "Pocahontas Flat Top Coal." For the manufacture of coke over 5,000 ovens had been constructed and were in use. During the year 1883, 99,871 tons were mined, the output in the following years rapidly increasing, until in 1894 3 888,058 tons were sent to market. For the purpose of illustrating the almost inexhaustible resources of the field, it may be stated

that at this rate of production—as shown by the returns for the year 1894—it would require about 548 years to exhaust the seam now being worked. And it is as to this entire body of coal that the complainants claim the exclusive right to use the word “Pocahontas,” as descriptive of its origin and quality.

There is no evidence to sustain the allegation in the bill that the Southwest Virginia Improvement Company began selling coal in the year 1882 from the Pocahontas Mine, nor that it made any sales of “Pocahontas” coal in the year 1883, in the sense that those words are used as a trade-symbol. Nor is there any satisfactory evidence tending to show that said company adopted and used a trade-mark, or made any effort to establish one as such, prior to the year 1885. It is true that in the assignment made by the Southwest Virginia Improvement Company to the complainants it is recited that said company “did adopt, on or about the 1st day of July, 1882, as a trade-mark, the word-symbol ‘Pocahontas’”; but surely that statement in such a paper, made under the date of April 1, 1885, cannot be considered as proving that fact, and the record has been searched in vain for testimony establishing it. The first coal sent to market, according to the evidence, was in July, 1883, at which date both the town of Pocahontas and the post office of the same name had been in existence for a year at least. The claim of complainants that the town had no existence until January 31, 1884, the date of the act of the Virginia legislature incorporating it, and that, therefore, it was not known legally, in a geographical sense, prior to such date, is not, in the light of the testimony, and in connection with the important questions herein involved, entitled to the consideration given it by counsel. There can be no doubt but that at the time the first shipment of coal was made by the Southwest Virginia Improvement Company, the town of Pocahontas was in existence, the post office had been established, and that the coal itself was sent from the station of that name. The word “Pocahontas” then denoted the locality at which the article in which the company was dealing was mined, as well as the point from which it was shipped, and it also indicated in business matters the natural product of all that region. It follows, therefore, that it could not then be used as an exclusive trade-mark, and as a matter of fact it was not so employed until some time thereafter. We are impelled to find from the testimony that in the early shipments of coal the word “Pocahontas” was used, not as a word-symbol or trade-mark, but simply as the name of the town from whence it came, for the purpose only of pointing out the place of production. The coal had not then been used, and it had not produced the wonderful results that it subsequently did. Its reputation had not been made, and it had not at that time found its way to the marts of the world, to the furnaces of land and sea. The operators of that section and their vendees, including complainants’ predecessors, had not then been given the opportunity to inspect, grade, and purify it, so as to make it typify the high degree of excellence that it now enjoys, and there is no evidence tending to show that selection and inspection were

then resorted to, other than is usual in all mines. The first direct evidence bearing on the trade-mark is the application of August 25, 1885, made by Castner & Company, Limited, to register the word "Pocahontas," at the United States patent office. Such registered trade-mark is not now relied upon by complainants; why we have not been advised, but likely for reasons connected with the decision of the supreme court in the Trade-Mark Cases, 100 U. S. 82. It is, however, worthy of notice that such application was made under the provisions of section 4937, Rev. St. U. S., which require the party so applying to set forth in the statement made by him the length of time, if any, during which the trade-mark had been in use, and that said applicants in their statement so filed used this language: "This trade-mark has been used continuously by said corporation since about January 1, 1885." The word-symbol or device now claimed by complainants as a trade-mark is founded on the rule of the common law that the person or company first employing it to distinguish the goods made or sold by the owner thereof is entitled to the benefits arising from its exclusive use. The chancery courts of England and of this country have long recognized this privilege, and have enforced it, if the property right of the claimant thereto has been duly established.

As we see this case, the complainants are not entitled to the exclusive right to use the word "Pocahontas," as descriptive of either the locality, or character of the coal mined in the Pocahontas coal field, but all of the producers of that product in that section have the right to so use it in common with complainants. That word has acquired a generic meaning, and from the evidence before us it is clear that in the business world it is used to indicate the place where the coal is produced, and that it does not point to either the producer or the vendor of the same. All the mine owners who, by their labor, succeeded in establishing their industries in that section, have the right to use in their business the geographical word which is the recognized designation of the same, and that points to the product peculiarly indicative of its wealth; and surely it cannot be that any one of them can inhibit all the rest from exercising the privilege, which was the birthright of the section, and is an advantage common to all who are interested in it. To give to the complainants below the exclusive right they claim in their bill would be to ignore the principle that is the foundation of the protection given to trade symbols and marks.

There remains yet one other allegation of complainants' bill to be considered, and that is the charge that the defendant below, intending to deceive dealers in coal and the public in general, unlawfully offered for sale and sold a very inferior article of coal under the name of "Pocahontas"; that purchasers of the same were liable to be and were misled, and were induced to buy it, as the superior and selected grade usually sold by the complainants; and that thereby the public was deceived, and the reputation of the coal sold by complainants was injured. It is undoubtedly true that complainants, as producers and sellers of coal from the "Pocahontas coal

fields," are, with all other producers and mine operators in that region, interested in maintaining the purity and reputation of the natural product of the same, and that they may cause the defendant or any one else to be inhibited and restrained from selling, or offering to sell, an inferior coal from another region as the coal mined in the Pocahontas field. This they can do independent of the question of trade-mark, or of their right to the exclusive use of one. This allegation that the defendant has been engaged in unfair and fraudulent trade is not supported by the evidence. It has been shown that he was advertising and selling "Pocahontas" coal, but the testimony also shows that the coal he so advertised and sold was in fact from the "Pocahontas coal field." It follows that the representations made by him were neither fraudulent nor untrue, and that he had a lawful right to so advertise and sell. It nowhere appears that he ever represented to the public that he was selling the same article sold by complainants, except as their coal was comprehended by the word "Pocahontas," which also justly described his own. He sold the product of the Browning Mine, which is located adjoining the original mine of the Southwest Virginia Improvement Company, in the town of Pocahontas, the coal from which is now disposed of by the complainants, as "Pocahontas" coal; and it is proven that both collieries excavate from the same vein. As to the right of the Browning Mine, one of the oldest in the field, to sell its product as "Pocahontas" coal, there can be no doubt, and it would be unconscionable to deny it. He also sold from the Indian Ridge Mine, which is located within the "Pocahontas coal field," and it is shown that the complainants are now selling the output of the Rolfe and Arlington Mines as "Pocahontas" coal, both of which adjoin the Indian Ridge Mine. The complainants themselves formerly sold the coal from this mine as "Pocahontas" coal, and it is really difficult to understand why it becomes another article in the hands of the defendant. It is also set forth in the bill that the coal from the Indian Ridge section does not grade as high as that from other portions of the field, and that it had not been carefully inspected by the defendant before it was sold. But the evidence does not sustain this claim, and it appears that the complainants themselves have endeavored to again secure the right to sell this coal as "Pocahontas" coal since it has been so sold by the defendant, and we cannot believe that they would have made this effort had the grade of the product been inferior, or its inspection careless.

The proof does not show that the appellant has practiced any deception upon the public, or that he has perpetrated any fraud upon the appellees. The appellant advertised and was selling coal obtained from the Browning and Indian Ridge Mines, of the "Pocahontas Flat Top region," and he did not represent it as purchased from the appellees, nor as mined by them. He has represented it as coal from the "Pocahontas" field, and it was in fact such coal. He has made no false representations, and he has invaded no right to which the appellees can properly assert a claim. There is error in the decree appealed from, and it is reversed, and this cause is remanded to the court below with instructions to dismiss the bill. Reversed.

## On Rehearing.

(May 19, 1898.)

Richard C. Dale and Henry E. Everding, for petitioners.

GOFF, Circuit Judge. The court has duly considered this petition for a rehearing, and it is ordered that the mandate issue as heretofore directed. The opinion filed in this cause on the 3d day of May, 1898, found error in the decree appealed from, not, as stated in the petition for a rehearing, solely because the complainants below had failed to prove material allegations of their bill of complaint, but also because the court found that the word "Pocahontas" could not be exclusively appropriated by complainants as a trade-mark or word-symbol, for the reason that it was and is a geographical word, in and to which all the people of the section of country to which it refers have the common right of use in connection with their business in such locality. It follows, therefore, that further proofs relating to the same would be unavailing, and it was for this reason that the court remanded the cause, with instructions that the bill be dismissed. The ruling is adhered to. We are clearly of the opinion, not only that complainants below are not entitled to an injunction, but also that there is no equity in their bill, and that, therefore, it will be a useless expenditure of time and money, and cause fruitless delay, to take the evidence mentioned in the petition for a rehearing. The prayer of the petition is refused.

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BASS, RATCLIFF & GRETTON, Limited, v. HENRY ZELTNER BREWING CO.

(Circuit Court, S. D. New York. May 13, 1898.)

## TRADE-MARKS—UNFAIR COMPETITION.

One using, in connection with pale ale, a plain red triangle stamped on a label, cannot enjoin, on the ground of unfair competition, one who uses, in connection with his lager beer, a similar red triangle, having a large white "Z" thereon, the labels and posters being so utterly unlike that the ordinary purchaser would not be deceived.<sup>1</sup>

This was a suit in equity by Bass, Ratcliff & Gretton, Limited, against Henry Zeltner Brewing Company, to restrain alleged unfair competition in trade.

Rowland Cox, for complainants.

Goepel &amp; Raeger, for defendant.

TOWNSEND, District Judge. The complainants herein are the proprietors of "Bass' Ale." They and their predecessors have for many years continuously used labels stamped with the well-known plain red triangle on an elliptical figure, with black border and red lace-work design, bearing the words "Bass & Co.," to designate their

<sup>1</sup> As to trade-marks and unfair competition in trade generally, see elaborate note to Scheuer v. Muller, 20 O. C. A. 165.

chief product, "Pale Ale." The defendant has used, to designate its "Old-Fashioned Lager Beer," a circular label, and posters representing a strap and buckle stamped with a red triangle, having a large white "Z" thereon. The labels and posters are so utterly unlike those of complainants in shape, color, and collocation of symbols and letters that a mere inspection shows that the ordinary purchaser would not be deceived. Furthermore, the defendant's product is a different article, sold under a different name, in bottles of a different color and shape, with different cork and capsule, from those of complainants, and no unfair competition or improper use of the red triangle has been proved. For these reasons the bill may be dismissed. This conclusion dispenses with the necessity of considering the further forcible contention of defendant as to complainants' use of said symbol.

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WALLACH et al. v. WIGMORE.

(Circuit Court, E. D. Pennsylvania. April 2, 1898.)

TRADE-NAMES—INFRINGEMENT—SUITS—PARTIES—LICENSEE.

No injunction can issue against infringement, on a bill to which an exclusive licensee (when there is one) is not a party.

This was a suit in equity by Leopold Wallach and Moritz Wallach against William H. Wigmore for alleged infringement of a trade-mark or trade-name. The cause was heard on a motion for preliminary injunction.

H. Gordon McCouch and R. C. Dale, for complainants.  
Wm. Morris, for defendant.

DALLAS, Circuit Judge. There can be no property in any name or word, abstractly considered; and accordingly the bill in this case avers that it is by reason of the appropriation of the term "Phonendoscope" to identify a certain patented instrument that the alleged exclusive right to its use in connection with that article, or with any instrument closely resembling it, though not identical therewith, has been acquired. The trade-name claimed, and the right to deal in the patented article, must be united in the same person or persons, or there can be no valid title to the exclusive use of the former. Here, however, the proofs of the plaintiffs show that a firm which has not been made a party to the suit is the exclusive licensee of the plaintiffs, as respects both the patent and the name; and while it is true that a licensee, less than exclusive, should not be joined in a suit for infringement (*Blair v. Glass Co.*, 52 Fed. 226), it is also true that an exclusive license is, in effect, a grant (*Johnson Railroad-Signal Co. v. Union Switch & Signal Co.*, 59 Fed. 23), and that, therefore, no injunction can issue to restrain future infringements, upon a bill to which an exclusive licensee (if there be such a one) has not been made a party (*Waterman v. Mackenzie*, 138 U. S. 255, 11 Sup. Ct. 334). This is shown by several authorities which are cited upon the defendant's brief, but it is not necessary to mention any others than those to which I have referred. These cases all relate to pat-

ents, but they seem to me to be plainly applicable to the present one, especially in view of the fact that the name in question is claimed only as incidental to the monopoly granted by a patent, under which, as well as of the alleged name itself, a party not before the court is exclusive licensee. It follows that the complainants' motion for a preliminary injunction must be denied, and it is so ordered.

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TRUMAN v. CARVILL MFG. CO.

(Circuit Court, N. D. California. March 28, 1893.)

No. 12,093.

1. RES JUDICATA—JUDGMENTS IN PATENT CASES.

A judgment sustaining the validity of a patent does not operate as *res judicata* in a suit on the same patent against a different defendant.

2. PATENT INFRINGEMENT SUITS—EFFECT OF PRIOR ADJUDICATIONS.

A judgment sustaining the validity of a patent is not conclusive in a subsequent suit against a different defendant in respect to a defense as to which substantially new evidence is produced, and the court will exercise an independent judgment in regard thereto.

3. SAME—PRIOR PUBLICATIONS.

Trade magazines, published and copyrighted, in general circulation, and found in public free libraries as well as scientific libraries, are publications, in the sense of the patent law.

4. SAME—BREAKING-CARTS.

The Putnam patent, No. 232,207, for improvements in breaking-carts, consisting in so attaching the footboard to the vehicle that it shall move in unison with the seat, is void because of anticipation, and for want of novelty.

This was a bill in equity for infringement of letters patent No. 232,207, issued to De Witt C. Putnam on September 14, 1880, for improvements in breaking-carts.

John L. Boone, for complainant.

E. J. Mize, for defendant.

MORROW, Circuit Judge. This is a suit in equity for the infringement of letters patent No. 232,207, granted to De Witt C. Putnam on September 14, 1880, for improvements in breaking-carts. The complainant is the assignee, by a regular chain of assignments, of all the right, title, and interest in said invention and letters patent for the territory known and described as "San Francisco county, state of California, and no other place or places." The patent has been in litigation heretofore in this court, and, on appeal, in the circuit court of appeals. *Truman v. Holmes*, 14 C. C. A. 517, 67 Fed. 542; *Id.*, 80 Fed. 109; *s. c.* (on appeal) 87 Fed. 742. In *Truman v. Holmes*, 14 C. C. A. 517, 67 Fed. 542, which was an action at law, the validity of the patent was sustained on a writ of error to this court from the circuit court of appeals; and the judgment of the lower court, in favor of the complainant, in the sum of \$150, as damages for infringement, was affirmed. In *Truman v. Holmes* and *Truman v. Implement Co.*,—both being "companion cases," and suits

in equity brought in this court for infringement of the same patent, —the bills were dismissed, and the defendants held not to have infringed. 80 Fed. 109, affirmed on appeal 87 Fed. 742. Different constructions of the carts were involved in the action at law and the suits in equity, as will be seen from the opinions above referred to. The original claim of De Witt C. Putnam, as first presented to the patent office, read as follows:

"The improvement in breaking-carts, consisting in suspending the footboard, E, by means of straps or hangers, F, from the shafts, seat, or that portion of the vehicle connected with the springs alone, whereby the seat and footboard have a common vertical movement, substantially as and for the purpose herein described."

This claim was rejected on the ground that "the patent of Jesse Winecoff, October 17, 1871, No. 119,956 (sulkies), substantially answers the claim." The applicant thereupon amended "by erasing the entire specification, and substituting" a new one. The figures of the patent, as they are shown in the amended specifications and claim, will be found represented in 80 Fed. 112. The amended specifications and claim read as follows:

"My invention relates to certain improvements in that class of vehicles known as 'breaking-carts,' in which young colts are broken to harness. Carts of this description are usually provided with very long shafts, and the seat is placed on springs immediately over the axle, or at such a distance back that the driver is not in danger of being kicked by a fractious animal. In this class of vehicles the footboard is usually secured to the axle, while the seat is on springs; and it is therefore uncomfortable to ride upon, since, while the body of the occupant may move up and down, his feet must remain stationary. My improvements consist in so attaching the footboard to the vehicle that it shall move in unison with the seat; the same spring which supports the seat serving as a spring for the footboard, as is more fully described in the accompanying drawings, in which Fig. 1 is a longitudinal section of my device; Fig. 2 is a bottom view. Breaking-carts usually have two wheels, A, only, and the springs, B, are secured both to the axle, C, and the shafts, D; said shafts being secured on the springs in the manner shown. In order to attach the footboard, E, to the vehicle, I place metallic straps or bands, F, in a proper position to hold the footboard, connecting these straps with the shafts and seat, and not with the axle. I have shown the straps connected with the shafts at the rear ends of, and forward of, the whiffletree bar. It will be seen by this construction that the rear ends of the shafts and the seat are supported upon the spring, B, while the straps, F, pass beneath the axle, and are bent up so that their rear and their front ends are secured to the shafts at points behind and in front of the axle, while the central portion does not touch it at all. The footboard, E, with its turned-up front portion, is then secured upon the bottom and front portions of the straps, F. Being thus entirely independent of any direct connection with the axle, it will have the same movement imparted to it by the action of the spring that the shafts have, and it will have none of the unpleasant jar that a stationary footboard, or one supported from the axle, will have; while the arrangement of the straps parallel with the shafts facilitates the attachment of the transverse footboard, and makes a strong construction. Having thus described my invention, what I claim as new, and desire to secure by letters patent, is the braces or straps, F, having their ends secured to the shafts before and behind the axle, while the central portion extends beneath the axle, and parallel with the shafts, and is adapted to support the transverse footboard, E, substantially as and for the purpose herein described."

With reference to the interpretation that should be placed on this amended specification and claim, the circuit court of appeals, per

Hawley, District Judge, delivering the opinion of the court in *Truman v. Holmes*, 87 Fed. 742, held that:

"The effect of the withdrawal of his original specifications and claim was to limit his patent to the specific invention as described in the claim of his amended specifications, to wit, to the construction of carts where the central portion of the straps 'extended beneath the axle';" citing *Roemer v. Peddie*, 132 U. S. 313, 317, 10 Sup. Ct. 98, and *Morgan Envelope Co. v. Albany Perforated Wrapping-Paper Co.*, 152 U. S. 425, 429, 14 Sup. Ct. 627, and the cases therein collated.

At the outset, the defendant filed a plea, which was subsequently amended, in which it is averred, substantially, that the complainant was at all times from the 18th day of January, 1888, to the 31st day of January, 1894, one of the co-partners comprising the firm of Truman, Hooker & Co.; that the complainant on or about the 28th day of June, 1893, as such member of said firm, induced the defendant to accept an order from the said firm of Truman, Hooker & Co. for the manufacture for said firm of large quantities of carts, including 125 or thereabouts, containing and embodying said invention described in the patent numbered 232,207; that the defendant did thereupon manufacture said quantities of said carts so ordered by said firm, of the kind and in the manner and at the times agreed upon by said parties to said order; that defendant offered to deliver, according to the terms of said order, all of said carts so ordered, to said Truman, Hooker & Co., but that said firm neglected and refused to receive the same, or any part thereof, except about two-fifths of the number so ordered; that the defendant has since said refusal sold most of the remaining number of said carts so ordered by said Truman, Hooker & Co., including about 75 carts containing said invention, within the territory alleged to be owned by the complainant; that the defendant has never at any time manufactured for sale nor for use, nor sold nor used, within said territory, nor threatened to sell nor offered for sale within said territory, any other or greater number of carts embodying said invention than the number so ordered as aforesaid; that the material put into said carts by the defendant was and is of greater value than the complainant's patent therein, etc. As it was claimed in the amended plea that the carts had been made under a contract to manufacture them by Truman, Hooker & Co., of which firm the complainant was a member at that time, it was contended that there was no infringement by the defendant in selling that number of the carts which had been refused by Truman, Hooker & Co. The plea as amended was, however, overruled; and the defendant duly filed its answer, denying infringement, and setting up want of novelty, prior use, and publication. Testimony has been taken, and the case now comes up for final consideration.

The fact that the carts made and sold by the defendant are like the carts for which the letters patent involved in this case were issued, is placed beyond controversy, not alone by the admission in the plea, but more particularly by the testimony of O. S. Carvill, the superintendent of the defendant company. He testified as follows:

"Q. (By counsel for complainant): Can you state whether or not the Carvill Manufacturing Company has since the year 1880 made or sold any

carts in which the springs were mounted directly upon the axle, the shafts secured upon the springs, the seat secured directly upon the shafts over the springs, and in which the footboard was supported by a strap attached or connected to the shafts in front of the axle, and passed down underneath the axle? A. Yes, sir."

To establish the validity of the patent, the complainant relies, for the most part, upon the decision of the circuit court of appeals for this circuit, affirming the judgment of this court in the case of *Truman v. Holmes*, 14 C. C. A. 517, 67 Fed. 542, and contends that it is *res judicata*, and concludes the defendant from denying the validity of the patent. Besides setting forth, by appropriate averments in the bill, the fact that the patent has been sustained in the case relied on, the judgment roll was also introduced in evidence. The case was an action at law to recover \$20,000 for infringement of the identical patent sued on in this case. It was tried before a jury, who returned a verdict for the plaintiff (complainant in this suit) in the sum of \$150. A writ of error was thereupon sued out from the circuit court of appeals, which affirmed the judgment of the court below. However conclusive the decision of the circuit court of appeals as to the validity of the patent in this case may be, still it is difficult to see how it can be deemed *res judicata* in the case at bar. True, it involves the same patent, and the complainant in the two cases is the same. But the parties defendant are entirely different. This difference, obviously, is fatal to the application of the doctrine of *res judicata*. The general rule, to make a matter *res judicata*, is that there must be a concurrence of four conditions: (1) Identity of the subject-matter involved; (2) identity of the cause of action; (3) identity of persons and parties; and (4) identity of the quality of the persons for or against whom the claim is made. 21 Am. & Eng. Enc. Law, 227, and cases there cited; *Packet Co. v. Sickles*, 5 Wall. 580; *Cromwell v. County of Sac*, 94 U. S. 351. One of the conditions is lacking in this case, and the judgment of this court and of the court of appeals in the case referred to cannot be deemed binding on the defendant in this case. It is true that, in suits where a preliminary injunction is asked for, the fact that the same patent has been sustained in other cases will often justify the court in granting the preliminary injunction. *Wells v. Gill*, 2 O. G. 590, 6 Fish. Pat. Cas. 89, Fed. Cas. No. 17,394; *Purifier Co. v. Christian*, 4 Dill. 448, Fed. Cas. No. 307; *Lockwood v. Faber*, 27 Fed. 63; *New York Filter Mfg. Co. v. Niagara Falls Waterworks Co.*, 26 C. C. A. 252, 80 Fed. 924; *Bowers Dredging Co. v. New York Dredging Co.*, 80 Fed. 119; *Bowers v. Reclamation Co.*, 81 Fed. 569. But no question of the propriety of granting a preliminary injunction arises now. The case is to be disposed of on its merits. So far as appears, this is the first time that this particular defendant has had his day in court. It furthermore appears affirmatively that some additional testimony has been introduced to that presented in the action at law relied on as *res judicata*. To what extent the evidence in the two cases differs on all the issues presented, does not clearly appear; but it was at least established in the case at bar that the witness A. D. Carvill, the president of the defendant company, who was also a witness in the action at law, was not examined with reference to the two publications introduced in the case at bar,

and that this was the first time these publications, in support of the defense of prior publication, had been so introduced. While the case of *Truman v. Holmes* may be considered as conclusive authority to establish the validity of the patent, so far as the defense of prior use, or other defense presented in that case, may be concerned, still it is obvious that it is not conclusive in this case, where a different defendant is involved, upon the defense of prior publication; it appearing affirmatively that other and additional evidence has been introduced in the case at bar to support that defense, which was not before the court in *Truman v. Holmes*. The following authorities—without entering into a discussion of them—will be found to support the views I have taken of the effect of the judgment in the case of *Truman v. Holmes*, supra, as applied to the case at bar: *Russell v. Place*, 94 U. S. 606; *Potter v. Whitney*, 1 Low. 87, Fed. Cas. No. 11,341; *Page v. Telegraph Co.*, 2 Fed. 330; *Day v. Rubber Co.*, Id. 570; *Wilson v. Coon*, 6 Fed. 611; *Consolidated Safety-Valve Co. v. Ashton Valve Co.*, 26 Fed. 319; *Lockwood v. Faber*, 27 Fed. 63; *Machine Co. v. Hedden*, 29 Fed. 147; *Cary v. Manufacturing Co.*, 31 Fed. 344; *Miller v. Tobacco Co.*, 7 Fed. 91; *Norton v. Wheaton*, 57 Fed. 929; *Southern Pac. Co. v. Earl*, 27 C. C. A. 185, 82 Fed. 690; 3 Rob. Pat. § 1175 et seq.; 21 Am. & Eng. Enc. Law, 128, 227. The court therefore feels compelled to consider the case upon its merits, and to pass its own independent judgment upon the defense now presented, as to which additional evidence has been introduced; that is, whether the Putnam patent, No. 232,207, has been anticipated by prior publication.

The complainant, called on his own behalf, testified, substantially, that his name was I. J. Truman; his residence, San Francisco; his age, 55 years; and his occupation at that time that of a banker; that he has resided in California since January, 1861; that his business has been the agricultural implement business,—wagons, carts, buggies, etc. He testified further that he had had considerable experience as a manufacturer of agricultural implements; that his experience in the business made him familiar with the state of the art, or, in other words, the kind and character of carts that were in use prior to 1880; that the carts that were made previous to that time were what are called “butcher carts”; that two-wheeled carts, called “sulkies,” had also been long in use prior to 1880; that the seat and footboard of sulkies, prior to 1880, were placed back, and the feet rested on the shafts, so that they were about level with the seat; that these sulkies were unhandy to ride in, and were not salable, except for racing; that subsequent to 1880 the cart trade was entirely changed, through the invention of Putnam, as contained in the patent involved in this case; that the feature or features of that cart which made it desirable, and tended to create a change in the manufacture and use of carts, were that the feet were placed in a comfortable position in relation to the seat, and that the body and the feet would move in unison up and down. On cross-examination he admitted that he was not a mechanic in the line of making agricultural implements or carts; that he had never made any himself. Being shown a picture or cut of a cart called a “Newport cart” (as

the same appears on plate 31 of volume 5 of the New York Coach-Makers' Magazine, and particularly the January, 1864, number thereof, which refers to page 120 of the same volume), he admitted that the picture of the cart looked as though it had a footboard extending below the axle; that perhaps the hole that is marked on the cut or picture is meant for the axle to work up and down inside the body of the cart; that a mechanic of ordinary ability in the line of cart making would, by copying from the draft of the picture on plate 31 of the publication referred to, put the seat above the shafts, and the footboard below the axle. With the testimony of this witness, and the introduction of copies of the assignments, to trace the chain of assignments to the complainant, also of the judgment roll in Truman v. Holmes, and the admission of the witness O. S. Carvill, the superintendent, that the defendant corporation had manufactured carts covered by complainant's patent, the complainant rested his case. The defendant introduced evidence of the following character in support of the defense of prior publication. Two volumes (2 and 5) of a publication designated as the "New York Coach-Makers' Magazine," and a number (January, 1874) of another publication called "The Hub," were introduced in evidence. These were offered for the purpose of showing, by a reference to certain cuts of carts, and descriptions thereof accompanying these cuts, that carts containing substantially the essential characteristics of the carts covered by the Putnam patent of 1880 were known and used long before that time. Volume 2 of the New York Coach-Makers' Magazine covers a period from June, 1859, to May, 1860. The January, 1860, number, at page 155 of the volume, contains a reference to the "Osier cab." This cab, which is really a cart, is illustrated on plate 28, at the end of the same volume. Volume 5 of the same publication covers a period from January, 1863, to May, 1864. The January, 1864, number, at page 120 of the volume, contains a reference to the "Newport cart." This cart is illustrated on plate 31 of the same volume. On page 137 of the same volume is a reference to a "caned gocart," illustrated on plate 34 of the same publication. The January, 1874, number of the Hub, at pages 326, 327, contains descriptions of various dog carts, and on page 327 is a picture of what is termed a "cottage gig." It is contended that these magazines are not publications, in the sense intended by the patent law. But it is difficult to point out any particular wherein they are lacking in that respect. It appears that they were published, and that they were copyrighted. That they were in general circulation is fully established by the testimony. Two witnesses, both assistant librarians of the Free Public Library, and the Library of the Mechanics' Institute of San Francisco, respectively, testified to the fact that these publications (the New York Coach-Makers' Magazine, in the Free Public Library, and the Hub, in the Mechanics' Institute) had been in their respective libraries for many years, and that they were accessible to the public. It further appears affirmatively from the testimony of David Kerr, a practical carriage maker, that both publications had not only been published, but that they had a general circulation among carriage makers. The witness testified that he first heard of the New York Coach-Makers'

Magazine about 30 years ago; that he was himself a subscriber to both publications, having taken the Hub for 12 years past. It therefore appears beyond contradiction that the two publications introduced in this case have been in general circulation many years before the Putnam patent was issued, in 1880. It further appears, from the testimony of at least three competent and experienced carriage makers, that a competent mechanic, experienced in the trade of constructing carts, and possessed of the ordinary mechanical skill peculiar to such trade, could, without any other guidance than the pictures, with the descriptions thereof contained in the two publications introduced in evidence, and without requiring any inventive faculty, have constructed a one-horse, two-wheeled cart, with elliptic springs resting directly upon the axle, and the shafts resting directly upon the springs, with the seat resting upon the shafts, and the footboard supported beneath the shafts, nearly in line with the axle, by means of a strap running under the footboard from the shafts, in front and back, and attached to the shafts. This evidence went entirely uncontradicted. Robinson, in his work on Patents (section 325), gives the following conditions upon which a prior publication, to be effective in defeating the validity of a patent, depends. He says:

"The publication must be (1) a work of public character, intended for general use; (2) within reach of the public; (3) published before the date of the later invention; (4) a description of the same complete and operative art or instrument; and (5) so precise and so particular that any person skilled in the art to which the invention belongs can construct and operate it without experiments, and without further exercise of inventive skill. Unless a publication possesses all of these characteristics, it does not place the invention in the possession of the public, nor defeat the claim of its reinventor to a patent."

See, also, the following cases: *Seymour v. Osborne*, 11 Wall. 516; *Cohn v. Corset Co.*, 93 U. S. 366, 370; *Downton v. Milling Co.*, 108 U. S. 466, 471, 3 Sup. Ct. 10; *Eames v. Andrews*, 122 U. S. 40, 7 Sup. Ct. 1073. The two magazines introduced in evidence, and the evidence in support thereof, would seem to satisfy the most exacting test of what are prior publications, within the meaning of the patent law, to defeat the right of a subsequent inventor. It does not appear that any such showing was made in the action at law of *Truman v. Holmes*, *supra*, claimed to be *res judicata*. At least, it affirmatively appears that the two publications upon which the prior publication is based in this case were not introduced in the case of *Truman v. Holmes*. I am compelled, therefore, from the evidence introduced in this case, to hold that the cart covered by the patent issued to Putnam in 1880 had been, to all intents and purposes, anticipated, and is void for want of novelty; that carts of the same, or substantially similar, construction, embodying the same idea, had been described in publications in general circulation among carriage makers long prior to the issuance of the patent to Putnam; and that a mechanic possessed of ordinary mechanical skill could have constructed carts from the descriptions contained in the publications introduced in evidence, which, in their essential characteristics, would have been like the carts covered by the Putnam patent. With reference to the question of prior use, A. D. Carvill, the president of the

Carvill Manufacturing Company, testified that he himself had made carts possessing all the essential characteristics of the Putnam cart prior to 1877; that he made such carts at Lewiston, Me., where they were at that time in general use. This testimony was, in effect, contradicted by that given by the complainant, who testified that there were only two kinds of carts in use prior to 1880,—a “butcher cart,” and sulkies,—and that the invention of Putnam in 1880 had effected a great change in the manufacture, use, and sale of carts. As the witness A. D. Carvill testified also in the case of Truman v. Holmes, on behalf of the defendant in that case, as to the prior use, manufacture, and sale of carts similar to the carts covered by the Putnam patent, and the verdict of the jury was in favor of the complainant, that case may be considered as conclusive on this court in the present case upon the question of prior use; no other or additional evidence appearing to have been introduced in this case. But, as previously stated, giving the case of Truman v. Holmes, 14 C. C. A. 517, 67 Fed. 542, all the persuasive authority which that decision may be entitled to upon the question of prior use, or any other defense to the validity of the patent presented in that case, it does not, in my opinion, in view of the additional and uncontradicted evidence given in the case at bar, conclude this court in this case upon the question of prior publication; and I therefore hold that the Putnam patent, No. 232,207, issued in 1880, is void for want of novelty, it having been anticipated, as shown by the prior publications proven in this case. The bill will therefore be dismissed, with costs to the defendant, and it is so ordered.

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### WELSBACH LIGHT CO. V. REX INCANDESCENT LIGHT CO.

(Circuit Court, S. D. New York. March 19, 1898.)

#### PATENT SUITS—PLEADING.

In an infringement suit, a mere allegation in the bill that the patent sued on covers new and useful improvements in the “manufacture of gas incandescents,” with a statement of the number and date of the patent, is an insufficient description of the invention, when unaccompanied with profert of the patent itself, and makes the bill demurrable.

This was a suit in equity by the Welsbach Light Company against the Rex Incandescent Light Company for infringement of a patent. The cause was heard on demurrer to the bill.

John R. Bennett, for plaintiff.

Louis Hicks, for defendant.

WHEELER, District Judge. The bills allege that one Carl Auer von Welsbach was the first inventor of certain new and useful improvements in the “manufacture of gas incandescents,” for which letters patent of the United States, numbered 409,531, were on the 20th day of August, 1889, issued to him, assignor to the plaintiff, with profert of the assignment. No profert of the patent is made, nor other description of the invention set out. The bill is demurred to for this cause, among others not so well founded; and the demurrer

has been argued. That the invention should be set out in the bill by allegation, profert of the patent or copy of it annexed, so as to inform the defendant what is claimed to have been infringed, is so fundamental that it need hardly be stated. In *Dickerson v. Greene*, 53 Fed. 247, and *American Bell Tel. Co. v. Southern Tel. Co.*, 34 Fed. 803, relied upon by the plaintiff to show the sufficiency of a general description of the invention, the bills each made profert of the patents. The profert of the assignment is argued to be sufficient to supply this defect, but it adds nothing in this behalf. For this defect the demurrer must be sustained. The complainant should, however, have leave to amend. Demurrer sustained, with leave to amend by next rule day.

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REGINA MUSIC-BOX CO. v. CUENDET.

(Circuit Court, S. D. New York. May 13, 1898.)

No. 9.

PATENTS—INFRINGEMENT—MUSIC BOXES.

The Brachhausen patent, No. 577,835, for an improved star wheel standard for music boxes, *held* valid and infringed.

This was a suit in equity by the Regina Music-Box Company against Emile Cuendet for infringement of a patent for an improvement in music boxes.

Antonio Knauth, for complainant.

SHIPMAN, Circuit Judge. The bill in equity in this case was based upon the infringement of the only claim of letters patent No. 577,835, dated March 2, 1897, and issued to Gustav A. Brachhausen, assignor to the complainant, for an improved star wheel standard for music boxes. The defendant appeared in the case, and filed an answer, but did not plead prior anticipatory patents. The complainant filed a replication. Prima facie proof was taken, and infringement was proved. The defendant called no witness, but stated in the record that it was "very common in foundries of all kinds to cast two or more finished brackets (for supporting arbors and shafts) into a base. Evidence of such combinations is to be found in toys, gates, and fences as well as in many other classes of machinery." The complainant thereupon called witnesses, mainly for the purpose of showing the patentable or inventive character of the improvement. These witnesses the defendant cross-examined. The question which was made by the defendant was apparently confined to the inventive character of the subject of the patent. Upon the argument the complainant appeared by his counsel Antonio Knauth, Esq., and the defendant did not appear. I perceive no reason why the usual interlocutory decree for an injunction against the infringement of the claim of the patent and for an accounting should not be entered.

## BRIGGS v. DUELL.

(Circuit Court, D. Connecticut. March 29, 1898.) No. 912.

**PATENTS—REISSUE—APPARATUS FOR PLANING CAKES OF ICE.**

The incorporation, into the first claim of the Briggs patent, No. 367,267, for an apparatus for planing cakes of ice (which claim was adjudged invalid by the circuit court of appeals), of new matter describing a cutter consisting of a number of points which will not only cut but groove the ice in one operation, and of an ice elevator adapted to positively force the ascending cakes into contact with the cutter, would not make the claim patentable so as to warrant a reissue.

This was a bill in equity by John N. Briggs against C. H. Duell, commissioner of patents, to obtain a decree that complainant is entitled to a reissue of his patent, No. 367,267, for an apparatus for planing cakes of ice.

Benj. F. Lee (Pollock & Mauro, on the brief), for complainant.  
W. A. Megrath, for defendant.

**TOWNSEND**, District Judge. Bill in equity for a decree that applicant is entitled to a reissue of patent No. 367,267 in accordance with the provisions of Rev. St. § 4915. On July 26, 1887, said patent was issued to the complainant for "an apparatus for planing cakes of ice." The first claim in his original application had been rejected, and, as amended, was as follows:

"The combination, with the cutter-head and the racks directly attached thereto, of the guides for both cutter-head and the racks, arranged perpendicularly to the plane of the elevator, the pinions mounted on said guides and engaging in said racks, and the levers or arms for operating said pinions, all constructed substantially as described, so that the depth of the cut may be directly and positively regulated by means of the levers, as herein specified."

In a suit for infringement of this claim Judge Coxe held that said claim must be limited to the precise mechanism described, and that the claim as thus limited was not infringed. *Briggs v. Ice Co.*, 54 Fed. 376. Upon appeal the circuit court of appeals held that, in view of the prior art, the claim was destitute of patentable novelty. *Id.*, 8 C. C. A. 480, 60 Fed. 87. The complainant thereupon amended his claims, and applied for a reissue of said patent. One of the amended claims was as follows:

"(3) The combination with the cutter-head and the racks directly attached thereto, of the guides for both cutter-head and racks, arranged perpendicularly to the plane of the elevator, the pinions mounted on said guides and engaging in said racks, and the levers or arms for operating said pinions, a cutter consisting of a number of points entering the ice in such a manner as not only to cut but to groove it at one operation, and an ice elevator adapted to positively force the ascending cakes of ice into contact with the cutter and groover, all constructed substantially as described, so that the depth of the cut may be directly and positively regulated by means of the levers, and the ice at the same time properly grooved for storage."

The only difference between said original and this amended claim consists in the insertion in the latter of the following language:

"A cutter consisting of a number of points entering the ice in such a manner as not only to cut but to groove it at one operation, and an ice elevator adapted to positively force the ascending cakes of ice into contact with the cutter and groover."

The primary examiner and the examiner in chief of the patent office rejected said claim, and the commissioner of patents affirmed the decision of the examiner in chief. The complainant thereupon appealed to the court of appeals of the District of Columbia, which sustained the decision of the commissioner of patents in refusing to allow said claim. Complainant thereupon filed this bill.

It is unnecessary here to discuss the construction or operation of the patented machine or the prior art. All these matters have been fully considered in the opinions of the tribunals hereinbefore referred to. The questions herein presented are as follows: (1) Does the addition of new matter to said claim affect the patentability of the combination? (2) If not, would the court of appeals for the Second circuit have decided differently if their decision had followed instead of preceded *C. & A. Potts & Co. v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194? (3) Does the discovery of a portion of the Butterfield patent-office model affect the decision of this controversy? In the opinion of the court of appeals for the District of Columbia in *Briggs v. Seymour*, 78 O. G. 169, the court says:

"Nor does the addition to the present claim \* \* \* of a cutter consisting of a number of points entering the ice in such manner as not only to cut but to groove it at one operation add anything new to the combination, for, as we have seen, that cutter was specifically described in reissued patent No. 11,060, and, besides, was shown in the specification and drawings of No. 387,267. Notwithstanding, therefore, the able and ingenious arguments made on behalf of the appellant, we must say that we think the commissioner was right in the conclusion that the whole combination had been substantially passed upon by the circuit court of appeals."

After independent examination, I concur in this opinion. It is admitted that the new matter in said claim specifies at most only two new elements: "A cutter, consisting of a number of points entering the ice in such manner as not only to cut but to groove it at one operation;" "an ice elevator, adapted to positively force the ascending cakes of ice into contact with the cutter and groover." But both of these elements are necessarily implied in the original claim which was held void for want of patentable novelty by the court of appeals in *Briggs v. Ice Co.*, supra. In that case the court, by Judge Wallace, said:

"Assuming the ice elevator, although not specifically mentioned, ought to be regarded as an element of the claim, and recognizing the fact, as we must upon the proofs, that the other devices of the claim were never before assembled together in an ice elevator, nevertheless we are of the opinion that the claim is destitute of patentable novelty."

The other element, the cutter, must also be regarded as one of the elements covered by said original claim, not only because a cutter is necessary for the operation of said machine, but because the original claim specified such a combination with a "cutter-head, that the depth of the cut may be directly and positively regulated by means of the levers." Even if this were not so, this element would add nothing to the novelty of the combination, for precisely such a cutter was described in *Briggs'* prior reissue patent No. 11,060. Whatever uncertainty may have originally existed as to the scope or effect of *C. & A. Potts & Co. v. Creager*, supra, it is now settled that it did not announce any new doctrine, or modify the existing rules of law, so far as this case is concerned. The same principle had already been stated and applied in *Blake v. San Francisco*, 113 U. S. 679,

5 Sup. Ct. 692; *Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co.*, 110 U. S. 490, 4 Sup. Ct. 220; *Aron v. Railway Co.*, 132 U. S. 84, 10 Sup. Ct. 24; and in *Briggs v. Ice Co.*, *supra*, Judge Coxe, and the court of appeals affirming his decision, stated and applied the same rule. Judge Wallace says:

"When thus assembled together, the elevating mechanism performs no new functions, and the adjusting cutter mechanism performs precisely the functions it did in the Butterfield machine. It is wholly immaterial that the adjusting devices of Butterfield were designed to be used in a machine for planing wood. The application of an old organism to an analogous use is not patentable. \* \* \* It is not invention to use an old combination of devices in a new location to perform the same operations, when no changes or modifications are required to adapt it to the new use, or when only such are required as can be made by the exercise of ordinary mechanical skill."

Since the decision of *Briggs v. Ice Co.*, *supra*, the expert for complainant has discovered the damaged patent-office model of the Butterfield invention. The experts are at issue as to the purpose for which certain screw-threaded holes and slotted bars were shown in said model, and as to the consequent effect to be given to the statement in the Butterfield specification that the knife is adjusted to set at a required thickness. The evidence is not sufficiently definite to narrow the scope of the Butterfield patent as already construed by the various courts. All the elements of the patented combination were old, the principle of their combined operation was disclosed in the prior art, and the modified adjustment and operation required only mere mechanical skill. Let the bill be dismissed.

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VERMILYA v. PENNSYLVANIA STEEL CO. et al.

(Circuit Court, E. D. Pennsylvania. April 23, 1898.) No. 29.

PATENTS—RAILWAY SWITCHES.

The Brahn patent, No. 248,990, for an improvement in railway switches, relating particularly to the crossbar and lugs which serve to connect the pointed or movable rails of the switch, discloses patentable invention, but, in view of the prior art, must be restricted to the particular devices substantially as described. The claim is, however, infringed by a device made according to patent No. 308,373, which merely shows a variation in the form of the jaws.

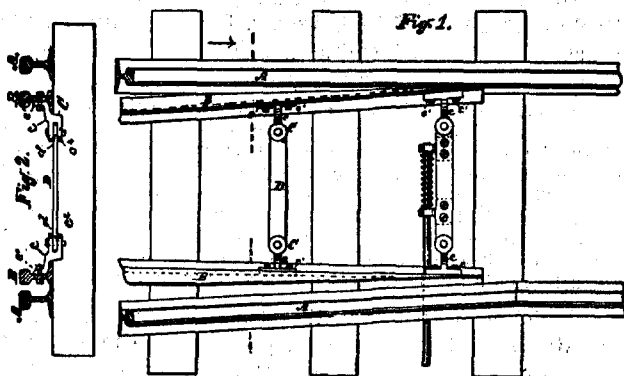
This was a suit in equity by Allen G. N. Vermilya against the Pennsylvania Steel Company and others for alleged infringement of a patent.

A. G. N. Vermilya, in pro. per.  
Joshua Pusey, for defendant.

DALLAS, Circuit Judge. The bill in this case charges infringement of letters patent No. 248,990, issued to James Brahn, and dated November 1, 1881. The invention, as the specification states, "relates to railway switches, and more particularly to the crossbar and lugs which serve to connect the pointed or movable rails of the switch." The only claim is as follows:

"In a railway switch, the combination, with the pointed or movable rails, B, B, of the lugs, C, fabricated as specified, and composed of the body, c, adapted to fit upon and depend somewhat below the flange of the rail, and the upwardly reaching flange, c<sup>1</sup>, adapted to fit against the body of

the rail, and having the jaws, c<sup>2</sup>, together with the forged bars, D, having the flattened ends, d, all substantially as and for the purpose described."



The evidence, including several prior patents and the Exhibit Pennsylvania Steel Company's Circular, conclusively shows that the invention of Brahn was not a primary one. But I cannot agree that he made no invention at all. He devised, in complete and combined shape, a convenient and improved arrangement of crossbar and lugs, which, though nearly approached, had not been before produced. His contribution to the art involved invention, although not of the highest order, and was both new and useful. The construction he devised was more convenient and better fitted for use than any of the appliances which had preceded it; and what is said in the defendant's circular of the advantages of the socket connecting bar, covered by patent No. 308,373, under which the defendant manufactures, might, in the main, be equally well said of the Brahn device. I am of opinion, therefore, that the patent in suit should be sustained. See the recent decision of the circuit court of appeals for this circuit in *Clinton Wire-Cloth Co. v. Hendrick Mfg. Co.*, 86 Fed. 137. The claim, however, cannot be broadly construed, but must, in view of the prior art, be restricted to the particular devices substantially as described. But the defendant's contrivance, as shown by the models before me, is obviously the same as that described in the Brahn patent, except only that the form of the jaws is somewhat varied. In the defendant's patent this variation is termed a "socket," and by one of the witnesses in this case it is said to be what is "called a 'box jaw.'" But, whatever be its name, the thing is essentially identical with the device of Brahn. It effects the same object in exactly the same way. *Clinton Wire-Cloth Co. v. Hendrick Mfg. Co.*, *supra*. The defendant's "socket" is nothing but the "jaws" of the plaintiff, having a slot or opening at the end towards the rail, and with the two sides closed. The bar is passed entirely through the open jaws, and it is pivoted thereto as in the Brahn arrangement, and the only difference in result is that the lateral movement of which the bar is capable is much restricted. But, as it allows as much play as the shifting of the point rail requires, this difference is immaterial, unless, indeed, it be true that the restriction is (as defendant asserts) advantageous, in which case a claim for improvement might possibly have been sustained, but not for appropriation of the previously patented subject to which the improvement applies. Decree for complainant.

## THE MOUNT EDEN.

BARRON et al. v. THE MOUNT EDEN.

(District Court, N. D. California. March 15, 1898.)

No. 11,418.

## 1. COSTS IN ADMIRALTY—DOCKET FEES.

A proctor representing more than one libellant on final hearing, though under independent libels, is entitled to but one docket fee of \$20.

## 2. SAME.

A "final hearing," within Rev. St. § 824, upon which the libellant's proctor becomes entitled to a docket fee, is a submission of the case for determination on the merits, or the submission of some question the disposition of which finally ends the case. A proceeding before a commissioner on a reference is not such a final hearing.

This was a libel in rem by James G. Barron and others against the steamer Mount Eden. The cause was heard on a motion to retax costs.

H. W. Hutton, for the motion.

DE HAVEN, District Judge. Section 824 of the United States Revised Statutes provides that upon a final hearing in admiralty, where the libellant recovers \$50 or more, a docket fee of \$20 may be allowed to his proctor; and, if less than \$50 is recovered, then the docket fee of the proctor shall be only \$10. The docket fee thus allowed is the individual property of the proctor, not that of the libellant (*Aiken v. Smith*, 6 C. C. A. 414, 57 Fed. 423); and where a proctor, upon such final hearing, represents more than one libellant, although such libellants may have filed independent libels in the proceeding, he is entitled to have allowed and taxed but one docket fee. A proceeding before a commissioner upon a reference is not a final hearing, and no docket fee can be allowed a proctor for attendance upon such a proceeding. A final hearing, within the meaning of the statute, is a submission of a case for determination upon its merits, or the submission of some question, the disposition of which finally ends the case. *Coy v. Perkins*, 13 Fed. 111. Motion to retax costs denied.

## THE H. C. GRADY.

BLACK DIAMOND COAL-MIN. CO. v. THE H. C. GRADY (HENDRY et al., Interveners).

(District Court, N. D. California. May 5, 1898.)

No. 11,369.

## INTERVENTION—DECREE BY STIPULATION—PROCTOR'S FEES.

Where, in a libel of intervention in an admiralty case, the parties stipulated for a decree in favor of the intervener, and a decree was entered accordingly, there was such a final hearing as would entitle the proctors for intervener to the allowance of a docket fee, under Rev. St. U. S. § 824, which provides that "on a final hearing in equity or admiralty cases a docket fee" should be allowed.

This was an intervention by G. W. Hendry and F. R. Strong in the proceedings by the Black Diamond Coal-Mining Company against the steamer H. C. Grady and others. Hearing on exceptions to the allowance of docket fees to the proctor of intervenor G. W. Hendry.

Bert Schlesinger and Samuel Knight, for intervenor Hendry.  
Andros & Frank, for intervenor Strong.

DE HAVEN, District Judge. G. W. Hendry filed his libel of intervention in this proceeding on November 26, 1897. No formal answer to this libel was ever made, but the court, with the consent of the parties interested, made an order of reference to a commissioner to take evidence and report the facts in relation to the matters alleged in said libel. The matter never came on for hearing before the commissioner, and it was subsequently agreed between the intervenors Hendry and Strong, the only parties having any interest in the question, that the intervenor Hendry was entitled to a decree in his favor for the sum of \$511.01 and costs, to be paid out of the proceeds arising from the sale of the steamer H. C. Grady; and thereafter, on motion, a decree was duly entered by the court in accordance with such consent and agreement. The question for determination at this time is whether the proctors for intervenor Hendry are entitled to a docket fee taxable as on a final hearing in admiralty under section 824, Rev. St. It is argued in opposition to the allowance of such docket fee that there never has been a final hearing upon the matters alleged in the libel of intervention; that the court was never called upon to determine any disputed question of law or of fact; and that, in the absence of the submission or determination of such a question, there is no final hearing within the meaning of that section. In my opinion, this contention must be overruled on the authority of the cases of *Wooster v. Handy*, 23 Fed. 49; *The Anchoria*, Id. 669; *Mercartney v. Crittenden*, 24 Fed. 401; *Coy v. Perkins*, 13 Fed. 111; and the recent case of *Barron v. The Mount Eden* (decided in this court, March 15, 1898), 87 Fed. 483. In this latter case it was said:

"A final hearing, within the meaning of the statute, is a submission of a case for determination upon its merits, or the submission of some question, the disposition of which finally ends the case."

And in the case of *Mercartney v. Crittenden*, 24 Fed. 401, the circuit court of this district, in approving the rule laid down in *Wooster v. Handy*, 23 Fed. 50, held:

"That to constitute a 'final hearing in equity or admiralty,' within the meaning of section 824, there must be a hearing of the cause on its merits; that is, a submission of it to the court in such shape as the parties choose to give it, with a view to a determination whether the plaintiff or libellant has made out the case stated by him in bill or libel as the ground for the permanent relief which his pleading seeks, on such proofs as the parties place before the court, be the case one of *pro confesso* on bill, or libel and answer, or pleadings alone, or pleadings and proofs."

It is apparent that in this case there has been a final hearing of this case upon the merits, and none the less so because the parties interested stipulated in open court as to the facts, and consented to

the decree. The facts agreed to took the place of formal testimony, and the decree, which was properly based thereon, finally determined the relief to which the intervener was entitled by reason of such facts and the matters alleged in his petition of intervention. The exception to the taxation of costs will be overruled.

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THE OCCIDENTAL.

DIOCHET v. THE OCCIDENTAL.

(District Court, D. Washington, N. D. May 2, 1898.)

1. SEAMEN—WAGES—FORFEITURE.

The mere failure of the master to punish a seaman for neglect of duty, and unauthorized absences in port for purposes of dissipation, implies no consent to a subsequent termination of the contract by the act of the seaman in leaving the vessel without permission, and filing a libel for wages.

2. SAME—SHIPPING ARTICLES—INDEFINITE VOYAGE.

Shipping articles described the voyage as follows: "From the port of San Francisco, Cal., to any port or ports on Puget Sound or British Columbia for orders. At Puget Sound or British Columbia, vessel may be ordered to load cargo for any port or ports in Alaska, as the master may direct. If the vessel is ordered to Alaska, the trips between Puget Sound or British Columbia and Alaska to be repeated one or more times; thence to San Francisco for final discharge, either direct, or via one or more ports on the Pacific coast,—for a term of time not exceeding six months." *Held*, that the articles set forth the nature, duration, and termination of the voyage with sufficient certainty to satisfy Rev. St. § 4511.

This was a libel in rem by Charles Diochet against the steamship Occidental to recover seaman's wages.

P. P. Carroll, for libelant.

J. B. Metcalfe, for claimant.

HANFORD, District Judge. On February 1, 1898, at the port of San Francisco, the libelant signed shipping articles whereby he engaged himself to go as an able seaman on the American ship Occidental for a term and voyage described as follows:

"From the port of San Francisco, Cal., to any port or ports on Puget Sound or British Columbia for orders. At Puget Sound or British Columbia, vessel may be ordered to load cargo for any port or ports in Alaska, as the master may direct. If the vessel is ordered to Alaska, the trips between Puget Sound or British Columbia and Alaska to be repeated one or more times; thence to San Francisco for final discharge, either direct, or via one or more ports on the Pacific coast,—for a term of time not exceeding six months."

The vessel having proceeded to Seattle, and being there detained a number of weeks, the libelant was assigned to duty as watchman; but he became negligent of his duties, devoting his time principally to the occupation of getting drunk. On a number of occasions he demanded payment of his wages, and was insolent to the captain. The only response made to his demand for wages by the captain was an emphatic refusal, coupled with a command to the libelant to go to his place in the ship, and attend to his duties. Having left the ship without permission of the captain, the libelant commenced this suit in rem to recover wages; and, in presenting his case, his counsel

rests his claim for wages without having fulfilled his contract on two grounds: First, the failure of the captain to punish him for his neglect of duty, and for leaving the vessel from time to time for the purpose of dissipation, gives rise to an implication of consent on the part of the master to the termination of the contract; second, the contract is totally void, because no particular voyage is described in the shipping articles.

As to the first point, it is nothing less than effrontery for the libelant to claim that he has gained any legal advantage by reason of mere forbearance on the part of the captain, when he might, with justice, have subjected the libelant to punishment for his dissolute conduct.

In support of his second point, counsel has cited the case of *Snow v. Wope*, Fed. Cas. No. 13,149, in which Mr. Justice Curtis held that a description of a voyage in shipping articles as being "from the port of Boston to Valparaiso, and other ports in the Pacific Ocean, at and from thence home direct, or via ports in the East Indies or Europe," is not a compliance with the requirements of the first section of the act of July 20, 1790 (1 Stat. 131); and the learned justice, in commenting upon the shipping articles, said:

"It would have been within this description, after leaving Valparaiso, to sail to any number of ports on the Pacific Ocean, then to visit in succession every port in the East Indies or in Europe, and to occupy such time in their passages, and in staying in the several ports, as the master, under the direction of the owner of the ship, might think fit. It is manifest that no definite and specific voyage, nor even any limited number of voyages, is here described; but liberty exists to carry on any number of voyages, during such time as the vessel may last, at the discretion of the master, provided that the first port to which the vessel goes is Valparaiso, and her ultimate port of destination is Boston."

The act of 1790, referred to, prescribed that shipping articles should declare "the voyage or voyages, term or terms of time, for which seamen or mariners should be shipped." By the acts of August 19, 1890, and February 18, 1895 (2 Supp. Rev. St. p. 377), sections 4511, 4512, Rev. St., are extended and made applicable to contracts for the shipping of crews for American vessels engaged in the coastwise trade, and in trade between ports of the United States and of the dominion of Canada. Hence the question as to the validity of this contract is to be determined by reference to section 4511, Rev. St., which prescribes that every agreement of seamen to serve in American vessels shall set forth definitely, among other things, "the nature and so far as practicable the duration of the intended voyage or engagement, and the port or country at which the voyage is to terminate." Both the law and terms of the contract which govern the decision of *Snow v. Wope* are so widely different that there can be no application of the doctrine of that decision to the case now under consideration. The libelant's contract fixes definitely the maximum duration of the time for which he engaged himself to serve in the *Occidental*. It indicates with reasonable clearness the nature of the different voyages to be made during said time, and specifies the port of final discharge. It is my opinion that there is no ground whatever for this suit. Let a decree be entered dismissing the case, with costs.

## THE HAVANA.

WOODALL et al. v. THE HAVANA.

(District Court, E. D. Pennsylvania. May 16, 1898.)

**MARITIME LIENS—REPAIRS IN FOREIGN PORT—PRESUMPTIONS.**

When repairs are made in a foreign port on the order of the owners, the presumption is against the existence of a maritime lien; and the burden is on the repairers to clearly show a contract or mutual understanding for a lien. Where the owners are solvent, and do not understand that there is to be a lien, the mere fact that the repairers understood the contrary, and that they charged the work on their books in the name of the vessel, is not sufficient.<sup>1</sup>

This was a libel in rem by W. E. Woodall & Co. against the steamship Havana to recover a balance due for repairs.

John F. Lewis, for libelants.

Matthew Dittman and Henry R. Edmunds, for respondents.

BUTLER, District Judge. The suit is for \$3,513, a balance due for repairs. The work was done at Baltimore, costing \$16,000. The home port of the vessel was Philadelphia, the owners being Patrick Dempsey and Henry Hess, who reside here,—the former having four-fifths and the latter one. Dempsey, as managing owner, ordered and superintended the repairs. Mr. Woodall sought the work for his company and came to Philadelphia to obtain it. At that time it was supposed \$5,500 would cover the cost. The vessel was subsequently taken to the libelants' place at Baltimore, and the work commenced in pursuance of the arrangement made here. It was afterwards found that much more must be done than had originally been contemplated, and a much larger bill be incurred. On the completion of the work notes were given for the \$3,513 unpaid, and the vessel was delivered to the owners. About six months later—after she had passed into other hands—those of a stock company, of which Dempsey and Hess were members, (the notes then being due and unpaid) the vessel was attached under an alleged admiralty lien. The case presents no legal question. The libelants concede that to entitle them to recover, the proofs must show a contractual lien—not an implied lien, resting on given facts, as in the case of repairs on a master's order, but one resting on contract, as in cases of bottomry. A contract must therefore be proved. It need not however, be proved by writing, or other direct evidence; but may be established by inference from facts which show its existence. As is pointed out in *The Mary Morgan*, 28 Fed. 196, this doctrine (the admissibility of such inferences to establish contractual liens) is modern; and as it tends to uncertainty (the inferences depending largely on the disposition of the particular mind that draws them) it may be doubted whether the modern doctrine is wiser than the old, whether it would not have been safer to adhere to the rule which required direct evi-

<sup>1</sup> For a very full discussion as to maritime liens for supplies and services, presumption as to credit to vessel, see note to *The George Dumois*, 15 C. C. A. 679.

dence of such contracts where a lien is intended—especially in view of the fact that it is so easy for parties to say they thus contract, where they contemplate it, and it is so reasonable to expect they will. The modern rule is however well established, and I have but to inquire whether the facts of this case show the existence of such a contract. Of course a mutual understanding that a lien shall exist is a contract for a lien. Do the facts prove such an understanding? The question thus presented is the only subject for consideration. The burden of proof is on the libelants. They must show the contract clearly, or fail in the suit. The repairs having been made by order of the owners the legal presumption is against them. *The Now Then*, 5 C. C. A. 206 [55 Fed. 523]; *The Wandrahm*, 4 C. C. A. 414 [67 Fed. 358]; *The Mary Morgan*, 28 Fed. 196. As such liens are secret and therefore not favored, the libelants must, as before stated, prove the alleged contract clearly, to overcome the contrary presumption. Have they done it? There is no direct evidence of a mutual understanding on the subject. Mr. Woodall who represented his firm about the business, testifies that he understood they were to have a lien; while Mr. Dempsey testifies that he had no such understanding. This does not even tend to prove a mutual understanding. If Mr. Dempsey is believed his testimony proves that none existed, no matter what Mr. Woodall understood. What is there in the circumstances of the case to overcome the legal presumption—supported as it is by the testimony of Mr. Dempsey? The libelants point to the owner's pecuniary condition, and argue that Dempsey could not have supposed the repairs would be made without the security of a lien. Dempsey, however, at that time appeared to be entirely solvent; and no doubt was. He owned four-fifths of a valuable vessel, and also owned the business he then conducted, which was prosperous and seemed valuable. Hess owned the other fifth, and also appeared to be solvent. Why therefore should Dempsey have supposed the repairs could not be obtained without charging the vessel with a lien (an unusual practice) especially when a lien was not demanded, or mentioned, as the evidence clearly shows. The libelants wanted the work, sought it in Philadelphia where the owners lived, and could readily have ascertained their pecuniary standing, if they did not know it. It seems, therefore, unreasonable to believe that they relied upon a lien, and that Dempsey understood them to do so, and especially in view of the fact they did not ask for such security, or mention the subject. Dempsey's statement on cross-examination, that he owned no property, is misinterpreted by the libelants; it must be understood simply as an admission that he owned no other property than that before referred to—the vessel and his business. The libelants also point to the manner of charging the repairs in their books; but at most these charges are evidence only of their own understanding. They do not, however, amount to so much, because they are made in the manner common to all cases where the owners are looked to for payment—the vessel being named simply to identify the work. This is a matter of common understanding. The omission of the vessel is of course important where an alleged contract for lien is set up. The charges here are

as consistent with the nonexistence of a lien as with its existence. The libelants also point to the manner of making out their bills, and the correspondence respecting them. The bills, however were made out in conformity with the charges in the books, against the vessel and her owners. They would be, naturally, so made out whether a lien existed or not. The same must be said of the correspondence. I do not find anything in it inconsistent with the nonexistence of a lien and with Dempsey's testimony respecting his understanding. In one instance, at least, the libelants wrote for money on account of their bill "against the Havana"; generally they referred to their claim as for repairs to the Havana. Making the utmost of this language its meaning remains, at least, equivocal; whether there was or was not such an agreement as is set up, the claim might properly and I think naturally would be stated as the correspondence stated it. And besides the libelants at the time the bills were made out and the letters written had a claim, strictly against the vessel, as she was in their possession and could be held, at least until they were paid the proportion of their debt stipulated by the contract to be paid before delivery. I do not however attach importance to this last suggestion. It should also be noted that at the date of this correspondence very much of the work had been done and paid for; and it seems unreasonable to suppose that Dempsey would consider the special significance of the language referred to, and understand it to be an assertion of right to a lien, on his vessel; and therefore feel called upon to deny the assertion.

I will not pursue the subject. It is sufficient to say that a very careful examination of all the facts has satisfied me that they show nothing sufficient to prove the contract set up, and thus to repel the legal presumption before stated. If trivial or equivocal circumstances are held to be sufficient for this purpose the value of the rule founded on the presumption is lost.

The libel must be dismissed with costs.

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#### THE OTHA J. SAMPLE.

#### SCIPLE et al. v. THE OTHA J. SAMPLE.

(District Court, D. New Jersey. May 27, 1898.)

#### SHIPPING—REGULATIONS AS TO STEAM BOILERS.

Under Rev. St. § 4431, which provides that "every plate of boiler iron or steel made for use in the construction of steamboat boilers shall be so stamped in such places that the marks shall be left visible when such plates are worked into boilers," it is not necessary that the builder of a steamboat boiler furnish a name plate, showing the name of the manufacturer, place where manufactured, and the tensile strength of the boiler, in the absence of a special contract calling for same.

This was a libel in rem by H. M. Sciple and others against the steamship Otha J. Sample. Judgment for libelants.

George A. Vroom, for libelants.

John F. Harned, for claimant.

KIRKPATRICK, District Judge. This libel is founded on a written contract for the balance due upon the purchase price of a boiler furnished by the libelants for the steam vessel Otha J. Sample. The contract calls for one vertical marine boiler of certain dimensions, which shall be subject to the tests and laws governing the building of marine boilers according to the United States laws; the said boiler to pass inspection by United States inspectors for 125 pounds steam, working pressure, and to be complete, with grates, water pan, and hood made of heavy sheet iron. The boiler was built and delivered, and passed an inspection of the United States inspectors for the 125 pounds steam, working pressure. In every respect that which was furnished complied with the requirements of the contract. The libelants, however, did not furnish the "hood" called for in the contract, but have made an allowance of seven dollars therefor, as they claim under an agreement made with Sample, the owner of the steam vessel. I am satisfied from the evidence adduced that such agreement was made. It is testified to by Mr. Toadvine and Mr. Sciple on the part of the libelants, and denied by the defendant Sample, but the conduct of Sample in regard to the several bills rendered by the libelants on which the credit of seven dollars for failure to supply the "hood" was entered and noted, which bills were accepted by Sample without protest or comment, lend strength to the position taken by the libelants that the rebate of seven dollars from the face of the bill had been agreed upon as the value of the "hood." The defendant claims an allowance for the failure of the libelants to furnish with the boiler a "name plate," showing the name of the manufacturer, the place where manufactured, and the number of pounds tensile strain it would bear to the sectional square inch. The 4431st section of the Revised Statutes requires "that every plate of boiler iron or steel made for use in the construction of steamboat boilers shall be so stamped in such places that the marks shall be left visible when such plates are worked into boilers." There does not seem to be any statutory requirement for a "name plate" such as defendant has demanded, nor is it called for by the contract. Judgment should be for the libelants in the sum demanded.

INSURANCE CO. OF NORTH AMERICA v. CANADA SUGAR-REFINING CO., Limited.

(Circuit Court of Appeals, Second Circuit. April 19, 1898.)

No. 95.

1. MARINE INSURANCE—PROFITS—TOTAL LOSS.

Under a contract of insurance of the profits on a cargo of sugar "against total loss only" there is no actual total loss of profits where any part, however small, of the cargo, is saved, and reaches the owner in condition to earn a profit; and in such case no recovery can be had.

2. SAME—CONSTRUCTIVE TOTAL LOSS—MOIETY RULE.

In the United States the owner may abandon ship or cargo, and treat the loss as constructively total, when the damage exceeds 50 per cent. of the total value.

3. SAME—ABANDONMENT.

In cases of constructive total loss, abandonment is indispensable to recovery of insurance, except when it could not possibly be of benefit to the insurer.

4. SAME.

Where insurance is upon the profits of a cargo, and not upon the cargo itself, a partial loss cannot be converted by abandonment into a constructive total loss.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel in personam by the Canada Sugar-Refining Company against the Insurance Company of North America to recover under a policy of marine insurance on profits on a cargo of sugar. The circuit court rendered a decree for libellant (82 Fed. 757), and the respondent has appealed.

Clifford A. Hand, for appellant.

Wilhelmus Mynderse, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The libel in this cause was filed to recover upon a contract of insurance with the libellant, evidenced by a certificate dated April 29, 1893, delivered by the appellant at Philadelphia, whereby the latter caused to be insured under its open policy No. 117,407, against perils of the sea, "\$15,000 on profits on cargo of sugar against total loss only, valued at sum insured, shipped on board the British ship John E. Sayre at and from Iloilo to Montreal." The policy contains the usual clause making the insurer responsible only for so much as the amount of prior insurance may be deficient towards fully covering the property at risk. The sugar was owned by the libellant, consisted of about 2,460 tons, was of the value of about \$181,000, and was insured for \$166,145 by the Atlantic Mutual Insurance Company. The insurance of the Atlantic Mutual Insurance Company covered the original cost price of the sugar to the libellant and an advance in market price since its purchase by the libellant; and when the insurance with the appellant was effected there had been a still further advance in market price, so that the insurance on profits really

covered a profit which had accrued to the libellant when it was effected. The appellant had been informed by the libellant of the insurance upon the cargo. July 6th the ship stranded on the coast of Newfoundland, and ultimately became a total wreck. The master at once made arrangements with local salvors for saving and storing the cargo, agreeing to give them one-half saved. The salvors removed from the ship to their own vessels all the cargo capable of being saved. The master was about to arrange for the transportation to Montreal of the part not going to the salvors, when the Atlantic Mutual Insurance Company, which had meantime been informed of the disaster, intervened, and took entire control. That company carried out the agreement made by the master with the salvors, paying them an equivalent in lieu of one-half of the sugar saved, and caused the sugar saved to be reconditioned, and shipped to Montreal on the steamer *Tiber*, and delivered upon arrival there to the libellant. The expenses incurred by the Atlantic Mutual Insurance Company for reconditioning and forwarding the cargo and adjusting the claims of the salvors amounted to \$10,167. That company also paid the ocean freight upon the quantity of cargo saved. It adjusted the loss with the libellant by paying the equivalent of the whole amount of its policy less the insured value of the sugar delivered to the libellant. The cargo delivered to the libellant consisted of 307 tons of dry sugar and about 26 tons of wet, and was of the value of about \$20,000. There was no notice of abandonment given to the appellant.

Upon these facts the court below was of the opinion that there had been a total loss of the profits insured within the meaning of the contract, and decreed accordingly for the full amount of the insurance.

The subject of insurance was not the libellant's cargo of sugar, but the profits, and the total loss to which the liability of the underwriter was restricted by the contract of the parties was a total loss of profits. That there was no actual total loss of profits is entirely clear. Insurance of profits of a cargo is an engagement by the underwriter that the goods shall not be prevented by the perils insured against from arriving at their destination in a condition for earning profits; and in a valued policy the parties fix for the purpose of adjusting a loss the sum which the cargo would earn upon safe arrival by way of profits. Under an insurance of profits, a loss of cargo carries with it, of course, the loss of the profits, at least is *prima facie* evidence of their loss; and under a valued policy the assured is entitled to recover the whole insurance upon proof of a total loss of the goods, without proof that any profits would have been made if the goods had arrived. *Barclay v. Cousins*, 2 East, 544; *Insurance Co. v. Coulter*, 3 Pet. 222; *Mumford v. Hallett*, 1 Johns. 439; *Fosdick v. Insurance Co.*, 3 Day, 108; *French v. Insurance Co.*, 16 Pick. 397. "If a part of the goods only are prevented from arriving, it constitutes a partial loss of those interests, according to the construction put upon it in the United States." 2 Phil. Ins. § 1503. In other words, there can be no actual total loss of profits when part of the goods arrive in condition to earn a profit (*Loomis v. Shaw*, 2 Johns. Cas. 36), notwithstanding a greater part have been destroyed by the perils insured against (*Waln v. Thomp-*

son, 9 Serg. & R. 115). In such a case, under a valued policy, the insured can only recover of the underwriter the valuation less the profits to be accounted for. *French v. Insurance Co.*, supra. It is only in a case of total loss that there is any difference between an open and valued policy. *Marsh. Ins.* 268, 618; *Batem. Com. Law*, § 1129. In the present case the value of the cargo saved was comparatively insignificant, being only about \$10,000, after deducting salvage and expenses, or alternatively something over 150 tons of dry sugar out of 2,460 tons; but, part having been saved, and actually received by the libellant, there was not an actual total loss. A loss of part of the cargo is a proportional loss on profits.

The question then arises whether the libellant was entitled to recover upon the theory of a constructive total loss. A constructive total loss is one where the loss, though not actually total, is of such a character that the assured is entitled, if he thinks fit, to treat it as total by an abandonment. A constructive total loss of cargo may arise by the loss of the ship under circumstances amounting to the destruction of the contemplated adventure, when no part of the cargo can be forwarded by a substituted ship except at a cost beyond the value of the goods. So, also, it may arise if the damage to the goods, though repairable, cannot be repaired except at an expense greater than their value when repaired, and is thus impracticable from a business point of view. There is also in the United States a conventional rule, originally adopted because of its convenience and certainty, which authorizes an abandonment of ship or cargo when the damage exceeds a moiety of the value, and a recovery as for a total loss. An abandonment is indispensable in all cases of constructive total loss, except in those where it could not possibly be of any benefit to the insurer.

By the later authorities it is settled that under a policy insuring a ship or cargo against "total loss only" the assured is entitled to recover upon proof of a constructive total loss. *Adams v. Mackenzie*, 13 C. B. (N. S.) 422; *Heebner v. Insurance Co.*, 10 Gray, 131; *Greene v. Insurance Co.*, 9 Allen, 217; *Burt v. Insurance Co.*, 78 N. Y. 400; *Carr v. Insurance Co.*, 109 N. Y. 504, 17 N. E. 369; *Snow v. Insurance Co.*, 119 Mass. 592. It is a reasonable intendment that when an underwriter offers to indemnify the insured against a "total loss" he means to be understood to include any loss which the latter may justifiably treat as total. If he contemplates a more limited liability, he can protect himself by insuring against actual or absolute total loss. It does not necessarily follow that these words are to be given the same meaning in a policy upon profits as in a policy upon cargo; and our opinion is that they cannot have the same meaning. How can there be a constructive total loss of profits? In all cases where the destruction of the voyage or the damage to the cargo renders it impracticable, because the outlay will exceed the returns, to go on with the adventure, there is an actual total loss of profits, though it may be there is only a constructive total loss of the cargo. The moiety rule cannot apply, because the profits cannot be separated from the goods

themselves, and an abandonment is ordinarily so impracticable that the rule cannot be supposed to have entered into the contemplation of the parties when making their contract. It has never been decided that in case of an insurance of profits an actual partial loss of the profits can be made total by abandonment, and the commentators incline to the contrary view. Mr. Phillips says:

"On the whole, it does not seem that the rule of constructive loss of over fifty per cent. of the value is applicable to a policy on profits in favor of the owner of the goods under any circumstances." Phil. Ins. 1656.

Prof. Parsons, after intimating that an actual partial loss of profits cannot be made constructively total by abandonment, uses this language:

"It would seem, therefore, that the fifty per cent. rule would not apply to an insurance on profits unless the insurer (the assured) should waive his right to abandon the goods, and, treating the loss of them as partial, abandon the profits separately. In theory this might be possible, but it would be attended with some difficulties, and can hardly be considered as in fact practicable." 2 Pars. Mar. Ins. 170, 171.

If there can be no constructive loss of profits the words "against total loss only" in an insurance upon profits can only refer to an actual total loss. They certainly cannot refer to a partial loss. They can have no effect whatever, if, as has happened here, the assured can retain part of the profits, and yet recover as though all have been lost.

The present contract, in view of the extrinsic facts, was intended to be, in substance, a second insurance on the goods themselves, "another way of valuing the goods" (Tom v. Smith, 3 Caines, 247), to cover the value represented by the advance in market price, and not adequately protected by prior insurance. See *Ionides v. Pender*, L. R. 9 Q. B. 531-536. Indeed, it is customary at the place where this contract was made to insure profits under the general denomination of "goods." *Pritchett v. Insurance Co.*, 3 Yeates, 461. If the cargo itself, instead of the profits, had been the interest insured, the libellant would have been indemnified only to the extent that the prior insurance might prove insufficient. Insurance is a contract of indemnity, and cannot extend to cover the loss in excess of the real loss; and, even under a valued policy, where there is a prior insurance, the assured cannot recover upon it more than will, with what has been received from the prior insurance, make up his whole loss. *Craig v. Murgatroyd*, 4 Yeates, 161; *Watson v. Insurance Co.*, 3 Wash. C. C. 1, Fed. Cas. No. 17,286; *Stevenson v. Insurance Co.*, 54 Me. 71; *Pleasants v. Insurance Co.*, 8 Cranch, 55. The property at risk was really the cargo, because the profits were merely an excrescence of the goods; and, if the contract had not been "against total loss only," the appellant would have been liable only for the deficiency. It cannot be that the insertion of these words were intended to enlarge the extent of the appellant's liability. They were meant to restrict it. They were used in view of the doctrine, expressed by the commentators upon insurance, that there cannot be a constructive total loss of profits.

We think the insurance was placed upon the profits instead of upon the cargo directly, and restricted to a total loss only, to save any question as to the liability of the appellant for a partial or constructive total loss; otherwise there would have been no occasion for naming that interest, and the insurance would have been upon the cargo itself.

By the decree of the court below the libelant has been awarded a recovery, which, if collected, would put into its pocket the profits realized on the cargo saved, in addition to the amount of the respondent's policy. Irrespective of this consideration, and because it has received the profits on a part of the cargo, we are of the opinion that there has not been a total loss of profits within the meaning of the contract.

The decree is reversed, with costs, and with direction to dismiss the libel.

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THE BRITANNIA.

HILLS BROS. CO. v. THE BRITANNIA.

(District Court, E. D. New York. May 17, 1898.)

CARRIAGE BY SEA—BILL OF LADING—LIBEL IN REM.

The agent at Barcelona of the owners of the B. contracted to carry goods from there to New York via Marseilles. The bill of lading provided for the carriage of the goods by the B., or, at the carrier's option, by another ship. It recited the name of the captain of the B., but the signature thereto was illegible, and bore no satisfactory resemblance to his name. The B. was not at Barcelona at that time nor thereafter. The goods were carried by another vessel, which sailed from Marseilles 19 days after the B. sailed from that port. *Held*, that a libel in rem for damages from the delay would not lie against the B., even in favor of a bona fide purchaser of the bill of lading, as there was nothing on its face to indicate, to one exercising care, that it was signed by her captain.

This was a libel in rem by the Hills Bros. Company against the steamship Britannia to recover damages for delay in shipping goods.

David F. Butcher, for libelant.

Benedict & Benedict, for claimant.

THOMAS, District Judge. The claimant's agent at Barcelona, Spain, contracted to carry certain almonds from Barcelona to New York, via Marseilles, France. The bill of lading, dated October 28, 1895, provides that the carriage should be performed by the ship Britannia, or, at the option of the carrier, by another ship. At this time the Britannia was not at Barcelona, and, although her captain's name is recited in the bill of lading, yet the name signed to such bill, in behalf of the carrier, is not proved to be his name, nor does an inspection of it cause such fact to appear. The goods were not carried by the Britannia, which sailed November 9, 1895, from Marseilles to New York, but by the Patria, which sailed from Marseilles 19 days later; and for this delay the libelants claim damages in an action in rem against the Britannia.

It may be inquired at the outstart whether the *Britannia* undertook, actually or constructively, the carriage of the goods. If not, an action in rem against her will not lie.

The *Britannia* was not at Barcelona at the date the bill of lading was executed. The bill of lading did not contemplate that the goods should be shipped on board the *Britannia* at Barcelona. There is no evidence that the *Britannia* was ever at Barcelona thereafter; that she ever was at Marseilles while the goods were there; nor that her captain signed the bill of lading. The ingenious argument of the advocate for the libellant does not meet these deficiencies.

The court is asked to assume that the somewhat obscure signature to the bill of lading was that of the captain of the *Britannia*. While the court may not decipher the signature, it bears no satisfactory resemblance to the name of the captain of the *Britannia*; and as he was not at Barcelona at the time, and as it does not appear that he was thereafter at that port, there is not the slightest reason for holding that he signed the bill of lading, as there is no extrinsic evidence of such alleged fact.

It is urged that the claimant is estopped by the bill of lading as against a bona fide holder. If the captain of the *Britannia*, having the real or apparent power to sign the bill of lading, did so, and thereby represented that he had received the goods, although the same were not in fact delivered to him, the question might arise whether the carrier could be estopped to deny the fact as against a bona fide purchaser of the bill, who had been damaged thereby. But such doctrine may not be invoked in this case, because a proposed purchaser of the present bill of lading would find nothing in it to induce him to believe that the captain of the *Britannia* had received the goods, or undertaken the carriage thereof, except that the bill recited his name, and stated that the *Britannia* was to carry the goods. But, had such a purchaser used requisite care, he would have received notice from the same bill that the captain of the *Britannia* apparently did not sign the bill, and, moreover, that the bill contemplated that the goods might be carried by some other ship, if the carrier preferred. There would be no evidence present to such proposed purchaser that the *Britannia* was bound by any act of its captain, denoting that he had, actually or constructively, received the goods, or had committed his ship to the carriage. Therefore no one could purchase the bill, relying either upon such fact or representation of such fact. Hence all the elements of an estoppel are absent, and the purchaser stands in precisely the same relation to the bill as the original holder thereof. In such a state of facts the action in rem against the *Britannia* must fail, and, in view of that fact, it is unnecessary to inquire whether the carrier is exempt from liability under the sixth article of the bill of lading. It results from the foregoing views that a decree should be entered dismissing the libel, with costs to the claimant.

## STATE OF MINNESOTA V. DULUTH &amp; I. R. R. CO. et al.

(Circuit Court, D. Minnesota. June 13, 1898.)

## REMOVAL OF CAUSES—FEDERAL QUESTION.

A right of removal exists, not only when plaintiff's claim is based upon some provision of the federal constitution or statutes, but also when it appears from his statement of his case that his right of recovery would be defeated by a construction, which may fairly be contended for, of some provision of such constitution or statutes. Thus, a suit by a state to recover lands under a state statute forfeiting a previous railroad grant is removable where the validity of the act of forfeiture is questionable, under the provisions of the federal constitution.

This was a suit by the state of Minnesota against the Duluth & Iron Range Railroad Company, Walter F. Cobb, and others, to enforce a statutory declaration of forfeiture of certain lands, previously granted by the state to aid in the construction of the railroad. The cause was heard on a motion to remand it to the state court from which it was removed.

H. W. Childs, H. C. Belden, and W. P. Warner, for the State of Minnesota.

Davis, Kellogg & Severance and Draper, Davis & Hollister, for defendants.

LOCHREN, District Judge. This action was begun in the district court of the Eleventh judicial district of the state of Minnesota, county of St. Louis, and removed to this court on defendants' petition, alleging that the suit is one arising under the constitution or laws of the United States. The complainant now moves that the cause be remanded to the state court, claiming that it does not appear on the face of the complaint that a federal question is involved. The complaint, with its exhibits, is lengthy. Not only are the acts of congress under which the state derived title to the swamp lands in question pleaded, but also the incorporation of the defendant railroad company; the legislative act granting to it swamp lands to aid in the construction of its railway, conditioned upon the completion of the railroad within limited time; the change in one of the terminals of the railway, and legislative consent to the change, with extensions of the time for completion of the railroad; the final completion of the railroad within the extended time, and report of such completion and practical operation of the railroad, made by commissioners to the governor; the selection of swamp lands by the defendant railroad company, and conveyance to it by the governor of a large amount of the lands so selected; sales of many parcels of such lands to purchasers, and conveyances to such purchasers by the railroad company; and the conveyance of all other lands, selected or not, claimed by said railroad company, to the defendant Walter F. Cobb, to secure specified bonds of said railroad company; also an act of the legislature of the state of April 21, 1897, purporting to repeal all prior acts granting lands to the defendant railroad company, and purporting to forfeit and resume all lands so granted.

*It appears to be settled that, to sustain the jurisdiction of this*

court, it must appear by the plaintiff's statement of the facts on which his claims depend, that the suit is one arising under the constitution or laws of the United States. The case of *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, has been followed upon this point. In that case (at page 460, 152 U. S., and at page 464, 14 Sup. Ct.) the decision in *Starin v. City of New York*, 115 U. S. 248, 6 Sup. Ct. 28, approved in *Carson v. Dunham*, 121 U. S. 427, 7 Sup. Ct. 1033, that "the suit must be one in which some title, right, privilege, or immunity on which the recovery depends will be defeated by one construction of the constitution or a law or treaty of the United States, or sustained by a contrary construction," was referred to as equally applicable to the act of March 3, 1887, as amended by the act of August 13, 1888, as to the prior act of 1875. In other words, to give the United States circuit court jurisdiction, it is not necessary that it should appear that plaintiff's right to recover is based upon and supported by some provision of the constitution or statutes of the United States. A federal question is equally presented if it appears from plaintiff's statement of facts that a construction, which may be fairly claimed and contended for, of a provision of such constitution or statutes, would defeat plaintiff's right of recovery. The complainant's right of recovery here depends upon the validity of the legislative act of April 21, 1897, when tested by the provisions of section 10 of article 1 of the constitution of the United States, and section 1, of article 14 of the amendments to that constitution. Every fact upon which the solution of this federal question depends is stated on the face of the complaint, and apparently the question can be presented by a demurrer to the bill of complaint. The motion to remand is denied.

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HILL et al. v. KUHLMAN et al.

(Circuit Court of Appeals, Fifth Circuit. May 3, 1898.)

No. 540.

1. **CIRCUIT COURT—JURISDICTION.**

A suit to stay an action on the law side of the court for recovery of lands, and to reform a deed thereto, is an ancillary suit, and the court has jurisdiction without regard to the amount in controversy.

2. **REFORMATION OF DEED—SUFFICIENCY OF EVIDENCE.**

The evidence showed that the only land owned by grantor was a tract of 250 acres in the Tierwester survey, while the field notes set out in the deed call for a tract of land of 100 acres in another survey, not then owned by grantor, and that, if the notes in the deed are reversed, they will substantially describe the 250 acres owned by the grantor; that, since the deed, the grantee and his successors have claimed and controlled the 250 acres in the Tierwester survey, while during this time the grantor or his successors have made no claim to it. *Held* sufficient to sustain a decree, in a suit brought 50 years after the deed, that such deed be reformed to cover the 250 acres in the Tierwester survey.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

S. W. Jones and Geo. H. Breaker, for appellants.

S. R. Perryman and A. C. Bullitt, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

PARDEE, Circuit Judge. This is an appeal from a decree on a bill brought to stay proceedings in an action on the law side of the circuit court, instituted for the recovery of certain lands, and to reform a deed from one John Y. Hill, the common source of title of both parties in the law action, to one Sanford J. Poston, the complainants' grantor, which deed was made on the 15th day of May, 1840. On the hearing, a decree was entered in favor of the complainants, reforming the deed in question as prayed for, and remitting the parties on the question of title to the action at law. To this decree the defendants below (appellants here) assign error as follows:

"(1) The evidence, as shown by the record in this case, fails to disclose such a state of facts, positive or circumstantial, as would justify a court of equity in adding to, correcting, changing, or modifying the language of a written instrument expressive of a contract solemnly entered into between the parties; and the said circuit court of the United States erred, to the prejudice of the said James H. Hill, Bell B. Pusey, Hill Hastings, Thomas H. Hastings, and Alfred Hastings, in holding, adjudging, and decreeing that a mutual mistake had been made by the grantor, John Y. Hill, and the grantee, Sanford J. Poston, in the field notes of the deed of conveyance, of date May 15, 1840, from the former to the latter, for a certain tract of land, being the land in controversy in this suit, situated in the county of Harris, then republic of Texas, but now the state of Texas, and in so correcting the field notes of said deed as to convey two hundred and fifty acres of land, instead of one hundred acres, as expressed in and by the field notes set out in said conveyance. (2) And other errors manifest of record."

This assignment of error amounts to no more than that the court below erred on the merits of the case. Counsel for appellants, however, by brief, present in this court the question of jurisdiction, want of equity in the bill, and insufficient evidence to support the decree. It is urged that the record does not show that the value of the subject-matter in controversy is within the court's jurisdiction. As the suit is one to stay proceedings at law, and could only be brought in the court a qua, the suit is an ancillary suit, and the jurisdiction of the court is clear. The want of equity in the bill is alleged, because the allegation of mutual mistake is not direct and positive in terms; and generally it is claimed that the bill and the amendment thereto wholly fail to state such a case as would authorize the correction or reformation of a written instrument executed more than 50 years ago, because it is said that the mutual mistake is not directly averred, but only on information and belief.

As we read the original bill of complaint, we find that the mutual mistake in the deed from Hill to Poston, which is the deed sought to be reformed, is fully described, and is sufficiently charged to support a decree in favor of complainants. If the objection had been made and insisted upon in limine, it could, if sound, have been easily cured by amendment. Whether a deed should be reformed on proof of mutual mistake after 50 years depends upon the peculiar circumstances attending the case. On the facts stated in the original bill and

the amendment thereto, laches is not imputable to the complainants in this case.

On the merits, we find the allegations of the bill sufficiently established to warrant the decree appealed from. The mutual mistake alleged in the bill is in regard to the field notes given in connection with a description of the land. The case shows that while John Y. Hill owned a tract of land in the county of Harris,  $1\frac{1}{2}$  miles from the city of Houston, being the southeast half of the Tierwester survey, he did not own any other land in that county; and that the deed purported to convey 250 acres off the Tierwester survey, while the field notes set out in the deed call for a tract of land of about 100 acres in another survey, not then owned or controlled or claimed by Hill; and that, if the field notes in the deed are reversed, they will substantially describe the 250 acres owned by Hill at the time of the conveyance; and that, from the time of the conveyance to Poston down to the present time, Poston and his grantees have claimed, controlled, and more or less occupied the 250 acres in the Tierwester survey, paying all taxes thereon, and as fully possessing the same as the circumstances permitted, while during all this time neither Hill nor his heirs nor other grantees have made any claim whatever to said lands. The case further shows that, in other deeds made by the said Hill about the time of the deed to Poston, he conveyed other portions of the same tract, reducing his holdings therein to the 250 acres sold to Poston, and in one of the deeds the land sold to Poston is referred to as being in the Tierwester survey. While it is possible that John Y. Hill, while pretending to sell 250 acres of land to Poston for a consideration of \$1,500, may have intended in describing the land to insert field notes which did not refer to any land he owned, yet it is not probable nor to be presumed in a court of equity, in the absence of proof. All the circumstances established by the evidence point to the fact that the insertion of such field notes was a mistake.

The decree of the circuit court seems to be just and equitable, and we see no reason to disturb it. Affirmed.

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LOUISVILLE & N. R. CO. et al. v. CENTRAL TRUST CO. OF NEW YORK  
et al.

(Circuit Court of Appeals, Sixth Circuit. June 1, 1898.)

No. 553.

1. RAILROADS—RECEIVERS—CLAIMS FOR TRACK RENTALS.

A claim against a railroad company which is in the hands of a receiver under foreclosure proceedings, for rent of track privileges accruing prior to the appointment of the receiver, is not entitled, as against the mortgage bondholders, to priority of payment out of the proceeds of sale, where no special equities are shown, and it appears that the lessor relied for payment upon the general credit of the lessee and its sublessee.

2. SAME.

Track rentals are not in general recognized as of the kind of claims which may become entitled, on the appointment of a receiver, to priority over the mortgage bonds.

## Appeal from the Circuit Court of the United States for the District of Kentucky.

This is a suit upon the intervening petition of the Louisville & Nashville Railroad Company and the Kentucky Central Railroad Company, filed in the circuit court for the district of Kentucky, in a consolidated suit in equity there pending, consisting of two original cases, one being brought by Samuel Thomas, a creditor of the East Tennessee, Virginia & Georgia Railway Company, and the other a suit by the Central Trust Company of New York, for the foreclosure of a mortgage given by the Louisville Southern Railroad Company to secure its bonds. This petition was presented for the purpose of enforcing a preferential claim upon the fund arising from the sale of the mortgaged property. The claim is founded upon the following facts:

Prior to January 29, 1890, the Newport News & Mississippi Valley Company was operating a railroad running from the East into Lexington, Ky., and stopping at Merino street, in that city, where it had a station. The Kentucky Central Railroad Company also had a line of road running into the city from the north until it reached a point on the west side of Cox street, nearly due west of the station of the Newport News & Mississippi Valley Company, from which point it turned to the east, and extended to the station mentioned. The Louisville Southern Railroad Company had built a railroad from Louisville to Lexington which entered the last-named city from the southwest to a point of junction with the Kentucky Central Railroad at the curve near Cox street, where the Kentucky Central Railroad turned east, as above stated. The Louisville Southern Railroad had no station at Lexington, and it desired to form a connection with the Newport News & Mississippi Valley Company's road. Accordingly, it entered into a contract on the 29th day of January, 1890, with the Kentucky Central Railroad Company, for the use of that company's track from the point of junction of their lines to the station of the Newport News & Mississippi Valley Company, and for certain terminal facilities in the immediate locality. This contract provided, among other things not necessary to be mentioned here, that the Louisville Southern Railroad Company should pay for the use of this portion of the Kentucky Central Railroad Company's track at the rate of 75 cents for each of its cars passing over it, and that all sums due under the contract should become payable during the month following that in which the service was rendered. The contract was to last for the period of 25 years. The Louisville Southern Railroad Company began to use the track under this contract in the latter part of March, 1890. Very soon after that a controversy arose as to whether the contract contemplated payment for the trackage for empty cars. The controversy continued, and the monthly payments were, in consequence, not paid.

On June 27, 1890, the Louisville Southern Railroad Company leased its railroad and assigned the benefits of the above-stated contract to the East Tennessee, Virginia & Georgia Railway Company, and the latter company immediately went into possession of the leased property, and continued to use the track of the Kentucky Central Railroad Company. The above-stated question of the construction of the contract continued unsettled. Matters went on in this way until September, 1891, when the Kentucky Central Railroad Company sold out all its property and contract rights to the Louisville & Nashville Railroad Company, including those inuring to it under the contract with the Louisville Southern Railroad Company. The use of the track continued by the lessee of the last-named company, and without any adjustment of the controversy as to the meaning of the contract under which the privilege was enjoyed. Finally, on the 2d day of May, 1892, the Louisville & Nashville Railroad Company, together with the Kentucky Central Railroad Company, brought suit against the Louisville Southern Railroad Company and its lessee, the East Tennessee, Virginia & Georgia Railway Company, in the circuit court for Fayette county, Ky., to recover for the use of the track from the beginning. This suit remained pending until June 23, 1894, when judgment was rendered for the use of the track by loaded cars against the Louisville Southern Railroad Company during the period prior to the date of the lease, and against both defendants from the date of the lease to the commence-

ment of the suit, rejecting the claim for empty cars. While this suit was pending, and on the 25th day of June, 1892, the suit of Thomas against the East Tennessee, Virginia & Georgia Railway Company was commenced in the circuit court for the district of Kentucky, and a receiver was appointed, who took possession of the railway company's property and exercised the privileges of the trackage contract. Not long afterwards the Central Trust Company of New York commenced suit in the same court against the same company to foreclose a mortgage given by the company to secure its bonds. The two suits were consolidated, new receivers were appointed, and the former receivers were directed to turn the property over to them. On the 1st day of July, 1893, the East Tennessee, Virginia & Georgia Railway Company failed to pay the rent due the Louisville Southern Railroad Company, and the latter company made default in the payment of the interest due on its bonds. On the 3d day of the same month the Central Trust Company of New York commenced suit to foreclose a mortgage given by the Louisville Southern Railroad Company to secure the bonds, and incidentally praying that the lease above mentioned might be canceled. Receivers were appointed in this suit, and the receivers in the consolidated causes against the East Tennessee, Virginia & Georgia Railway Company were ordered to turn over to them the property of the Louisville Southern Railroad Company, which they had theretofore had in their possession, and the new receivers were ordered to pay and be answerable for all just claims against the receivers for the East Tennessee, Virginia & Georgia Railway Company, growing out of their operation of the Louisville Southern Railroad. The several receivers above mentioned continued to use the connecting track under the contract of January 29, 1890.

On November 3, 1894, having obtained their judgment in the Fayette county circuit court as above stated, these petitioners filed their petition of intervention in the court below, reciting the substance of the foregoing statement, stating the situation of the several railroads with reference to each other, and the necessity of the connecting track in the operation of the Louisville Southern Railroad, and, by amendment of the petition, the diversion of earnings, both before and after the appointment of the receivers, to the payment of interest on bonds, and to the purchase of equipment and the betterment of the property; and the petition prayed for payment, out of the proceeds of the sale of the Louisville Southern Railroad property, of the amount alleged to be due for the use of the petitioners' track during the several periods of such use,—first, by the Louisville Southern Railroad Company from the latter part of March, 1890, to June 27, 1890; second, by the East Tennessee, Virginia & Georgia Railway Company from June 27, 1890, to June 25, 1892; and by the receivers after the last-named date. The interveners' claim was referred to the special master, W. O. Harris, to whom all other claims against the fund had already been referred. The master reported, in favor of the interveners, for the use of the track during all the periods for which claim was made, sums amounting, with interest, after deducting some payments, to \$5,759.80, upon findings that the trackage was at all times a necessity to the profitable operation of the road, and that there were continuously large diversions of current earnings, more than sufficient to pay all current operating expenses, and that, therefore, the claim was entitled to priority of payment. Exceptions were filed to the allowance of this claim as one entitled to preference over that of the bondholders. At the hearing the court, in effect, sustained the exceptions so far as they related to the claim for track service prior to the date when the receivers took possession of the Louisville Southern Railroad, June 25, 1892, and overruled them so far as they related to the use of the track by the receivers after that date. A decree was entered accordingly, and the interveners have appealed from so much of the decree as disallows priority to the claim for track service while it was used first by the Louisville Southern Railroad Company, and afterwards by its lessee, the East Tennessee, Virginia & Georgia Railway Company.

Helm Bruce, for appellants.

A. P. Humphrey, for appellees.

Before LURTON, Circuit Judge, and SEVERENS and CLARK, District Judges.

SEVERENS, District Judge, having stated the case as above, delivered the opinion of the court.

As will be seen from the foregoing statement of the facts, the circuit court directed that compensation be made for the use of the track, in accordance with the terms of the contract, during the time when the court had possession of the property. We have, therefore, only to determine whether or not the court was right in disallowing priority to the interveners' claim for the track service from the latter part of March, 1890, to June 27, 1890, that being the period of the Louisville Southern Railroad Company's occupation, and also during the second period, from June 27, 1890, to June 25, 1892, while the track was in use by the East Tennessee, Virginia & Georgia Railway Company. It will be noticed from these dates that the use by the first-named company terminated two years prior to the time when the receivers were put in possession. It was found and reported by the master that during this first period, the claim for which we are now considering, the current net earnings were more than sufficient to pay this claim; and it also appears that surplus earnings were paid over to the bondholders for interest, or appropriated to the purchase of equipment and for improvements of the road. Upon such facts it is contended by the counsel for the appellants that the proceeds of the sale of the mortgaged property may be appropriated to the interveners' claim for that period, notwithstanding the lapse of time intervening between the termination of it and the commencement of the foreclosure proceedings. But it would be unprecedented for the court, upon these facts merely, to concede the priority of a claim of such a character. There is no proof in the record to show that at the time in question the Louisville Southern Railroad Company was insolvent or approaching or apprehending insolvency. The principal of the bonded debt, secured by its mortgage, was not due, the interest was being paid, and there was no ground for any action of the trustee towards foreclosure. There was, therefore, no delay which enabled the mortgagor to disappoint its creditors. There is nothing to show that the Kentucky Central Railroad Company relied upon, or had any reasons for relying upon, the then current earnings as the source from which these track rentals were to be paid, and there was nothing in the nature of an equity which gave it any right to have those earnings applied in satisfaction of the installments of rent as they fell due. In fact, there was no equitable circumstance which does not exist in every case where a debtor applies his current income to the payment of one creditor rather than another.

Again, in order to constitute an equitable claim upon the current income, it must appear that the creditor asserting the claim did, in fact, or presumably, rely upon an expectation of being paid out of that fund. In the present case it is shown that from the beginning there was a question pending between the Kentucky Central Railroad Company and the Louisville Southern Railroad Company in regard to the construction of the contract on which the amount to be paid under the contract was to be ascertained. The parties took no steps at that time to have the question determined, and appear by mutual consent to have let its determination remain in abeyance. This action shows

clearly enough that the Kentucky Central Railroad Company did not rely upon or expect payment for this track service at the time or out of the current earnings, but must have understood that payment was postponed until some future time. It is a hopeless proposition to say that any equitable charge upon the current income arose upon facts like these. None of the facts upon which equitable claims have been maintained in suits of this character existed. All of the cases, from *Fosdick v. Schall*, 99 U. S. 235, to the present time, in which such claims have been recognized as having priority, rest upon the fundamental ground that there were peculiar circumstances, out of the ordinary course of business, which gave rise to a special equity, which it was the duty of the court to enforce.

With respect to the claim of priority for the track rentals during the period from June 27, 1890, to June 25, 1892, while the East Tennessee, Virginia & Georgia Railway Company was operating as lessee the road of the Louisville Southern Railroad Company, many of the above and still other considerations are presented. The lessee company was using this piece of track for its own purposes and its own business. It is true that, in a strictly legal sense, the lessor continued to be bound by the obligations of the contract; but, having assigned its interest therein to the East Tennessee, Virginia & Georgia Railway Company, with the knowledge of the Kentucky Central Railroad Company, followed by the recognition by the latter company of the assignment, the lessor company stood in the relation of surety for the payment of these charges. It did not control the operation of the road and had no control of the disposition of its earnings. During the foreclosure proceedings resulting in the sale of the property of the East Tennessee, Virginia & Georgia Railway Company and the distribution of its assets, this claim was not presented to the court, nor was any attempt made to collect it. It was known to all parties that the position of the Louisville Southern Railroad Company was that of surety merely. We do not say that the mere failure to assert this claim against the assets of the East Tennessee, Virginia & Georgia Railway Company during its winding up would, in and of itself, be a bar to the prosecution of the same claim against the surety if inherently it were one of an equitable character, but it is one of the circumstances which a court of equity may properly regard as having some bearing upon this claim as urged in the present condition of affairs. But beyond all this, and with respect to the claim for both of the periods we have been considering, the nature of the claim itself is of a kind which, upon the general current of authority upon the subject, disentitles it to a position of priority over the mortgage debt. It appears to us to stand upon no higher or better ground than claims for rentals of rolling stock, which are quite as indispensable to the daily operations of a railroad as are its tracks; and, with respect to track rentals for the period prior to the accession of the receiver, they are not, as a general rule, recognized as entitled to priority. *Thomas v. Car Co.*, 149 U. S. 95, 13 Sup. Ct. 824.

The facts in the present case clearly indicate that the Kentucky Central Railroad Company placed its reliance upon the general credit of the Louisville Southern Railroad Company and of the East Ten-

nessee, Virginia & Georgia Railway Company, rather than upon the expectation of displacing the priority of the mortgage lien, to adopt the language of Mr. Justice Shiras, in delivering the opinion of the supreme court in the case of *Thomas v. Car Co.*; or, as he elsewhere puts it in the same opinion, "must be regarded as contracting upon the responsibility of the railroad company, and not in reliance upon the interposition of a court of equity."

It further remains to be observed that much the larger portion of the interveners' claim is excluded by the operation of the rule in respect to the length of time prior to the appointment of a receiver the court will regard in the adjustment of equities of this sort. But for the reason that, upon the grounds already considered, we think no part of this claim can be given preference, it is not necessary to draw a line of discrimination or to canvass the rule upon this subject. It was discussed upon this, as well as several other of the aspects of this case, by Judge Lurton in delivering the opinion of this court in the case of *Central Trust Co. of New York v. East Tennessee, V. & G. Ry. Co.*, 26 C. C. A. 30, 80 Fed. 624. There is no error in the decree appealed from, and it is affirmed, with costs.

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NORTHERN ALABAMA RY. CO. v. HOPKINS.

HOPKINS v. NORTHERN ALABAMA RY. CO.

(Circuit Court of Appeals, Fifth Circuit. May 3, 1898.)

No. 638.

1. RECEIVERS—EXPENSES—ESTOPPEL.

The receiver of a railroad, at the instigation of the bondholders, made several trips to Europe, in an effort to get the property out of its embarrassed financial condition. *Held*, that the bondholders were estopped to complain of the allowance of the receiver's expenses for such trips out of the proceeds of the sale of the property under a decree of foreclosure.

2. SAME.

And the purchasers under the sale had no interest to contest the allowance of such expenses.

3. SAME.

Traveling expenses of a receiver of a railroad, incurred in going to and from his residence to the railroad property, and elsewhere about the country, in the interests of the property, are properly allowed.

4. SAME—FINDINGS OF LOWER COURT—REVIEW.

Unless injustice clearly appears, the findings of the lower court allowing receiver's expenses and fees will not be disturbed on appeal.

Appeal from the Circuit Court of the United States for the Northern District of Alabama.

Exceptions by J. Kennedy Tod, John G. Leiper, and the Northern Alabama Railway Company, as purchasers of the property of the Birmingham, Sheffield & Tennessee River Railroad Company at foreclosure sale, and by E. A. Hopkins, receiver of said company, to the master's report, allowing fees and expenses to said receiver. The report was modified, and the Northern Alabama Railway Company appealed, and E. A. Hopkins filed a cross appeal.

Geo. L. Rives and Girault Farrer, for Northern Alabama Ry. Co.  
J. F. Martin and E. B. Kruttschnitt, for E. A. Hopkins.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE,  
District Judge.

PARDEE, Circuit Judge. The Birmingham, Sheffield & Tennessee River Railroad Company, a corporation organized under the laws of Alabama, owned and operated a railroad from the town of Sheffield, Ala., to the town of Parish, on the line of the Georgia Pacific Railroad, running through some five counties in the state of Alabama. April 1, 1889, the said company executed to the Knickerbocker Trust Company, a New York corporation, a deed of trust under which \$2,975,000 of bonds were issued to the Sheffield & Birmingham Construction Company, which bonds were by the last-named company afterwards hypothecated to various parties. On June 1, 1893, the railroad company having been in default in the payment of interest on the aforesaid bonds for more than a year, the Knickerbocker Trust Company filed its bill in the court a qua, asking for the appointment of a receiver, the foreclosure of the trust deed, and a sale of the mortgaged premises. The railway company answered the bill, admitting all its allegations; whereupon, on June 7, 1893, the court appointed E. A. Hopkins, a citizen of Philadelphia, receiver of all the property of the Birmingham, Sheffield & Tennessee River Railroad Company. The evidence shows that Mr. Hopkins was selected as receiver by and through the consent of the parties in interest. The receiver, having filed his bond, on June 16, 1893, took possession of the railroad, and thereafter held and operated the same, under the direction of the court, until November 30, 1895, when he turned over the property to the purchasers thereof. A decree of foreclosure and sale was entered in favor of the Knickerbocker Trust Company on July 5, 1895, by the terms of which it was ordered that the railroad should be sold by a commissioner therein appointed; that the purchasers should pay to the commissioner the sum of \$50,000 in cash; that the purchasers should be entitled, in the settlement of the balance of the purchase price, to turn in or use receiver's certificates, or other valid claims against the receiver, or bonds of the railway company; that the receiver should not receive any bid for a sum less than \$500,000; that the proceeds of the sale were to be applied to the payment of the expenses of the sale and the debts and liabilities incurred by the receiver in the operation of the railway property, including a reasonable allowance to the said receiver for his compensation and for his attorney, the clerk's fees, the charges of the trustee and its counsel, all such sums as might by subsequent orders in the cause be declared to be payable out of the purchase money and be prior in lien to the bonds secured by the mortgage and deed of trust, the bonds, coupons, and interest thereon secured by the first mortgage in full, or, if there be not sufficient, a pro rata amount thereon, and to the payment of the balance, if any, into court. The railroad was sold under said decree on September 16, 1895, to J. Kennedy Tod and James J. Leiper, who duly complied with the terms of sale. On October 29,

1895, the sale to Tod and Leiper was confirmed, and a deed ordered, and in the decree to that effect the following provision is found:

"And that the said purchasers, J. Kennedy Tod and James J. Leiper, and their heirs and assigns, be, and they are hereby, allowed to appear, either in person or by attorney, before the said special master, and also before the court, in any and all proceedings wherein and whereby any claim against said Birmingham, Sheffield & Tennessee River Railroad Company, or the receiver of said company, is sought to be declared to be payable out of the said purchase money, or to be prior in lien to the mortgage bonds of said railroad company; and the said purchasers, and their heirs and assigns, shall have the right to appeal from all decrees in such cases to the same extent as the original parties to the said suit."

On January 9, 1896, the receiver presented his final report, accompanied by a statement of his personal expenses, and a petition asking for compensation, and the appointment of a master to determine the amount thereof. Upon this petition, a decree of reference was entered the same day containing the following provision:

"It is further ordered and decreed that the said master shall be empowered to hear the testimony of such witnesses as the petitioner and said parties may cause to be brought before him, and such other testimony as may be legally admissible in such cases, and from such testimony to find, fix, and determine the amount of the said receiver Edmund A. Hopkins' compensation, and that he report the amount of his findings to this court by the 27th day of April, 1896."

After taking much evidence, the master filed an elaborate report, recommending that the receiver be allowed for compensation as receiver the sum of \$20,000; for personal expenses,—trips to Europe \$3,150, and for other personal expenses \$3,022.50,—making a total of \$26,172.50, subject to a credit of \$6,127.82. To this report exceptions were filed by J. Kennedy Tod and John G. Leiper and the Northern Alabama Railway Company, as purchasers of the railway property at the foreclosure sale. The grounds of the exceptions were that personal expenses should not have been allowed at all, because no itemized accounts were presented, nor vouchers produced, nor were said expenditures necessary; and that the compensation of \$20,000 is excessive, and not warranted by the testimony. Hopkins, the receiver, also filed exceptions to the report, claiming that the sum allowed him as compensation was inadequate and not reasonable. The exceptions to the master's report were heard before the court, all parties being represented by counsel; whereupon the court, being of opinion that the \$20,000 allowed the receiver for compensation was excessive, and that the sum of \$5,000 per year would be a just and reasonable compensation, maintained the exceptions filed by the purchasers to that extent, but otherwise overruled all exceptions, and entered a decree accordingly. From this last decree the Northern Alabama Railway Company, as purchaser, appealed, assigning as error the allowance by the special master and the court of the personal expenses claimed by the receiver. Only the Northern Alabama Railway Company and E. A. Hopkins were made parties. Hopkins entered a cross appeal against the Northern Alabama Railway Company solely, assigning as error that the court erred in overruling the receiver's exceptions, and reducing the amount of compensation as allowed by the special master.

The evidence shows that the master reports that the expenses of the receiver in his several trips to Europe were incurred while the receiver was visiting Europe in the interest and at the instigation of the bondholders, and with the consent of the stockholders of the railway company, to try and bring about a reorganization which would get the property out of its then embarrassed financial condition, and complete the railroad in accordance with its original design; and that it was then believed by all the parties that the receiver, because of his knowledge of the subject, would be the best person who could be selected to present the plans to those who were already interested in the property as well as to those from whom it was hoped additional capital could be obtained.

Without seriously denying this evidence, the appellant contends that the business was entirely outside of the receiver's duties under the order of the court, which, it is claimed, were limited to managing and operating the railroad, keeping it open as a public highway, and to collecting money due to the company; and that, as the endeavors to successfully reorganize the property were fruitless, the expense cannot be allowed, particularly as against Tod and Leiper and the Northern Alabama Railway Company, purchasers of the property. On the other hand, it is contended that Leiper and Tod were really a purchasing committee, representing all the bondholders, and that, as the expenses were incurred in the interest of and with the consent of the bondholders, they cannot be allowed to object to the expense; and it is further contended that it was proper for the receiver to act in conjunction with, and in the interest of, all the bondholders, to endeavor to bring about a reorganization of the property. As to these expenses the special master reports as follows:

"It further appears from the testimony given and the papers filed in this matter that, while this suit was in progress, several plans were set on foot, or attempted to be set on foot, between Messrs. J. Kennedy Tod and John G. Leiper, representing the bondholders, and the receiver, and with the consent of the stockholders of the railroad, to get the property out of its then condition, and complete it, in accordance with its original design, into Birmingham, and extending it to Riverton; and that it was then believed that, because of his knowledge of the subject, the receiver in this cause would be the best person who could be selected to present the plans to those who were already interested in the property, as well as to those from whom it was hoped the necessary additional capital could be obtained; and that, pursuant to that understanding, Mr. Hopkins made three trips to Europe, as testified to by him, and which were fully known by Messrs. Tod and Leiper. It cannot be believed that it was understood by those parties that Hopkins was making these trips, or 'excursions,' as counsel for the railway company term them, with the intention or expectation of paying his own expenses. He had no interest in the property, either as bondholder or stockholder, and, although he admits an interest in the property by reason of the stock in the railroad company belonging to his friends, it could hardly be supposed that his friendship would be carried to the extent of his paying out \$3,150, when the property involved was first called upon to pay off the claim of the bondholders, amounting to about \$1,700,000, together with all prior claims and the costs of this litigation, before anything could possibly be realized upon the stock in the railroad. It might be argued that there may have been some other plan understood between Mr. Hopkins and these representatives of the bondholders looking to his compensation in this regard, and a repayment of his expenses, but if such a plan existed it might well be presumed they would have made it known on the hearing. Nor can I find, after careful perusal of the

plans of reorganization filed as part of the testimony in this cause, any provision by which any compensation for payment of expenses is made to Hopkins. Of course, the distinction must be kept in mind that, even if it had been agreed between the parties to the litigation that provision should be made by the court to pay the receiver's expenses of this character, and that, without notice of such a claim, third persons should have bought the property under the decree rendered in this suit, it might be doubted if the court would impose these expenses as a prior claim under its decree; but in this case the purchasers of the property were the same parties with whom all prior transactions had been had, and they had acted with the receiver in his efforts to put the property on its feet, and they would have been the beneficiaries had his and their efforts been successful. It seems that it would be just and equitable that the amount shown to have been expended on these trips, about which there was no contention, should be allowed. It is shown that the Northern Alabama Railroad Company simply stands in the 'shoes' of Messrs. J. Kennedy Tod and John G. Leiper, the purchasers of the railway property, who themselves represented the bondholders of the Birmingham, Sheffield & Tennessee River Railway Company, and that they assigned their bid to said Northern Alabama Railway Company, which is a new corporation, organized for the purpose of operating the purchased property."

The view we take is that, under the circumstances reported by the special master, the bondholders are estopped to deny the propriety of the expenses incurred by the receiver at their own instance and for their own benefit, and that the purchasers of the railway property under the decree of foreclosure and sale, as such, have no interest to contest the expenses of the receiver. The other expenses of the receiver which are contested appear to have been incurred by the receiver in traveling to and from his residence to the railway property and elsewhere about the country, in the interest of the railway property in his custody. As the evidence shows that such traveling was necessary in looking after the involved interests of the railway property in his charge, we are of opinion that they were properly allowed, and we take this view the more readily because, generally, in such cases, the expenses allowed receivers of railway property are so identified with the matter of compensation as to ordinarily affect, if not control, the allowance made by the court. The receiver's compensation, as fixed by the circuit court, appears to be reasonable, under the evidence. Certainly, it cannot be held excessive on appeal, for we cannot say that it was unjust, insufficient, or unreasonable.

We had occasion to declare the rule in matters of this kind in *Gaines' Adm'r v. Mills' Ex'rs*, 13 U. S. App. 229, 235, 4 C. C. A. 521, 525, and 54 Fed. 614, 617:

"Appellate courts are generally not disposed to disturb the findings of the lower courts in the matter of compensation for services of trustees, solicitors, receivers, and masters rendered in the conduct of litigation in said courts, whether based on findings of masters or verdicts of juries, unless injustice clearly appears, for the reason that the court below should have considerable latitude of discretion on the subject, since it has far better means of knowing what is just and reasonable than an appellate court can have. See *Trustees v. Greenough*, 105 U. S. 527, 537; *Cowdrey v. Railroad Co.*, 1 Woods, 331, 341, Fed. Cas. No. 3,293; and *Head v. Hargrave*, 105 U. S. 45."

We have been furnished with no authority to justify us in departing from the rule above declared. We do not find it necessary to pass upon the question, much argued in the briefs, whether it is

proper to permit a receiver of the court to participate in schemes of reorganization. Nor do we decide that the appellant has on the record an interest sufficient to warrant his appeal (but see *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 222, 10 Sup. Ct. 736), nor that either the appeal or cross appeal was properly taken. The decree of the circuit court is affirmed.

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OTTO v. REGINA MUSIC-BOX CO.

(Circuit Court, D. New Jersey. May 5, 1898.)

1. ADMINISTRATORS—APPOINTMENT—JURISDICTION—PLEADING.

One claiming title to a patent by assignment from an administrator of the former owner, appointed by the surrogate's court of the city and county of New York, which is a court of limited and inferior jurisdiction, must allege the facts upon which its jurisdiction to make the appointment was founded; and if the bill does not show whether the deceased died intestate, whether, at the time of his death, he was a resident of the city and county of New York, or whether he had any property there to be administered on, it is subject to demurrer.

2. SAME.

The mere averment that one was duly "appointed" administrator is not sufficient to show his authority as such, for his power arises only from the issuance of letters of administration to him.

This was a suit in equity by Gustav Otto against the Regina Music-Box Company. The cause was heard on demurrer to the bill.

Antonio Knauth, for complainant.

W. Laird Goldsborough, for defendant.

KIRKPATRICK, District Judge. The complainant in this cause has filed his bill of complaint, in which, among other things, he claims title to certain letters patent of the United States numbered 401,187 and 401,188. He sets out that these patents were issued on the 9th of April, 1889, to one Terrence A. McCauley, otherwise known as Thomas A. McCauley, and then avers as follows:

"And your orator further shows that the said Terrence A. McCauley, otherwise known as Thomas A. McCauley, died on the 17th day of April, 1894, and that Daniel McCauley, of Springfield, Massachusetts, was on the 23d day of May, 1894, duly appointed by the surrogate of the city and county of New York administrator of the goods, chattels, and credits of said Terrence A. McCauley, otherwise known as Thomas A. McCauley."

The bill then alleges that the said Daniel McCauley, on the 5th day of October, 1894, as such administrator, duly assigned, transferred, and set over the entire right, title, and interest in said letters patent to William H. Hoschke, through whom the complainant claims to be the owner. To this bill the defendant has filed a general demurrer, and, as one of the causes of demurrer, shows that the bill of complaint fails to set out a good and sufficient title to the said letters patent. In examining the complainant's chain of title as set out in the bill of complaint, it will be observed that the only allegations concerning the authority of Daniel McCauley to make a transfer and assignment of Terrence A. McCauley's interest or ownership of the patents in suit

are that Terrence A. McCauley, otherwise known as Thomas A. McCauley, is dead, and that Daniel McCauley was duly appointed his administrator by the surrogate of the city and county of New York. The surrogate's court is one of inferior and limited jurisdiction (*Bloom v. Burdick*, 1 Hill, 139); and therefore the facts upon which the jurisdiction of the court is founded should be set out in the pleadings (*Dakin v. Hudson*, 6 Cow. 224). Upon such questions of fact the bill is silent. Whether Terrence A. McCauley, otherwise known as Thomas A. McCauley, died intestate, whether at the time of his death he was a resident of the city and county of New York, or whether he had in the city and county of New York any property to be administered upon, the bill omits to state. If these jurisdictional facts had been alleged, it would have been necessary to have shown, further, that the court had proceeded to final decree before the proceedings would have been presumed to be regular. *Reeves v. Townsend*, 22 N. J. Law, 396.

The mere designation or appointment of one to act as administrator is but an interlocutory order, and confers no powers upon the appointee. It is but a preliminary step to the final act of granting the letters of administration, which issue to the person appointed when he shall have given bond for the faithful performance of his duties or otherwise comply with the requirements of the court. So, it was held in *Beach v. King*, 17 Wend. 197, "that one cannot be an administrator unless letters of administration of the goods, chattels, and credits of the intestate have been granted to him"; and that "the proper mode of pleading the fact is by direct allegation that such letters were granted." The court held that the allegation that the party was "duly appointed administrator consists partly of matter of fact and partly of matter of law, and was not capable of trial." The case of *Beach v. King*, *supra*, differs from that of *Wheeler v. Dakin*, 12 How. Prac. 537, cited on plaintiff's brief, in that the latter was rendered under the Civil Code of Procedure in New York, which has no applicability in the state of New Jersey. From what has been said, it follows that the complainant has failed to show, by proper averments, that Daniel McCauley had any authority to make transfer of the interest of Terrence A. McCauley or Thomas A. McCauley, to whom the letters patent were issued; and that in consequence the title thereto, so far as the allegations in the bill show, still remains in the heirs or legal representatives of Terrence A. McCauley or Thomas A. McCauley, and not in the complainant. Inasmuch as there is but one demurrer, which cannot be allowed in one part and overruled as to another part in the same proceeding (*Wellesly v. Wellesly*, 4 Mylne & C. 554), judgment must be for the defendant.

**DAVIS v. PORT ARTHUR CHANNEL & DOCK CO.**

(Circuit Court of Appeals, Fifth Circuit. May 18, 1898.)

No. 699.

**1. CORPORATIONS—TEXAS CHANNEL AND DOCK COMPANIES—POWERS.**

A channel and dock company organized under Sayles' Ann. St. (Tex.) 1897, §§ 721, 722, and authorized to construct a channel "across, along, through, or upon" certain waters within the jurisdiction of the states, is not restricted to a route through such waters, but may construct its channel along the borders of the same.

**2. INJUNCTION PENDENTE LITE—CONDEMNATION PROCEEDINGS.**

An application for an injunction pendente lite is addressed to the sound discretion of the court, and will be granted only to prevent irreparable injury; hence a corporation having instituted proceedings for the condemnation of land, and a controversy having arisen as to the value thereof, an injunction will not issue to restrain the corporation from entering upon the land until the termination of the condemnation suit, where the corporation has given bond in a sum sufficient to cover all damages, and the whole controversy appears to be rather an attempt to defeat the purpose of the corporation than a simple contest as to the value of the land.

**Appeal from the Circuit Court of the United States for the Eastern District of Texas.**

This is an application by the appellant, Davis, in the United States circuit court for the Eastern district of Texas at Beaumont, for an injunction restraining the appellee, the Port Arthur Channel & Dock Company, its agents and employes, from entering or remaining upon two certain tracts of land in which the appellant owns an undivided interest, and from the prosecution of any work or construction on any part thereof, or from doing any act in jeopardy of plaintiff's right and peaceable possession of said premises pending the adjudication of the rights of the plaintiff and the defendant in a common-law cause in said court, in which the defendant company was seeking to condemn said land for the purpose of cutting a channel through it. Plaintiff's land is described as an undivided one-eighth interest in divisions A and 6 of a tract of land on the west side of and upon the waters of Sabine Lake and Sabine Pass, known as the "Dennis Gahagan League" of land. The common-law case referred to is a proceeding which was originally commenced in the county court of Jefferson county, Tex., by the appellee, to condemn said land for the purposes of said channel company, both as to the construction of its channel and for a right of way on each side of it. That suit was removed to the United States circuit court at Beaumont after the commissioners appointed by the county judge for that purpose had awarded damages to appellant, and the amount had been paid into the county court, and the appellant had filed his objections to the award, and the proceedings had become a case in court for trial as in other causes, and this application was filed after said removal. The grounds of the application are, briefly, as follows: "(1) The charter of the Port Arthur Channel and Dock Company is void, because it authorizes the construction of its channel from the waters of the Gulf of Mexico, at Sabine Pass, along and across Sabine Lake to a point at or near the town of Port Arthur; and Sabine Lake is a body of water not within the jurisdiction of the state of Texas, and said charter is not, therefore, authorized by the constitution and laws of the state of Texas nor of the United States, but in contravention thereof. (2) Said charter contemplates the construction of a channel through the waters of Sabine Lake, not to enter the mainland until it reaches a point at or near the town of Port Arthur, whereas the route of the channel, as designated by said company, does not touch Sabine Lake, but enters the mainland before reaching said lake, and continues through the mainland until it reaches Taylor's Bayou, a navigable stream, and, after crossing the same, extends to the town of Port Arthur. (3) The usefulness of Taylor's Bayou as a navigable stream would be destroyed by cutting the channel into it, as its waters would be diverted from their natural

course into the Port Arthur channel, and its depth would be reduced, and no permit had been obtained from the United States government for the construction of the channel. (4) There was no necessity for cutting the channel where the company proposed to construct it—between Taylor's Bayou and its southern terminus—for the purpose of reaching a safe place for wharfs and docks; that Port Arthur is nine miles in a northerly direction from where the channel enters the mainland, and the entire property between the two points is comparatively level, the height at Port Arthur being about the same as at the southern terminus of the channel. (5) In the condemnation suit pending between the parties hereto the commissioners had reported the damages of appellant by reason of the condemnation of his land to be \$281.60, and appellant had filed exceptions to said award, and these objections were still pending, and had not been determined, and the cause stood for trial de novo, and the award had been set aside and held for naught, and appellee had no right to enter upon said land until said proceedings should be finally determined." Irreparable injury to appellant's land was alleged, and an injunction was prayed for as already stated. A restraining order was granted by Hon. A. P. McCormick in terms conforming to the prayer for injunction, to continue until the further order of said circuit court or one of its judges, and the appellee was directed to appear before said circuit court at Galveston on February 28, 1898, to show cause, if any it could, why the preliminary injunction should not be granted. On the day named the appellee appeared, and filed his reasons why the injunction should not be granted, substantially as follows: "(1) That the bill showed no equity on its face. (2) The charter attached to the bill showed the right of the company to condemn the land. (3) Bill showed adequate remedy at law through the condemnation proceedings, and did not allege insolvency of defendant. (4) Charter showed defendant worth a half million dollars, and no irreparable injury was shown, and all questions in the case could be tried in the condemnation suit. (5) The bill did not show that the plaintiff had land on Taylor's Bayou, and, if it did, the United States government only could object to any injury done to that stream. (6) The amount assessed by the commissioners as damages to plaintiff's land had been deposited in court for the benefit of plaintiff. (7) Res adjudicata in this: that in equity No. 1, in the United States circuit court at Beaumont, the matters set up in plaintiff's bill had been adjudicated against him. (8) Plaintiff's land was of but little value, and had never been used by him for any purpose. (9) The defendant had a permit from the United States government to cut its channel through 200 feet of the water of Sabine Pass to where it enters the mainland. (10) Defendant admitted its incorporation as charged; also, that the legal title to the land was in plaintiff; the filing of condemnation proceedings; award as stated; alleged payment of that amount into court; admitted the removal of the cause to the United States court as charged; the filing of objections to the award by plaintiff; that the channel would cross Taylor's Bayou; but denied that that stream was navigable, or that injury would result from cutting the channel into it; alleged conspiring of plaintiff with Kountze Bros. to defeat the construction of the canal; and denying other allegations of the bill; asked to give bond to pay any damages that might be assessed in the condemnation suit, and to proceed with the construction of the canal through plaintiff's land." The case was heard, the preliminary injunction prayed for was refused, and the defendant permitted to proceed with the work of digging the channel upon giving a bond in the sum of \$5,000 conditioned as asked by defendant.

A. H. Willie, for appellant.

Hal. W. Greer and R. A. Greer, for appellee.

Before PARDEE, Circuit Judge, and SWAYNE and PARLANGE, District Judges.

PARDEE, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

No written opinion having been given in the court below, the appellant has assigned errors covering all possible views and rulings of

the judge a quo, but from the view we take of the case the right of the appellant to a preliminary injunction depends upon two propositions, and the first is: Does the charter of the appellee authorize it to construct its channel along the route proposed, and thereby to pass through and over the appellant's land, and condemn so much of it as may be necessary for the purposes of the said channel? The appellee obtained its charter under article 721, Rev. St. Tex. 1895, and article 722 of the same, as amended March 1, 1897 (1 Sayles' Ann. St. 1897, p. 289 et seq.), as follows:

**"Chapter 14.**

**"Channel and Dock Corporations.**

"Art. 721. This title shall embrace and include the creation of private corporations for the purpose of constructing, owning, and operating deep-water channels from the waters of the Gulf of Mexico along and across any of the bays on the coast of this state to the mainland for the purpose of navigation and transportation, and for the construction, owning and operating docks on the coast of this state for the protection and accommodation of ships, boats and all kinds of vessels for navigation; and their cargoes. Acts 1887, p. 91.

"Art. 722 (644b) Channel Corporations; Added Powers. Every such channel corporation shall, in addition to the powers herein conferred, have power:

"(1) To cause such examination and survey for its proposed channel to be made as may be necessary to the selection of the most advantageous route for such purpose by its officers, agents or servants to enter upon any of the waters of such bays and upon any of the lands of this state, or of any person.

"(2) To take and hold such voluntary grant of real estate and other property as shall be made to it to aid in the construction and maintenance of its deep water channel and works pertinent thereto.

"(3) To construct its channel across, along, through, or upon, any of the waters of the bays within the jurisdiction of this state, and so far into the mainland as may be necessary to reach a place for its docks that will afford security from cyclones, storms, swells and tidal waves with such depth as may suit its convenience and the wants of navigation not less than five feet, and a width of not less than forty feet.

"(4) To furnish to vessels and boats adapted to the purpose facilities for navigating in and along the entire length of its channel, and to charge and collect a toll therefor, to be prescribed and established by its by-laws, not to exceed one per cent. per barrel bulk of the capacity of each vessel for each mile of the length of its channel used by the vessel going either way.

"(5) To borrow such sums of money as may be necessary for constructing, finishing, or operating its channel, and to issue and dispose of its bonds for any amount so borrowed and to mortgage its corporate property and franchises to secure the payment of any debt contracted for the purpose aforesaid: provided, the damages for any property appropriated by such corporation shall be assessed and paid for as is provided for in the case of railroads.

"(6) To enter upon and condemn and appropriate any lands of any persons or corporation that may be necessary for the uses and purposes of such channel corporation, the damages for any property thus appropriated to be assessed and paid for in the same manner as provided by law in the case of railroads: provided that no damages shall be assessed against or paid by it for any portion of the route of the channel embraced within and covered by the waters of any bay or lake on the coast of this state, nor for any portion of any island belonging to the state that may be requisite and necessary to the construction and successful operation of its channel: and provided, further, that its right of way shall not be less than the actual width of its channel, nor more than seven hundred feet in width on each side of its channel: provided, that when the land sought to be condemned under this chapter is arable land, such right of way shall not extend further than six hundred feet on each side of the channel from the edge or boundary of said channel."

An inspection of these statutes, particularly in connection with the following sections of the same chapter in relation to dock and channel corporations, shows that the right to expropriate the appellant's land for the purposes of channel cannot be questioned, if the route of the channel is laid out within the law, and in accordance with its charter. The charter of the company purports to authorize it to construct, own, and operate a deep-water channel from the waters of the Gulf of Mexico at Sabine Pass, along and across Sabine Lake, on the coast of Texas, to a point on the mainland at or near the town of Port Arthur, in the county of Jefferson, in the state of Texas, and to control, own, and operate docks along the coast of the state of Texas, at or near said channel, for the protection and accommodation of ships, boats, and all kinds of vessels for navigation and their cargoes, with full authority to exercise all of the powers and enjoy all the rights and privileges prescribed by chapter 14 of title 21 of the Revised Statutes of Texas of 1895, and all acts amendatory thereof and supplemental thereto. The charter follows the language of the Revised Statutes of 1895, except that in the Revised Statutes power is given to construct channels from the waters of the Gulf of Mexico along and across any of the bays on the coast of this state, and the charter authorizes the construction to begin at the waters of the Gulf of Mexico at Sabine Pass, and to run along and across Sabine Lake to a point in the mainland at or near the town of Port Arthur. The channel actually laid out by the company, and the location given it, begins at Sabine Pass, several miles above the Gulf, and without touching the waters of Sabine Lake, and going along and across that lake to the mainland near Port Arthur, goes directly into the mainland within 200 feet of its beginning point, several miles from the town of Port Arthur, and runs the rest of its route through the mainland, bordering on and along Sabine Lake till it reaches Port Arthur. The land bordering upon Sabine Lake, and particularly the land of the appellant through which the channel is to be constructed, is open, unimproved, low, flat, salt marsh, unfit for cultivation of any kind, and practically in high water the borders of the lake are not well defined. Assuming that the beginning of the proposed channel in the waters of Sabine Pass is equivalent to beginning at the Gulf of Mexico, the proper location of the channel therefrom seems to depend upon the force and effect of the words "along and across" in article 721, and "across, along, through, or upon" in paragraph 3, § 722. "Across" the waters of any bay would seem to warrant the locating of a channel in and through any bay in any direction. "Across, through, or upon" the waters of any bay certainly warrants a channel in any direction. "Along the waters of any bay" does not necessarily mean over, in, or through the waters, and may well mean along the borders of any bay; and in the statutes under consideration it seems to mean that or nothing. Considering the object of the statutes and the purposes of the appellee company, the narrow construction contended for is not admissible.

Concluding, as we do, that the charter of the appellee company authorizes it to construct its channel along the route proposed, and

thereby to pass through and over appellant's land, and by proper proceedings expropriate the said land, the next proposition is: Under the peculiar circumstances of this case, is the appellant entitled to an injunction pendente lite to restrain the appellee company from entering upon the said land for the purpose of digging its channel until the final determination of the expropriation suit, and the payment of the damages awarded? Section 17 of article 1 of the Texas constitution reads as follows:

"No person's property shall be taken, damaged, destroyed or applied to public use without adequate compensation being made, unless by the consent of such person; and when taken, except for the use of the state, such compensation shall be first made, or secured by a deposit of money, and no irrevocable or uncontrollable grant of special privileges or immunities shall be made, but all privileges and franchises granted by the legislature, or created under its authority, shall be subject to the control thereof."

The articles of the Revised Statutes of 1895 of Texas bearing on the question read as follows:

"Art. 4463.—When the said commissioners shall have assessed the damages they shall reduce their decision to writing, stating therein the amount of damages due the owner of such real estate, if any be found to be due, and shall date the same and sign it, and shall file the said assessment, together with all other papers connected with the case, with the county judge without delay."

"Art. 4468.—If either party be dissatisfied with the decision of such commissioners he may, within ten days after the same has been filed with the county judge, file his opposition thereto in writing, setting forth the particular cause or causes of his objection, and thereupon the adverse party shall be cited, and said cause shall be tried and determined as in other civil causes in said court."

Art. 4469.—If no objections are filed to such decision within the time prescribed in the preceding article, the county judge shall cause the said decision to be recorded in the minutes of said court, and may issue the necessary process to enforce the same."

"Art. 4471.—In no case shall such corporation be entitled to enter upon and take the property condemned without first having paid whatever amount of damages and costs may have been awarded or adjudged against it."

Construing these statutes, the Texas supreme court, in *Gulf, O. & S. F. Ry. Co. v. Ft. Worth & R. G. Ry. Co.*, 86 Tex. 537, 546, 26 S. W. 54, 60, said:

"Under the law the award could not be made the judgment of the court until after the expiration of ten days from the time it was returned into court, and during that time plaintiff, by filing his objections to it, would have been entitled to a trial de novo before a jury, by which objections it would have set aside the award, and thus have secured ample protection before the county court, with the right of appeal to the court of civil appeals if its rights were not fully protected by the judgment of the county court."

In *Travis Co. v. Trogdon*, 88 Tex. 302, 31 S. W. 358, the court held, in effect, that where the condemnation was for the use of the state the statute might provide for entry upon payment of the assessment made by the commissioners, thereby inferentially holding the converse to be true, i. e. if the condemnation is for the benefit of private corporations, and not of the state, payment of the amount awarded will not authorize the condemning party to occupy and use the land.

In *Ditch Co. v. Hudson*, 85 Tex. 587, 22 S. W. 398, the commissioners had reported, and the amount of their award had been paid into

court by the condemning party, at the time the owner applied for injunction to prevent entry upon his land, and the court held that an injunction to prevent entry upon the land should be granted, to continue till the condemnation proceedings were finally determined.

These decisions of the highest court of the state of Texas on the construction of the constitution and expropriation statutes of the state show that the appellee company had no right to enter upon the lands of the appellant for the purpose of digging its canal until compensation had been made, or the damages had been judicially assessed, and the amount thereof deposited; and that the deposit made by the appellee company in the county court of Jefferson county upon the award made in that court, and afterwards vacated, is without value; and it may be conceded that such will be the decree in the instant case on final hearing. This, however, does not meet the question in hand. The present application is for an injunction pendente lite to restrain the appellee company from committing trespass, and to compel the appellee to desist from further trespassing, and to abandon the digging of its channel pending and until the final determination of the litigation. Such injunctions are issued in the circuit court in the sound discretion of the chancellor, to prevent irreparable injury pending the final determination of the rights of the parties. It is only recently such discretion could be reviewed on appeal, and the effect of the appeal is merely to substitute the judgment and discretion of the appellate court for the judgment and discretion of the circuit court.

The circumstances of this case are peculiar. The case does not show a simple case of contest as to the value of certain lands to be expropriated for a canal; it rather shows an attempt, of course within the party's right, to defeat entirely the construction of the canal; and the grounds of attack cover many matters which, if well taken, would be fatal to the projected improvement without in the slightest degree benefitting the appellant. The appellant only owns an undivided one-eighth interest in the lands sought to be expropriated, and, although it is shown to be low, flat, salt marsh, unfit for human habitation, and unfit for farming or cultivation of any kind, he claims for it a value of \$200 per acre on the water front and \$100 per acre back from the water, while his co-owners of the other seven-eighths of the same land have acquiesced in the condemnation at the comparatively insignificant figure of less than \$6 per acre. Considering the character of the land, it is by no means certain that any kind of canal digging done upon it pending the litigation would do any substantial injury, even if thereafter the canal should be abandoned. A jury of the freeholders in Jefferson county awarded the sum of \$281.80 as the actual damages to the appellant for the expropriation sought, and that amount of money has been deposited to the credit of the appellant. The circuit judge required the appellant to file a bond in the sum of \$5,000, conditioned to pay all damages which may be finally adjudged against the Port Arthur Channel & Dock Company in the condemnation proceedings. Without expressing any opinion as to the real value of the land in question, we are of opinion that the deposit already made and the bond required by the

circuit court fully protect the appellant from all damages he may possibly incur pending the litigation, and that no injunction pending the said litigation is necessary to prevent irreparable injury.

The other questions raised by the assignments of error need not be passed upon at this time. The order of the circuit court appealed from is affirmed.

**GLOVER et al. v. EQUITABLE MORTG. CO. OF KANSAS CITY et al.**

(Circuit Court of Appeals, Fifth Circuit. May 17, 1898.)

No. 669.

**1. CONTRACTS—WHAT LAW GOVERNS.**

Complainants, husband and wife, consulted their attorney at Memphis, Tenn., about securing a loan on Mississippi real estate. He advised them to visit the office of a loan company at Vicksburg, Miss., with him, which the husband did. A bargain was struck, and papers drawn, which were sent to Memphis for the wife's signature. The notes were payable in New York, and the money was sent from Vicksburg to Memphis to complainants. The attorney received a commission on loans from the company. *Held*, that the contract was a Mississippi contract, to be construed by the laws of Mississippi.

**2. USURY—SOLICITOR'S FEES ON MORTGAGES.**

Provision in a deed of trust for the payment of solicitor's fees on default in no way affects the rate of interest thereon.

**3. SAME—PROVISION AGAINST TAXATION.**

Provisions in a trust deed giving the mortgagee the right to declare the principal due in case of taxation by the state of the deed or debt is not a means of evading the usury law.

**Appeal from the Circuit Court of the United States for the Northern District of Mississippi.**

The facts are practically conceded to be as found by the trial judge, as follows:

"This suit was originally brought in the chancery court of De Soto county, Mississippi, and removed into this court on the petition of the defendants. The bill of complainants alleges that the contract was executed in the state of Tennessee, and usurious, and to be performed in New York; and, if a New York contract, usurious, and usurious if construed under the laws of the state of Mississippi. \* \* \* The facts in this case are substantially stated as follows: C. C. Glover and wife needed money, and applied to Caldwell & Co., of Memphis, Tennessee, for it, or contemplated doing so. C. C. Glover went to the law office of Mr. A. S. Buchanan, in the city of Memphis, Tennessee, to get him to prepare an abstract of title, and desired to borrow as much as twenty thousand dollars on his and his wife's plantation in De Soto county, Mississippi. Mr. Buchanan suggested to Mr. Glover that he would like to negotiate the loan through the Equitable Mortgage Company for him (Buchanan having no authority for making any loan for said company, or concluding any negotiation at any time in the state of Tennessee, or in the state of New York, or in the state of Mississippi. The extent of his authority was to solicit loans for the Equitable Mortgage Company, for which the company paid him a commission if they approved the loans); that it would be to his (Buchanan's) interest. C. C. Glover thereupon agreed to make application through Mr. Buchanan to the Equitable Mortgage Company at Vicksburg, Mississippi, and expressed himself as being in a hurry to get the money as soon as possible. Mr. Buchanan assured Glover that the Equitable Mortgage Company were very prompt in the transaction of business, and that it would greatly facilitate matters if, instead of correspondence with the company at Vicksburg, Mississippi, he would accompany him to Vicksburg, and there

have a personal conference with the officers or agents of the company, at their office, and discuss with them all the business details, and all the questions arising about the title and the sufficiency of the security. Mr. Buchanan represented to Glover that the trip could be made to effect the purpose of practically closing the loan, and it was for this reason the trip was made to Vicksburg by Mr. Buchanan and Mr. Glover. They left Memphis on Sunday, the 6th day of January, 1889, and arrived at Vicksburg, Mississippi, on the afternoon of the same day. On the following day, Monday, January 7, 1889, they went to the office of the Equitable Mortgage Company in the city of Vicksburg, and submitted to the representatives of said company an abstract of title to the lands situated in De Soto county, state of Mississippi, belonging to Mr. and Mrs. Glover, together with certain affidavits to prove the abstract of title. All of said papers were also submitted to Miller, Smith, and Hirsch, attorneys of said mortgage company. Glover then and there appointed Buchanan his agent, and an application for a loan of twenty thousand dollars was then and there made to the Equitable Mortgage Company by Glover. The mortgage or deed of trust and the notes were all written and prepared then and there, and for the accommodation of Mrs. Glover, though dated and written at Vicksburg, in the state of Mississippi, the deed of trust and notes were sent to Memphis, in the state of Tennessee, and there signed and executed by the complainants to prevent Mrs. Glover from making a trip to Vicksburg, and not for the benefit of the Equitable Mortgage Company. Mrs. Glover knew of her husband's trip to Vicksburg with Mr. Buchanan, and that it was to borrow money. The Equitable Mortgage Company had no office or place of business in the state of Tennessee, and did no business in that state, but had an office and place of business in the state of Mississippi, and did business in said state from 1887 until they failed, in September, or thereabouts, 1893. The notes, as before stated, were written and dated in Vicksburg, Miss., and made payable at the office of said Equitable Mortgage Company in the city of New York, state of New York, and signed by Mr. and Mrs. Glover in the city of Memphis, Tennessee. When this was done, the mortgage was to be delivered to the clerk of the chancery court of De Soto county, at Hernando, then placed upon the records of said court, and delivered to said company at Vicksburg, and when this was done twenty thousand dollars was forwarded to the complainants from Vicksburg, Miss., to Memphis, in the state of Tennessee, and they received that amount."

H. D. Minor and J. W. Buchanan, for appellants.

J. Hirsh, Murray F. Smith, and T. M. Miller, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

PARDEE, Circuit Judge, after stating the facts, delivered the opinion of the court.

The circuit court found that the loan in question "was made in the city of Vicksburg, and therefore a Mississippi contract, and not intended as a mere cover for usury, and must be construed under the laws of Mississippi, and is, therefore, not usurious"; and thereupon entered a decree dismissing the complainants' bill. In this finding we concur. The loan company was located in Mississippi, and the property mortgaged was in the same state. The agreement to make the loan on the security offered—the meeting of minds—was in the state of Mississippi, and it is clear from the evidence that the parties intended that it should be a Mississippi contract. Mr. A. S. Buchanan was a mere solicitor, and, while paid by the loan company, appears to have acted in the interest of and for both parties. He certainly was no such agent of the loan company as was authorized to agree to any of the terms of the contract. The fact that the note

and deed of trust dated at Vicksburg, Miss., were executed in Memphis, Tenn., is a circumstance fully explained by the evidence. The loan is not usurious under the laws of Mississippi, because the rate of interest agreed upon was permitted by the laws of that state. The provision in the deed of trust as to the payment of solicitor's fees on default relates to a contingency which in no way affects the rate of interest. *Spain v. Hamilton's Adm'r*, 1 Wall. 624, 626; *Meacham v. Pinson*, 60 Miss. 217, 226. The provision with reference to the right of the loan company to declare the unpaid principal due in case of taxation by the state of the deed of trust or debt is also based on a contingency, and, as we construe the contract, it warranted, in no event, any higher rate of interest than the 10 per cent. stipulated. See *Spain v. Hamilton's Adm'r*, supra; *Dugan v. Lewis* (Tex. Sup.) 14 S. W. 1024; *Williams' Heirs v. Douglass* (La.) 17 South. 805; *Gillmour v. Ford* (Tex. Sup.) 19 S. W. 442. The decree of the circuit court is affirmed.

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RAND et al. v. COLUMBIA NAT. BANK OF TACOMA, WASH., et al.

(Circuit Court, D. Minnesota. June 15, 1898.)

**BANK STOCK—OWNER'S LIABILITY.**

Where one subscribes for part of an increased issue of national bank stock, but actually receives original stock instead, and holds it for several years, receiving dividends and paying assessments thereon, he will be liable, upon failure of the bank, to assessment on such stock by the comptroller of the currency.

This was a suit in equity by Alonzo T. Rand, Rufus R. Rand, and Kate A. Ogle against the Columbia National Bank of Tacoma, Wash., Philip Tillinghast, its receiver, and James H. Eckels, as comptroller of the currency, to enjoin the prosecution of actions at law by said receiver to recover an assessment made by the comptroller on certain shares of the bank's stock.

A. B. Jackson, for complainants.

J. B. Atwater, for defendants.

LOCHREN, District Judge. The bill of complaint in this suit alleges the organization of the defendant the Columbia National Bank of Tacoma, Wash., under the national banking laws of the United States on September 2, 1891, with a banking capital of \$200,000, divided into 2,000 shares of \$100 each; and that on the 24th day of October, 1895, the defendant James H. Eckels, comptroller of the currency, took possession of said bank and its books and assets, and later transferred the same to the defendant Philip Tillinghast, whom he appointed receiver of said bank; and that said Eckels, as such comptroller, on June 22, 1896, made an assessment and requisition upon the shareholders of said bank of \$61 on each and every share of the capital stock of said bank. Also that said Tillinghast, as such receiver, has, by direction of said comptroller, begun an action at law in this court against every one of said com-

plainants, wherein he seeks to recover of every of said complainants, severally, the sum of \$3,050 and interest, being the amount of said assessment upon 50 shares of the capital stock of said bank, which said Tillinghast, as such receiver, alleges was owned by each of the complainants at the time of the failure of said bank. The complainants aver that they are not, and never were, shareholders of said bank, but that on the 12th day of January, 1892, the shareholders of said bank duly passed the following resolution:

"Resolved, that under the provisions of the act of May 1, 1886, the capital stock of this association be increased in the sum of \$300,000, making the total capital \$500,000. Further resolved, that, as the money paid in amounts to \$50,000 or more, the president or cashier be authorized to certify the same to the comptroller of the currency, and shall so continue to certify until the said \$300,000 is paid in."

And that thereafter, on or about July 1, 1892, each of said complainants subscribed for 50 shares of such proposed increase of the capital stock of said bank, and paid to said banking association the amount of \$5,100 in full upon such subscription, taking its receipt therefor in the form of certificate for 50 shares of the capital stock of said bank; but that such proposed increase of stock was never, except in part, subscribed for, and was abandoned; and that an increase of such stock of \$150,000, afterwards certified by the comptroller, had never been subscribed for nor paid in, and that such certification by the comptroller was and is null and void. The object of this suit is to enjoin the said actions at law, and any attempted collection of the said assessments against complainants. No service was had upon the comptroller, and he does not appear; and this suit, together with the three actions at law sought to be restrained, are submitted upon the stipulated facts, supplemented by a very little oral testimony taken at the hearing. The evidence supports the allegations of the bill as to the organization of the bank, and the adoption by the shareholders of the resolution of January 12, 1892, for the increase of the capital stock of the bank to \$500,000; and shows that on July 18, 1892, the complainant Alonzo T. Rand was at the office of said bank in Tacoma, and was informed of the proposed increase of the stock of said bank to \$500,000, and that he was desirous to obtain stock of that bank for himself and for the other complainants, and then subscribed for 50 shares of the capital stock of said bank for himself and for a like amount for each of the other complainants at \$101 per share, to be paid on call of the said bank, the certificates of stock to be sent to the Nicollet National Bank of Minneapolis, Minn. On the 19th day of July, 1892, the vice president of said Columbia National Bank inclosed to the cashier of the Nicollet National Bank three certificates of the original stock of said Columbia National Bank, one for each of the above-named complainants, each certificate stating that the capital stock of said Columbia National Bank was \$200,000, and that the complainant named therein was the owner of 50 shares of \$100 each in the capital stock of the Columbia National Bank of Tacoma, directing said cashier to deliver such certificates of stock to the parties named therein on payment of \$5,050 for each certificate, and that such certificates were, on July 23, 1892, delivered to the complainants, respectively, who

each paid for his or her own certificate the said sum of \$5,050. On January 3, 1893, each of said complainants was paid by said Columbia National Bank the sum of \$200, being a stock dividend of 4 per cent. declared by said bank on December 30, 1892; and on January 2, 1894, each of said complainants was paid by said Columbia National Bank another sum of \$200, being another stock dividend of 4 per cent., declared by the same bank on December 28, 1893. On July 18, 1895, the comptroller of the currency notified said Columbia National Bank that he found its capital stock impaired, and required it to assess its capital stock 25 per cent., which was done, and in compliance therewith each of the complainants paid to said bank \$1,250. On the 25th day of July, 1895, the board of directors notified the comptroller of the said resolution of January 12, 1892, to increase by \$300,000 the capital stock of said bank, and that \$150,000 had been paid in and certificates issued therefor, and requested the comptroller to approve the increase to \$350,000. After further correspondence and action, needless to refer to, this increase of capital stock of said bank to \$350,000 was approved by the comptroller October 23, 1895, and two days later the comptroller put the bank, as insolvent, into the hands and charge of a receiver.

The testimony of Alonzo T. Rand indicates that in his conference on July 18, 1892, with the officers of the Columbia National Bank of Tacoma, its then last printed statement, of July 12, 1892 (Exhibit 15), was put in his hands, stating that the bank was increasing its capital to \$500,000, and therefore it was this proposed increase alone that he bargained concerning. There was nothing in the situation or in the negotiation to indicate on the part of Mr. Rand any preference for the proposed new stock over the original. The subscription for the stock was different in its terms from any other subscription for the new or increased stock. But, admitting that this subscription was intended and understood to be for the increase stock only, it is certain that the certificates of stock which were on the next day sent by the vice president of the Columbia National Bank to the cashier of the Nicollet National Bank for delivery to the subscribers on payment, were for original stock of the Columbia National Bank, and so appeared upon the face of each certificate. That particular stock was therefore offered, accepted, and paid for, as the stock bargained for, or in lieu of the stock bargained for. Being so accepted and paid for, the purchaser cannot be permitted, after holding it several years, and receiving dividends and paying assessments upon it, to claim now, after the collapse of the bank, that it was not the kind of stock which he at first supposed he subscribed for. Even if the certificates of stock delivered to the complainants could have been regarded as receipts for money paid on subscription,—though they state no amount,—and only to be considered certificates of stock when the increase on which the payment was made was approved by the comptroller, still such approval was had before the failure of the bank. The resolution of January 12, 1892, under which the subscriptions for increase were made, expressly provided for increase by installments, or in part, to the amount of paid-in subscriptions whenever certified to amount to \$50,000 or more. Such certificate was

made to the comptroller before his approval of the \$150,000 increase, and whatever was done September 9, 1895, whether valid or not, was unnecessary. The case is a hard one upon the stockholders, as is every case where they have to make good the losses caused by unwise or dishonest management. But as against the receiver, who represents the creditors of the Columbia National Bank, there is no equity in the contention of the complainants. Decree will be entered dismissing the bill, with costs. In the law cases, counsel will draft proper findings.

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LOVE v. WHEELER.

(Circuit Court, S. D. New York. May 27, 1898.)

STOCK HELD IN TRUST—ASSIGNMENT—ASCERTAINMENT AND ACCOUNTING.

Complainant's assignor delivered to defendant a large amount of stock in a corporation in which he was the principal stockholder, and of which defendant was the general manager. Defendant had power to transfer the stock, and alleged that he held a portion of it, which he had transferred to himself, under a parol trust agreement, for the promotion and benefit of the corporation and the protection of persons who might be induced to invest in it, but produced no evidence in support of his testimony to that effect, while the letters and other documentary evidence all showed that the directions of the owner, as given from time to time, as to the disposal of the stock, were to be followed. Defendant alleged and testified that a portion of the stock was held for the joint benefit of himself and complainant's assignor, but the evidence was vague and unsatisfactory. *Held*, that the stock admitted to be held in trust was so held for the exclusive benefit, and subject to the direction, of complainant's assignor, and should be transferred to defendant, as trustee for complainant, and that complainant is entitled to an ascertainment of all the stock held by defendant, and an accounting as to receipts and disbursements, if any, by the trustee.

This was a suit in equity, brought by Robert W. P. Love against Albert G. Wheeler for an accounting as to certain stock delivered to Wheeler in trust by John C. Love, and assigned to complainant. The ruling is upon the hearing on proofs taken on both sides.

Wm. S. Beaman, for complainant.

Robert L. Harrison, for defendant.

SHIPMAN, Circuit Judge. The bill alleges that John C. Love, now temporarily residing in England, was on August 14, 1895, the beneficial owner of a large amount of stock of the Love Electric Traction Company, and that the defendant was the trustee for said Love of about 20,000 shares of said stock, the exact number of shares the complainant being unable to give; that on August 14, 1895, John C. Love assigned to his son, the complainant, all the father's right in this stock so held in trust; that the trust is still open and continuing, and the defendant has never rendered any account. The bill prays that the defendant may be required to render an account of the trust, and of all property held under it, and of his receipts and disbursements as trustee; and for other and further relief as may seem proper. The bill does not state the terms or the nature of the trust.

The answer alleges that the defendant holds the stock under a trust agreement, states its terms, and avers that he has never sold the stock; that none of the objects for which the trust was created have been accomplished; that he has received nothing; that claims are pending against John C. Love, and until they are settled it is impossible to render an account. Proofs on both sides were thereupon taken.

John C. Love was an inventor and patentee of the invention described in four patents for improvements in a conduit system for electric railways and in electric appliances. On October 18, 1890, he entered into a written agreement with Albert G. Wheeler, the defendant, now a resident of the city of New York, and citizen of the state of New York, in regard to the incorporation of a company, with a capital of \$10,000,000, for the development of these patented inventions. It is not necessary, for an adequate knowledge of this case, to state the terms of this agreement. On December 9, 1890, the corporation, by the name of the Love Electric Traction Company, was established in Chicago, Ill., with a capital of \$10,000,000, in 100,000 shares of \$100 each, for the purpose of placing these improvements in active operation. John C. Love subscribed for 99,998 shares, Homer N. Hibbard and the defendant each subscribed for one share. Love transferred his four patents to the company, and received on January 5, 1891, a certificate for 99,998 shares, which, on February 9, 1891, was exchanged for a certificate for 50,000 shares (which were to be treasury stock), and 33 certificates—Nos. 5 to 37, inclusive—for 49,998 shares in all. All these certificates were in Love's name. On May 7, 1891, Wheeler, who was and is the vice president and general manager of said company, received from Love certificates Nos. 6, 7, and 8, for 5,000 shares each, and certificates 13 and 14, for 1,000 shares each, making 17,000 shares in all. These certificates were assigned to Wheeler, and are the bulk of the stock which is the subject of the present suit. Wheeler testifies that they were received by him in trust, in accordance with an oral trust agreement which was made before the organization of the company, which was never put in writing, and has never been modified. This agreement, Wheeler testifies, was that he should "hold the stock for the benefit of the company, and for its promotion, until it should get on a financial basis," and to carry out certain agreements which were "to protect the parties investing in the Love Company, take care of the personal obligations of Mr. Love, and the assignment of patents for the company and Mr. Love, and any of the obligations, and to hold it so that it should not be in any way put upon the market to interfere with those who had invested in the company." He further testified that:

"The understanding in holding this stock as trustee was that it was to be held so as not to interfere with the investments of any that might come in this company to assist in the financing of the company, and I calculated that that would cover all that had any interest in the Love Company, and the names of the persons would be the names of the stockholders. The principal idea of forming this trusteeship was for the protection of those who were interested and to be interested in this company."

The witness further explained the trust agreement as follows:

"The company was incorporated in the winter of 1890, with the understanding, if incorporated, that this block of stock should remain in my hands until the company was properly financed, in order that the investments of those coming into the company could not in any way be impaired by it; and efforts were made in every direction from that time until this to try to get the proper people who could have influence to assist the company in having its system adopted, and up to this time we have failed, as street-railroad men are absolutely opposed to doing anything that will help or aid the adoption of this company's system."

In regard to a retransfer to Love after the purposes of the trust had been fulfilled, answers were made by Wheeler in reply to questions as follows:

"There was no agreement that after the purposes of the trust were performed that you were to retransfer the stock to Mr. Love? A. No; no such agreement. The purpose of placing the stock there was to finance the company, and it would have been necessary, probably, for the sale of such stock and the accounting to Mr. Love for what might be due him under such sale; and if it was found necessary not to sell all of it, what interest he would be entitled to would be accounted to him for." "Were you in any event, under this trust, to retransfer any stock to Mr. Love? A. There was never anything stated in what shape it might be returned to him. It might have been returned by retransfer, as you call it, or accounting to him for it."

This vague and inexact statement of the alleged trust seems, in connection with Wheeler's other testimony, to mean that he was to hold the stock, and control its sale, until the company was properly "financed," by which he says he meant until the company has a sufficient revenue from its business, and that he was to sell the stock in such manner as to promote the financial welfare of the company, and to such persons as would not interfere with the interest which was in control of the company. In other words, Wheeler held the stock with power to sell it, not according to Love's directions or individual pecuniary interest, but according to his own opinion of the proper time of sale and proper purchasers, and the benefit which would come to the company from its sale. The company has never been in good financial condition, and the time has never arrived, in Wheeler's opinion, when the stock could properly be sold. This so-called trust is not in accordance with any written paper or document in the case which was made by or which was seen by Wheeler. On May 7, 1891, he signed the following receipt, which is in his handwriting:

"Received from John C. Love, certificates numbers as follows of the Love Electric Traction Company stock, with par value \$100.00:

Numbers.

Certificate	6	.....	5,000 shares.
"	7	.....	5,000 "
"	8	.....	5,000 "
"	13	.....	1,000 "
"	14	.....	1,000 "

Total, 17,000 shares.

"Same to be held by me in trust until the declaration of trust given by John G. Shortall to John C. Love has been carried out, when I am to dispose of the said seventeen thousand shares according as I have been directed by said John C. Love."

The terms of the Shortall trust have not been stated, but they have been apparently satisfied, and have no bearing upon the present case. On June 30, 1894, Love sent Wheeler the following directions:

"You are hereby authorized to sell for me seventeen thousand five hundred shares of the capital stock of the Love Electric Traction Company now held in trust by you for the sum of one hundred & twenty-five thousand <sup>00</sup>/<sub>100</sub> dollars, provided the same shall be paid to me on or before November 1, 1894. Should no sale be consummated, and the proper payments made to me for the same on that date, November 1, 1894, then you shall continue to hold said stock as trustee, same as before this letter was written."

The manner in which this additional 500 shares came into the amount held by Wheeler will be stated hereafter. The next written declaration of the authority or agency by Wheeler is contained in what is called Mr. Love's will, dated October 4, 1894. In this singular document Wheeler is appointed executor, and is instructed to follow specific directions which are given, and which are:

"That the contract authorizing him to sell seventeen thousand five hundred shares of the capital stock of the Love Electric Traction Company, which should expire Nov. 1st, 1894, is hereby extended as to time, so as in no way to upset or interfere with the carrying out of the provisions herein to be set forth as this, my last will and testament.

"Section 1. It is my wish to set aside from the realization of my effects the sum of fifteen thousand <sup>00</sup>/<sub>100</sub> dollars, which must be used to settle in full every indebtedness against me, and, after such indebtedness has been fully liquidated, and receipts in full for the same have been given, I authorize the payment of the following sums to the following parties: [These sums amount to eighty-five thousand dollars, among which are \$25,000 to Wheeler and his family. The will then provides as follows:]

"Section 2. The remaining amount to be realized under the contract I authorize Albert G. Wheeler, as my executor, to pay the sum of ten thousand dollars to a certain party known to us both, who has rendered me valuable services, and whatever else may be realized from my interests in all foreign patents, as well as under this contract, shall then be paid to Mary A. Love, my wife. I also hereby authorize Albert G. Wheeler, as trustee, should the sale be made of the seventeen thousand five hundred shares of stock of the Love Electric Traction before my death, to carry out the conditions and payments according to section 1 of this, my last will and testament, and, after such payments have been made, to set to my credit all moneys and interests then due, serving me with prompt notice that such conditions have been complied with and carried out, that I can at such time give further instructions."

This document would have no importance as against Wheeler were it not for the fact that he saw it, knew its contents, and inserted in his handwriting the date and the words "Signed in New York City." In October, 1894, Love went to Europe, and has remained there ever since. Wheeler probably had a duplicate original of the will in his possession. It was revoked on February 11, 1896. On April 12, 1895, Wheeler wrote Love, asking him if he would take \$100,000 for his "entire interest," to which Love replied on April 23, 1895, that he would take that sum for his "interest in America on the following conditions: To be closed at once, and all indebtedness and past agreements shall be canceled, I having the one hundred thousand clear, of which pay over to my wife the sum of \$75,000, and the remaining \$25,000 to me in London." This sale was never made. On August 14, 1895, John C. Love transferred to his son, the complainant, a resident and citizen of the state of Pennsylvania, all his interest, right, and title in the company, and also on the same day signed an order upon Wheeler to deliver to his son all his stock in the company. Wheeler refused, on September 2, 1895, to deliver the stock, saying that it was held under a private confi-

dential trust. John C. Love has transferred to the company 17 patents for his inventions in electrical conduits or appliances which were issued on and after November, 1897. The three certificates Nos. 6, 7, and 8, for 5,000 shares each, the defendant kept until December 10, 1895. He then surrendered them to the company, and received in lieu thereof 15 certificates in his own name for 1,000 shares each, being numbers 271 to 285, inclusive. Most of these certificates still remain in his own name. In 1896 he transferred all the stock in Nos. 282 and 285 and part of the stock in No. 284 to other parties. He has transferred the stock in No. 13 and in No. 14 at various times, beginning at November 6, 1893, to various parties. He has now certificates for 17,500 shares in his own name, which he acknowledges to be the stock of which he is trustee for John C. Love. Shortly before January, 1898, 29,757 shares stood in Wheeler's name. On December 31, 1891, the company issued to John C. Love certificate No. 84, for 4,000 shares. These 4,000 shares were transferred to Wheeler on December 12, 1895, and four new certificates for 1,000 shares each, Nos. 287 to 290, inclusive, were issued to him, and all these shares still stand in his name. He testifies that this stock was outside of the trust, was never held under a trusteeship, but was to be used for the "promotion" of the company; that they owned it jointly, and that the unexpended part of the proceeds was to be divided. Wheeler thinks that the extra 500 shares in the letter of June 30, 1894, came from Love's interest in the 4,000 shares which belonged to him at the date of that letter. No particulars in regard to any sales of 4,000 shares, or any part thereof, which were supposed to represent the stock in certificate No. 84, were given. The complainant offered no testimony in regard to these shares. The defendant testified that they never belonged to the trust, unless 500 shares were put into it by agreement made on or before June 30, 1894. The testimony is too indefinite and uncertain to permit any finding to be made in regard to these 4,000 shares, except that somehow, and from some quarter, 500 shares have been added to that trust. There should be an ascertainment whether any part of the other 3,500 shares belongs to a trust in which John C. Love was, and the complainant is, beneficially interested.

There is no document or letter in this case which was signed by John C. Love, or which was written by Wheeler, which confirms the idea that Wheeler was to hold the 17,500 shares of stock upon any other trust than to sell and convey it, and pass over the avails in conformity with the directions given by John C. Love from time to time. The letter of June 30, 1894; section 2 of the will, which gave directions as to the disposition of the avails of the stock, if sold before Love's death; the letter of April 23, 1895,—all show that his directions, as modified from time to time, were to be ascertained, and were to be followed. Wheeler's position was apparently very much that of an ordinary agent or attorney who holds a power of attorney to sell and convey stock in a company in which both principal and agent happen to be largely interested. If any inequitable result to the company or to Wheeler comes from this conclusion, the

result will be due to the fact that from the inception of the company, in 1891, to the time of the transfer to the complainant, in 1895, Wheeler has no piece of paper which verifies his statement of the trust, and that the papers which passed between the parties do not support the kind or the terms of a trust which he says existed. While the relations between John C. Love and Wheeler were in some respects like those of an agent and principal, they were styled by the parties to be of a fiduciary character. Love voluntarily placed his certificates of stock in the possession of Wheeler, with power to transfer them to himself. They have been thus transferred to himself or to others, and Wheeler now has certificates for 17,500 shares in his own name, of which he is the legal owner, and which he holds for the exclusive benefit, and to be disposed of according to the exclusive directions, of Love. This condition of affairs brings the property into the condition of a trust, which "in the most enlarged sense in which that term is used in English jurisprudence, may be defined to be an equitable right, title, or interest in property, real or personal, distinct from the legal ownership thereof." 2 Story, Eq. Jur. § 964. The trust was an express one, voluntarily entered into by Love, and in regard to property in which Wheeler has no pecuniary interest, and upon which he has no apparent lien. The allegations of the bill were limited to stock of which the defendant is a trustee, and the terms of the decree must be confined to that class of stock. The bill avers that the trust is still open and continuing, and asks for an account of it, and of all property held thereunder, and of all the defendant's receipts and disbursements as trustee. I have not, therefore, considered the question whether there has been a revocation of the trust, or, if there had been, what would be a proper decree. The certificates for 17,500 shares of stock should be placed in the name of Albert G. Wheeler, as trustee for the complainant, so that the certificates should distinctly show that the beneficial interest is in him. Let there be an interlocutory decree directing the transfer of the certificates for that number of shares to Albert G. Wheeler, as trustee for the complainant, and for a reference to a master for an ascertainment of the entire amount of the stock of said company held by the defendant under any trust for John C. Love and for the complainant as assignee, and for an accounting of all the defendant's receipts and disbursements, if any, as trustee of said trust property.

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EARLL v. METROPOLITAN ST. RY. CO.

(Circuit Court, S. D. New York. April 19, 1898.)

EQUITY PLEADING—ISSUE OF FACT UPON TRAVERSE TO PLEA—EFFECT OF FINDINGS.

Where an issue of fact upon traverse of a plea to a bill in equity is found for the complainant, he is entitled to a decree; but if such issue be found in part for each party, the defendant, under the thirty-third equity rule, is entitled to the benefit of the facts so found for him, and the decree must be limited accordingly.

This was a suit in equity by Charles I. Earll against the Metropolitan Street-Railway Company for an injunction and an account for alleged infringement of letters patent No. 520,259, granted to complainant, May 22, 1894, for a grip mechanism for cable railways. The cause was heretofore heard and decided on a traverse of a plea. 85 Fed. 214.

James C. Chapin and Esek Cowen, for plaintiff.

Frederic H. Betts and Samuel B. Clarke, for defendant.

WHEELER, District Judge. The motion of the defendant for leave to put in evidence a resolution of the common council of the city of New York adopted November 13, 1889, authorizing the use of cable power on the Broadway Line to South Ferry, in connection with chapter 259 of the Acts of the Legislature of New York, approved May 1, 1890, confirming the same, is granted, to make the record herein complete, and the copies thereof attached to the motion papers are allowed to be filed and are considered as a part of the evidence in support of the plea herein. These proceedings appear to show that at the time of the arrangement in respect to the plaintiff's patent the Broadway & Seventh Avenue Railroad Company had the right to put in cable power down Seventh avenue and Broadway to Bowling Green, and the South Ferry Railroad Company the same right from there to South Ferry, but not that the Broadway & Seventh Avenue Company had any right to put in cable power from Bowling Green to South Ferry. It could run its cars over that part of the South Ferry Line, and, if the South Ferry Company had put in cable power, perhaps it could have run its cable cars there, but it could not then put in a cable with which to run any cars there. That right belonged to the South Ferry Company. The work then being done corresponded with these respective rights. The situation to which the understanding as to the use of the plaintiff's inventions was to apply is therefore the same as before, with the same limitation as to extent and with the same result, when the understanding is applied to it, as it was, in respect to the then existing rights.

Question is made about the effect of the finding of fact upon the traverse of the plea that, as to a part of the alleged infringement of the plaintiff's patent, it is not sustained by the evidence, but must fail. In *Kennedy v. Creswell*, 101 U. S. 641, the authorities were reviewed by Mr. Justice Bradley, and a decree in chief founded upon a finding of an issue of fact joined by traverse of a plea, in favor of the plaintiff, was affirmed. That would be, of course, sufficient authority for a decree in chief here for relief against that infringement. But *Farley v. Kittson*, 120 U. S. 303, 7 Sup. Ct. 534, where the authorities, with the rules in equity, are again reviewed by Mr. Justice Gray, is cited and relied upon to the contrary. The law of equity pleading is not there stated differently from that stated by Mr. Justice Bradley, but the decree, which was for the defendant, was reversed, and the case was remanded, with directions to overrule the plea, and to order the defendants to answer the bill, and this direction is different from the decree affirmed in the former

case. But in the latter case the plea was said to consist of three parts: "First, a restatement in detail of some of the facts alleged generally in the bill." The issue of fact found for the plaintiff, on a stipulation, is said to have related to this first part of the plea, and the second and third parts are said to have been mere matters of law arising on the bill. So the case stood somewhat as if the bill had been demurred to, or the plea had been set down for argument, whereby the part found would, in either way, have stood admitted. Thereupon the justice said that the question argued was not presented by the record, and that, "as suggested in behalf of the plaintiff at the reargument, the plea was erroneously sustained, and must be overruled, and the defendants ordered, in accordance with the thirty-fourth rule in equity, to answer the bill." The requirement to answer may have been made at the request of the plaintiff for further discovery, as well as because of the form of the plea and the limited finding. This case does not overrule the former one expressly, and, as here understood, does not do so impliedly. In *Elgin Wind-Power & Pump Co. v. Nichols*, 65 Fed. 215, 12 C. C. A. 578, since both of these cases, a final decree in a cause on a patent founded on a finding for the plaintiff of an issue joined by traverse of a plea was affirmed by the circuit court of appeals of the Seventh circuit.

In this case the substance of the plea is that the invention was so made in the defendant's employment, and the patent was so procured at its expense, that it has an implied right, under the patent, like a territorial right to the extent of its roads, to use the invention in the construction and operation of its roads. This impliedly admits the existence and validity of the patent. The right of the defendant as to some of its roads is found on the traverse of the plea in its favor, and as to some in favor of the plaintiff. The thirty-third equity rule provides that "if upon an issue the facts stated in the plea be determined for the defendant they shall avail him as far as in law and equity they ought to avail him." As the plea is pleaded to the whole bill, and is not sustained to the whole, perhaps, but for this rule, the plaintiff would, without leave to the defendant to amend, be entitled to a decree for the whole alleged infringement, but under this rule certainly the finding of the right of the defendant to the extent of certain of its roads ought to avail the defendant to that extent. Decree for an injunction and an account, except as to Broadway Line to Bowling Green.

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UNION TRUST CO. v. ATCHISON, T. & S. F. R. CO.

(Circuit Court, D. Massachusetts. June 3, 1898.)

No. 438.

ANCILLARY RECEIVERS—ACTIONS AGAINST.

Ancillary receivers in Massachusetts of a Kansas railroad company are not liable for a tort committed by the original receivers of the company in Kansas.

This was an intervening petition, claiming damages of the receivers of the Atchison, Topeka & Santa Fé Railroad Company for personal injuries sustained by the petitioner while a passenger on a train.

Louis D. Brandeis, for receivers.

Sherman L. Whipple, for petitioner.

LOWELL, District Judge. The petition sets out that the Atchison Railroad and all its assets were placed in the hands of Walker and McCook, as receivers, said persons having been appointed as receivers by this court; that the said receivers, on October 5, 1895, were operating a train on the said railroad, in which train the petitioner was a passenger; and that the petitioner, while so traveling, was injured by the negligent management of the train, wherefore she asks this court to grant to her a trial by jury upon her claim for damages, and that the said receivers be notified by this court to appear and make answer to her claim. The answer sets out that the receivers appointed by this court have never operated any train, and that the injuries suffered by the petitioner were suffered in Kansas. It was stated in argument without contradiction, and it appears sufficiently from other papers in the case, that the train in question was operated by the named persons as receivers of the Atchison Railroad, appointed by the United States circuit court for the district of Kansas, in which state the named persons were originally made receivers of the Atchison Railroad, and that the receivership in Massachusetts is ancillary. The relation of ancillary receivers to the original and principal receivers of a corporation has not yet been fully defined, nor have the courts yet determined precisely in what respects they are to be treated as identical, and in what respects as separate legal persons. For the determination of this question, it would seem to be unimportant whether the original and ancillary receivers are the same or different natural persons.

The case of *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. 773, decides that a judgment obtained against an ancillary receiver in the state of his appointment binds only the property in his custody as such ancillary receiver, and ancillary receivership is in that case treated as analogous to ancillary administration. See *Johnson v. Powers*, 139 U. S. 156, 15 Sup. Ct. 525. If original and ancillary receivers are to be treated as different legal persons in respect of the judgments obtained against them for the debts of the corporation, and in respect of the application of the property in their hands to the payment of these debts, it would seem that they must be treated as different legal persons in respect of the management of the property in their hands, and in respect of the torts for which they are liable in connection with this management. It follows, therefore, that the tort for which the petitioner seeks to recover in this case was committed, not by the ancillary receivers appointed in Massachusetts, but by the original receivers appointed in Kansas, over whom this court has no jurisdiction, and that, inasmuch as the Massachusetts receivers committed no tort against the petitioner, this petition should be dismissed. I am aware that opinions have been rendered by some circuit courts in which may be found expressions not in

apparent harmony with the decision in *Reynolds v. Stockton*. See *Ames v. Railway Co.*, 60 Fed. 966; *New York Security Co. v. Equitable Mortg. Co.*, 71 Fed. 556. If there be anything in the latter decisions inconsistent with the above-mentioned decisions of the supreme court, I am compelled to disregard it. The petitioner relies also upon section 3 of chapter 866 of the Acts of 1888, but that section applies to suits brought without the previous leave of the court. If the petitioner is advised that she can obtain service upon the Kansas receivers sufficient to bring suit against them in this district, she has but to institute the suit by serving them accordingly. Petition dismissed.

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CALIFORNIA & OREGON LAND CO. v. RANKIN et al.

(Circuit Court, D. Oregon. May 6, 1898.)

No. 2,415.

INDIAN TREATY—RIGHTS ACQUIRED.

Where, in a treaty made subsequent to a road grant, Indian lands are ceded to the United States with a reservation of a right to a residence on part of them "until otherwise directed by the president," such reserved right is not a new right founded on the treaty, but the restricted right is a continuous one, and is prior and superior to the road grant. 85 Fed. 94, affirmed on rehearing.

This was a motion for a rehearing in the suit of the California & Oregon Land Company against Charles E. Worden, reported in 85 Fed. 94.

BELLINGER, District Judge. In the petition for a rehearing filed in this case the position heretofore taken by complainant that by the treaty with the Indians the lands in controversy were ceded to the United States, that the right of occupancy now held by the Indians is a new right acquired by the treaty, and that, the treaty being subsequent to the road grant, such right is subject thereto, is restated with great clearness, and the argument in its support is strongly re-enforced. Particular attention is called to the language of the proviso in the treaty by which the residence of the Indians therein provided for is to continue "until otherwise directed by the president," and the contention is made that this language shows that the rights now held by the Indians are not the same rights originally held by them, but are new rights bottomed on the treaty, and therefore subsequent in time to the road grant. My conclusion is that it is not material whether the rights in question are equal in extent with those originally held by the Indians. It may be conceded that these rights are not the same with reference to their extent, but it does not follow that they are new. When there is a cession with a reservation, the right reserved may be a less right than that originally held, but it is not for that fact a new right. There is nothing to shake the conclusion that the right of occupancy enjoyed by the Indians has never as to these lands been surrendered by them. If, having an unlimited right of occupancy in all the lands

of Southeastern Oregon, they ceded that right with a reservation as to a part of a limited occupancy, the restricted right is none the less a continuous one. If, as to the particular tract, they reserved less than what they originally possessed, the character of the right as a reservation is not changed. What is reserved out of a grant is not acquired by the reservation. The treaty could not confer a new right unless it conferred something in addition to what the Indians already possessed. Whatever is within the rights originally held by the Indians has been continuous in them. Equity is not concerned with the form of the proviso in this case. In its purpose and intent it is a reservation, and it is a reservation in its terms. The right of occupancy was not granted to these Indians. It was withheld by them. Furthermore, I am of the opinion that the words, "until otherwise directed by the president," do not have the effect attributed to them by complainant. The treaty provides that congress may hereafter permit the sale of these lands, if the prosperity of the Indians will be thereby advanced. The relation of the Indians to the United States is shown to be that of dependence. They submit to the control and guardianship of the government, and this right of sale can only be upon a consideration moving to the Indians. There can be no sale as of a property right in the United States, and the power of sale and the right of the president to direct a removal of the Indians in pursuance of its policy is manifestly the exercise of a trust power by the United States. These powers are not the exercise of proprietary rights by the United States, but the performance of a duty which it has assumed. The president can only direct the removal of these Indians in their interest. The right provided for as to this is not a limitation of the right of occupancy theretofore enjoyed by them, but a provision to make effective the authority to dispose of that right when the United States, acting in their behalf, determines that it is to their advantage that such interest should be sold. The treaty, by its terms, provides for public improvements of a permanent character upon these lands; for the erection of sawmills, flouring mills, shops, school and hospital buildings, and for maintaining them in repair for a period of 20 years; and it provides for an assignment or allotment of lands among the Indians, as is now proposed, and for the prevention of which this suit is prosecuted. These provisions strengthen the conclusions that the reservation contained in the treaty was of a substantial and permanent right, co-extensive with that theretofore enjoyed by the Indians. The effect of the construction contended for by complainant would be to deprive the Indians of the valuable right reserved to them in the treaty, which constituted the consideration for the cession of lands made by them to the government, and of which the road company is to a large extent a beneficiary. It would enable the road company to enjoy the benefits in a large measure of the cession made by the Indians, and at the same time take from them the benefits which constituted its inducement. It would defeat, in its main scope, the object of the treaty, and would, in its results, be contrary to justice and right. The petition for a rehearing is denied.

## MCGOUGH v. ROPNER.

(District Court, E. D. Pennsylvania. May 6, 1898.)

No. 48.

## 1. NEGLIGENCE—LOADING SHIP.

In loading staves onto a ship with a winch it is negligence for the winchman to run the draft rapidly up the skid without stopping at the hatch side, and warning the men below.

## 2. CONTRIBUTORY NEGLIGENCE.

A laborer employed in the hold of a ship in loading is not negligent in working directly beneath the hatch.

## 3. NEGLIGENCE—LIABILITY OF SHIPOWNER.

The owner of a ship under charter, who retains control, and furnished the officers and crew, is responsible for an injury to a stevedore engaged in loading, where such injury is caused by the negligence of the crew in operating the winch.

## 4. FELLOW SERVANTS.

Where a stevedore contracts to load a ship, the ship to furnish the winch and man to operate it, the man operating the winch and an employé of the stevedore are not fellow servants.<sup>1</sup>

This was a libel by Michael McGough against Robert Ropner, owner of the steamship Haxby, for personal injuries.

Samuel Evans Maives and Curtis Tilton, for libelant.

Convers and Kirlin, for respondent.

BUTLER, District Judge. The libelant was employed by John Dougherty, a contracting stevedore, to assist in loading the steamship Haxby in this port. Dougherty had contracted to load the steamship—she undertaking to furnish the winch and a member of her crew to work it, together with the necessary steam power, gear and tackle. The cargo consisted in part of staves, and while the latter were being taken on, in the usual manner, a draft or sling load was drawn up the skids to and across the hatch, striking the opposite side, spilling the load upon, and seriously injuring, the libelant—who was working in the hold immediately below. For this injury the libelant seeks compensation from the respondent as owner of the ship, on the ground that it resulted from the negligence or incompetency of the winchman. Numerous questions have been raised and discussed; but I deem it unnecessary to consider any other than those respecting, first, the alleged negligence of the winchman, second, the charge of contributory negligence in the libelant, and third, the respondent's liability. The testimony relating to the first of these questions is very contradictory; but a careful examination of it in the light of surrounding circumstances, has satisfied me that the winchman failed in his duty, either through carelessness or incompetency. That the draft or sling load should have been moved slowly up the skids and stopped at the hatch side, so that it could there be steadied over the opening, and lowered with safety (after warning to the men below),

<sup>1</sup> For a full collection of the cases on the question as to who are fellow servants, see note to Railroad Co. v. Smith, 8 C. C. A. 668, and supplementary note to Railway Co. v. Johnston, 9 C. C. A. 596.

seems very clear; and this I think is the customary practice pursued, notwithstanding the conflict in the testimony respecting it. Certainly no other practice can be free from danger. To run the draft up rapidly and swing it over the hatch without such stopping and steadying, would necessarily tend to accident. On leaving the upper skid it would swing violently, and beat against the opposite side of the opening (as it did in this instance), and would be likely to spill and fall upon the men below, who must at times be immediately under. Without express orders to run slowly and stop at the hatch side it would therefore appear to have been the winchman's duty to so operate the winch. I am satisfied however, from the evidence that he was expressly ordered by the hatch tender to "go easy" and "stop on the skid"; and I so find the fact. To discuss the conflicting testimony of the witnesses relating to this branch of the case would require much space and time, and be of little if any value. I, therefore, content myself with stating the conclusions reached.

Was the libelant guilty of contributory negligence? If he should not have been under the hatch at the time, he was so guilty. Inasmuch, however, as he had work to do there, and, as the evidence shows, was engaged in doing it, and was justified in expecting notice to move before drafts were swung over and lowered, he is not blamable for being there at the time. He was there because his employment required it; and that he believed himself safe is manifest from the fact that he was there. Men do not voluntarily incur unnecessary risk, and if the libelant's experience had not taught him that the situation was safe, until he should receive notice to leave, the inference is very strong that he would not have been there. His own testimony as well as that of witnesses called by him, render it very clear I think, that he is not blamable.

Is the respondent responsible for the injury? I believe he is. The fault, whether it resulted from carelessness or incompetency, was the fault of the ship, in operating its winch and tackle; for which she would have been answerable, if attached. The fact that she was under charter is not deemed material in view of the circumstances. The owner retained control, furnishing the officers and crew, and consequently remained liable to all the ordinary responsibilities of such owners. *Leary v. U. S.*, 14 Wall. 607; *U. S. v. Shea*, 152 U. S. 178, 14 Sup. Ct. 519; *Sherlock v. Alling*, 93 U. S. 99; *The Terrier*, 73 Fed. 265. Nor can he, I believe, escape liability on the theory that the libelant and the winchman were "fellow servants." The subject is a much controverted one, and the authorities are not harmonious. I believe, however, the weight of the argument is with the libelant, and that the clear weight of authority in this country, at least, is also with him. I could not add anything of value to what has been said on the subject, and will not therefore enter upon a discussion of it. The suggestion that the ship was not obliged to assist in the loading, by furnishing its winch and a man to operate it, and that the contracting stevedore simply borrowed this assistance from the ship, which was furnished as matter of favor merely, finds no support in the facts of the case. The stevedore contracted to load, subject to the agreement that the ship would thus aid him in the work, and

charged accordingly. The winchman was not therefore in the employment of the stevedore but of the ship, of whose crew he was a member, and was not therefore a "fellow workman" with the libellant, in the sense in which the law uses this term. The case is not distinguishable I think, from *The Victoria*, 69 Fed. 160, and *Johnson v. Navigation Co.*, 132 N. Y. 576, 30 N. E. 505. See, also, *Steamship Co. v. Anderson*, 50 Fed. 462, 1 C. C. A. 529; *The Carolina*, 30 Fed. 199; *The Wells City*, 38 Fed. 47. As *The Victoria* was decided in admiralty by a court of the United States, and is in all respects in point, I would probably feel constrained to follow it even if my judgment respecting the question were different.

Whether the winchman's failure of duty resulted from incompetency I have not found it necessary to consider. In the view I have adopted the question is unimportant.

The libel must therefore be sustained, and a decree may be entered accordingly.

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ROBERTSON v. SEWELL.

SEWELL v. ROBERTSON et al.

(Circuit Court of Appeals, Fifth Circuit. March 15, 1898.)

No. 626.

1. TAXATION—SPANISH GRANTS.

Until a Spanish grant has been segregated from the public domain by survey properly approved, it is not subject to taxation by state authority, and a sale thereof for such taxes is void.

2. PUBLIC LANDS—SPANISH GRANTS.

The survey of a Spanish grant, as recorded in 1851, contained 18,121.22 acres, and was approved by the surveyor general in 1871. In the chancery book was found what purported to be a decree entered in 1851, confirming the surveyor's report to the extent of 16,000 acres. The decree was not signed by the judge, nor was it his practice to sign decrees, but the decree purported to be entered three days before the answer praying it was filed. *Held*, that the decree was not final so as to bar a further survey and confirmation.

In Error to the Circuit Court of the United States for the Southern District of Florida.

This is an action of ejectment brought by Anna Bell Robertson and others, in the United States circuit court for the Southern district of Florida, involving the title to a tract of land described in the declaration. The court below filed the following findings and opinion:

"This cause coming on for a trial before the court, the parties having waived a jury by stipulation duly filed herein, and the same having been fully heard by documentary and written evidence and the oral testimony of witnesses and by argument, and having been fully considered, the court finds as matters of fact:

"First. That a grant of land five miles square on Indian river, at the mouth of San Lucie river, was made by the representatives of the Spanish government to one Samuel Miles, July 19, 1813; that May 17, 1815, said grant was surveyed in a square form by one McHardy; that said grant and survey were confirmed in 1840 by the superior court of the United States for the district of East Florida to certain grantees of said Miles; that upon appeal

to the supreme court of the United States said confirmation was set aside as to the survey, but confirmed as to the validity of the grant, and a mandate issued directing that a new survey be made of the places and for a number of acres designated by said grant, of a form in accordance with the views expressed in the opinion in said case, namely, that the width on the river was not to exceed one-third of the length of the said survey back from said river [U. S. v. Hanson, 16 Pet. 196]; that in November, 1844, a new survey was ordered, which was made by the surveyor general through his deputy, Houston, and returned June 14, 1845; that such survey was also in a square form, and not in accordance with the mandate of the supreme court, and was rejected by the presiding judge of said superior court; that another survey was ordered to be made in accordance with the principles stated by the supreme court and its mandate; that on the 26th day of April, 1850, John M. Hanson et al. filed in said superior court a petition praying that said petitioners might be permitted to locate the number of acres contained in said grant in parcels in any land office in the state of Florida; that on the 18th day of April, 1851, the United States attorney for said district filed his answer to such petition, representing that a new survey had been made, and that petitioners should be limited to such location; that there was filed by A. M. Randolph, a deputy surveyor, in 1851, a plat and description of the claim of John M. Hanson and others as the claim designated in the 'register of mill grants in the name of Samuel Miles'; that such survey contained 18,121.22 acres, and was not approved by the surveyor general until November 25, 1871; that there was found recorded in the chancery book of the United States district court for the Northern district of Florida, under date of April 15, 1851, what purports to be a decree of confirmation of the said survey made by A. M. Randolph to the extent of sixteen thousand acres, and orders that the said lands thus located, surveyed, and described be decreed to be fully and finally confirmed to said claimants; that such decree was not signed by the presiding judge, and purported to be entered three days before the answer of the United States attorney praying the decree was filed; that it was not the practice at that time for the judge to sign decrees; that subsequently, April 14, 1880, upon the petition of one Jonathan C. Greely, assignee in bankruptcy of said John M. Hanson, alleging that no survey had ever been made as required and directed by the supreme court of said grant, an order was made that the surveyor general of the state of Florida do survey said Spanish grant to Samuel Miles in accordance with the mandate and opinion of the supreme court, and file a plat and map of said survey in said cause; that such survey was made in accordance with such order, and a survey and plat was filed in this court in this cause containing 16,006.38 acres, and that said survey and plat was in all respects approved and confirmed upon the application of Rufus K. Sewell et al.; that application was duly made to the general land office of the United States, and a patent issued from said office giving and granting unto John M. Hanson, John J. Hedrick, Bernardo Segui, and Dionisia Segui, and their heirs and assigns, the land described in said foregoing survey, provided that such patent should not interfere with any valid adverse right to the same, or be construed to preclude a legal investigation by a proper judicial tribunal; that said John M. Hanson, John J. Hedrick, Bernardo Segui, and Dionisia Segui were the original grantees of said Samuel Miles; that said patent was issued the 4th day of September, 1889; that December 1, 1890, Sarah Van Wagenen and others, among whom were all of the plaintiffs in the present suit, filed their petition alleging the previous survey by A. M. Randolph, and the alleged decree confirming said plat and survey, and praying that all subsequent action by Jonathan C. Greely, as assignee in bankruptcy of John M. Hanson, and others, and the survey and plat made under the order of April 14, 1885, and the decree of confirmation thereof, be vacated and set aside as null and void on account of the court's having no jurisdiction, it having exhausted its jurisdiction by its said previous action, and for other relief, to which a demurrer was filed, which, upon being fully heard, was sustained, and, no application to amend being made, said petition was dismissed.

"And the court further finds, as a matter of fact, that subsequent to the survey of said grant of 1851, certain lands called [claimed] to have been surveyed as such grant in the survey of Randolph, to the extent of 17,970.97

acres, were entered upon the tax books of the state of Florida for the county of Dade, and assessed as of unknown ownership, for the years 1877, 1878, and 1879, and were put at auction for sale for such taxes on the 6th day of September, 1880, and, there being no bidder, were reported as sold to the state of Florida for the sum of \$292.65; and on the 1st day of May, 1882, W. D. Barnes, comptroller of said state, did transfer and assign such certificate to Sarah A. Falligant, Sarah A. Van Wagenen, Mary R. Gilbert, Fannie E. Lanier, Anna Bell S. Robertson, and Electra C. Falligant, plaintiffs herein, and upon the presentation of said certificate to the clerk of the said county of Dade he made a deed of said 17,970.97 acres to said Sarah A. Falligant and others as aforesaid.

"And the court further finds, as a matter of law, that the action of the court in ordering and approving the survey of Hopkins, as is shown in evidence, and in the matter of the petition of the plaintiff herein in the case of Van Wagenen et al. against Sewell, is binding upon this court, and that all such rights of the plaintiffs herein as against the defendant, as relates to and depends upon the said survey of Randolph in 1851, and the confirmation thereof, and the said survey of Hopkins, and approval and confirmation thereof, of 1889, have been heretofore determined and settled, and such questions are res judicata by the action of the court in the said case of Van Wagenen against Sewell.

"And the court further finds, as a matter of fact, that the defendants, claiming for Rufus K. Sewell, went onto and took possession of the eastern one-third part of said grant in November, 1889, and has held possession of the same as his one-third interest in said grant ever since, and paid taxes on the same, and has ousted plaintiffs from any interest in said one-third of said grant.

"And the court further finds, as a matter of law and fact, that the grant to Samuel Miles was never legally segregated from the public domain at the time when the taxes were assessed on the grant, and prior to the time it was sold, as cited in the tax deed put in evidence by the plaintiffs, and said alleged sale and said tax deed were null and void.

"And the court further finds that the plaintiffs herein are by proper and legal conveyance jointly entitled to a fee-simple title in and to the possession of one undivided third part and interest in the entire tract, lot, or parcel of land situated in the county of Dade, state of Florida, and known and described as follows, to wit: [Then follow same description of land as described in the declaration]; and that for this one-third undivided part of such lot or parcel of land, together with their costs herein, they are entitled to judgment."

#### Opinion.

"The plaintiffs in this case claim title and possession of the property in dispute from two sources: First, the plaintiffs claim to be the heirs of the grantee of one-third of the entire grant; second, they claim under a tax deed from the state of Florida for the nonpayment of unpaid taxes.

"The case was tried by the court upon stipulation of parties, in one of which was stipulated that Miles, the original grantee, conveyed one undivided third interest through John J. Hedrick; in another it is stipulated that Hedrick's interest purports to have been conveyed to John G. Falligant, and the plaintiffs are his heirs and devisees. It was further stipulated that, in 1890, Rufus K. Sewell claims to have gone upon the east one-third of the land, and claimed it as his third, and has claimed to pay taxes on that portion since 1891 or 1892. The title of Rufus K. Sewell is shown by a regular deed of conveyance from John M. Hanson, and a deed of conveyance from said Rufus K. Sewell to the defendant Henry E. Sewell.

"First the defendant pleaded the general issue of not guilty, but on the 27th day of January, after the case was called for trial, the defendant filed an additional plea, viz. that the defendant had never denied the right of the plaintiffs to the undivided one-third interest of the grant.

"The court has found that the tax title under which the plaintiffs claim is void, but that they are entitled jointly to an undivided one-third interest in fee simple of the entire grant, and that they had been so ousted from the possession of the eastern one-third of the grant as to entitle them to judgment upon this suit. Exceptions to such findings have been taken.

"It is contended by the defendant that the plaintiffs, having claimed the whole of the premises, are not entitled to judgment unless found to be entitled to the whole. The court does not consider the law to be so determined in this state. The common-law action of ejectment has been done away with, and the statute which has taken its place plainly provides that, in any suit for ejectment, the judgment shall determine and declare the interest that the plaintiff may have in the premises claimed. The court considers that wherever any interest is found in the plaintiff, not more than that claimed by him he is entitled to judgment for that amount, although it may be of less quantity than that sued for. This view is sustained by the text and a large number of authorities cited in Waite's Action and Defenses (volume 3, p. 123).

"It is also claimed by the defendant that there is no evidence which would justify the findings of fact that the plaintiffs were entitled to an undivided one-third interest in the land. The language of the stipulation that Hedrick's interest purports to have been conveyed to John G. Falligant can only be considered as equivalent to a declaration and stipulation that there is evidence which tends to show that Hedrick's interest has been conveyed to John G. Falligant, and this, taken in connection with the plea of the defendant that he had never denied that the complainants were entitled to a one undivided one-third interest in the property, the court considers may be deemed as an allegation and an admission of the title in the plaintiffs to that amount. Any other construction would appear to be simply holding out an inducement to plaintiffs to waive introducing testimony upon that point, and then taking advantage of such omission.

"The only other ground of exception is to the finding of fact that the defendant did oust plaintiffs from any possession which would justify this suit.

"The sixteenth stipulation is that Rufus K. Sewell claims to have gone upon the eastern one-third of the land and claimed it as his one-third. The defendant, Henry E. Sewell, testifies that he, in 1889, went onto this, and claimed for his father a part of this land, and his improvements were upon the northeastern portion. There can be but one conclusion drawn from this stipulation and testimony, taken together, and that is that the defendant herein claimed that which is stipulated his father claimed, and since that time been holding the land with the same understanding that it is stipulated that Rufus K. Sewell claimed; that is, he claimed the eastern one-third of the land as his third. This is considered a reasonable and necessary conclusion that the land was held, claimed, and possessed as an entire interest of that eastern one-third instead of the one undivided third of the entire lot which it is admitted he was entitled to; and such possession of the one-third it is considered fully justifies the finding that the plaintiffs had ousted the defendant from any interest in that eastern one-third.

"It is also contended by the defendant that he having admitted by his plea that the plaintiffs were entitled to one undivided third interest, and the court not having found them entitled to any greater interest than it is so admitted, the costs should not have been adjudged against him herein. Had such plea of admission of the right of the plaintiffs been filed at an earlier stage of the case, it might have been considered more favorably; but until the case was called for trial the defendant had stood upon his plea of not guilty, which, under the statute, is held to admit both his possession and adverse claim. It is true that a party can, by admission of the rights of the plaintiff at any time in the suit, prevent a judgment for subsequent costs, but at no time will such action be held to affect the costs which had already been incurred up to that time. In this case the late filing of such plea cannot be considered as depriving the plaintiffs of their right of costs up to that time, as certainly no opportunity was given for them to dismiss their suit or obtain their rights in any other manner previous to that time.

"It is ordered, therefore, that the judgment be so far amended as to make the defendant liable to the cost of suit up to the time of the filing of that plea; and the motion for arrest of judgment and a new trial is denied."

H. H. Buckman, for Anna Bell Robertson and others.

H. Bisbee and C. D. Rinehart, for Henry E. Sewell.

Before PARDEE and McCORMICK, Circuit Judges.

**PER CURIAM.** As the parties waived trial by jury in the circuit court and submitted the case to the judge, we are concluded by the findings of fact. The vital question in the case is whether the lands in controversy had been so segregated from the public domain by the alleged decree in 1851 as to permit of their assessment and taxation by the state of Florida in the years 1877, 1878, and 1879. From the findings of fact relating to the decree of 1851, we are of opinion that the said decree did not become final and executory. This we understand to be the ruling of the circuit court, and we affirm the same. Affirmed.

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THE EDWIN.

CRAWLEY v. THE EDWIN.

(District Court, E. D. New York. April 28, 1898.)

1. NEGLIGENCE—EVIDENCE—WEIGHT AND SUFFICIENCY.

A longshoreman, who was injured by the slipping of a boom from its crotch, introduced three witnesses, who testified that the cleats and leg of the crotch were badly worn. Three other witnesses, on behalf of claimant, testified that the leg and cleats were in good condition. *Held* that, the burden being on libellant to prove the worn condition, his proof failed.

2. EVIDENCE—ADMISSIBILITY.

On an issue as to the condition of a crotch supporting a boom, testimony of a ship surveyor, who examined it several days after an accident alleged to have been caused by its defective condition, is inadmissible, it not being proven that the crotch had remained unchanged.

3. MASTER AND SERVANT—APPLIANCES ON SHIPBOARD.

Where the wooden crotch for supporting a boom is such as are usually in use on old ships, and it is not shown to be unsuitable, it is not the duty of the shipowners to furnish a later appliance, although it is a superior one.

This was a libel by John Crawley against the steamship Edwin to recover damages for personal injuries.

Alex. McKinney and Robert H. Roy, for libellant.  
Convers & Kirlin, for claimant.

**THOMAS**, District Judge. The libellant is a longshoreman. On the 29th day of December, 1898, he was employed by a firm of stevedores to assist in loading with grain the claimant's steamship, the Edwin. The ship was lying at a dock at the foot of Pacific street, Brooklyn, with her bow in, and her starboard side abreast, the wharf. The grain was brought into the aft hatch from an elevator on the port side of the ship, by means of a pipe 70 feet in length. The free end of the pipe was supported by a line running from it to a gaff of the ship. Slipped over the end of the pipe, and held to the same by a rope, was a sleeve or nozzle, about 16 feet long and some 8 inches wide. This sleeve ran into the hatch of the ship sufficiently to carry the grain into the port or starboard side thereof, accordingly as the free end of the sleeve was raised or lowered. To raise or lower the

end of the sleeve for this purpose was the duty of the libellant. To enable him to do this, a rope was fastened to the sleeve, somewhere along the portion thereof extending from about the coaming of the hatch, on which the sleeve rested, to the end of the sleeve. The claimant claims that, to obtain a purchase on the sleeve, the libellant had carried the rope over the boom, which was some 6 feet to the starboard of the sleeve, and which extended from the mast across the hatch to a point aft thereof, where it rested on a crotch. The boom was  $46\frac{1}{2}$  feet long, measured 12 inches in diameter, weighed about 1,800 pounds, and could only be moved from its position by some great force suitably applied for that purpose. The boom was not supported otherwise than by the mast at one end and the crotch at the other. The crotch consisted of two pieces of wood, 6 inches in width and 3 inches in thickness, set into each other at the point of intersection, and holding the end of the boom some 7 feet above the deck. The spread of the crotch was 4 feet and 8 inches, and the opening wherein the boom rested was 11 inches wide by 6 inches deep. On the deck were bolted pieces of wood, each 9 by 7 inches in length and breadth, with a recess 3 by  $6\frac{1}{2}$  inches by 1 inch deep, into which the leg fitted. Crotches of this sort for holding booms are of the older kind. Somewhere from 10 to 20 years ago, iron supports, firmly fastened to the deck, came into use, and are now generally employed on the newer ships. The wooden crotches, however, continue in use on the older ships, and it is not apparent that they are not sufficiently suitable. In such case it was not the duty of the shipowner to provide the later appliance for the protection of the libellant, although it might in some respect be superior.

While the libellant was attending to the sleeve, and leaning over and looking down into the hatch for that purpose, the boom fell over to port and struck him, doing the injury which is the subject of this action. A witness for the libellant states that he saw the crotch sliding a little to port, until it finally tilted on its port leg, and went bodily over, allowing the boom to fall. This witness, and two others, all stevedores, state that the leg and the cleat into which it was fitted were considerably worn, and it is the claim of the libellant that this worn condition enabled the leg of the crotch to slip over the cleat, aided thereto by the slippery and icy condition of the deck which then existed.

On the part of the ship three witnesses, all connected with the ship, state that the legs and cleats were in good condition and were not worn. A ship surveyor, two or three days after the accident, examined the crotch and cleats and found them in good condition. Upon the trial a question arose as to accepting the evidence of this subsequent examination, as it did not appear that the appliances had remained unchanged. Although the witness seemed to identify the crotch and cleats, by showing that they did not appear to have been disturbed or removed, yet, for the purposes of this discussion, his evidence should be disregarded.

The case on this issue will then stand in this way: Three men, fellow workmen of the libellant, examined in court, testified to the worn condition of the crotch and cleats. Three persons connected

with the ship, examined on depositions, testified to the good condition of the crotch and cleats. The three men examined by the libellant impressed the court with their general good faith. The witnesses not presented in court cannot be presumed to have been otherwise than presentable and well-appearing. The burden of proving the defective condition is on the libellant; hence he must produce a preponderance of evidence. Can the court justly say that the evidence of the libellant's witnesses outweighs that of the claimant's witnesses? The men on the ship had the best opportunity to judge, and there seems to be no reason for holding that they are less worthy witnesses than those produced by the libellant.

It is urged that the theory of the worn legs and cleats should be adopted, as this alleged condition furnishes a sufficient cause, and no other sufficient cause appears. A cause may be sufficient, yet it has no claim to acceptance unless the quality or weight of the evidence brought to establish it be also sufficient. Otherwise there would be the following illogical deduction: (a) Worn legs and cleats are a sufficient cause of the boom's slipping. (b) No other sufficient cause appears. (c) Worn legs and cleats are not proven by a preponderance of evidence. (d) The sufficiency of the worn legs and cleats as a cause, and the insufficiency of the proof of other causes, justifies the adoption of the theory that worn legs and cleats were the cause, although no sufficient independent proof thereof be given. In other words, the doctrine of exclusion is employed to help out evidence defective in weight. But the fact that theories furnished by the claimant do not explain the accident does not leave it to be inferred that the real cause is that suggested by the libellant. The libellant must stand on the strength of his own theory, and not on the weakness of that of his adversary. The claimant is not required to present either a theory or an explanation. He may content himself with adducing evidence sufficient in weight to counterbalance that produced by the libellant in support of his particular theory.

The event has been thoroughly investigated, and the cause of the accident has not been proved within the rule that places the burden of proof upon the libellant. Therefore the legal presumption that the claimant was not negligent must continue. There is no question of the libellant's injury. Although the libellant's case has been presented thoroughly and with skill, it fails because of the onus resting upon him of showing, with the precision required by law, what agencies produced the accident. The circumstances seem to preclude an ascertainment of the just cause of the accident.

The libel must be dismissed, with costs.

TICKTIN v. FIDELITY & CASUALTY CO. OF NEW YORK.<sup>1</sup>

(Circuit Court, W. D. Missouri, W. D. May 20, 1898.)

No. 2,222.

## ACCIDENT INSURANCE—SUICIDE.

Rev. St. Mo. 1889, § 5855, which provides that in suits "upon policies of life insurance," suicide shall be no defense, although the policy may contain stipulation to the contrary, does not apply to accident policies, although Rev. St. Mo. 1889, § 5811, authorizes life insurance companies to engage in the business of accident insurance, declaring, however, that "such accident insurance shall be made a separate department of the business of a life insurance company undertaking it."

This was an action by Liebke Ticktin against the Fidelity & Casualty Company of New York on an accident insurance policy. Defendant demurred to the petition.

I. Ringolsky, for plaintiff.

Warner, Dean, Gibson & McLeod, for defendant.

PHILIPS, District Judge. The defendant, the Fidelity & Casualty Company of New York, is what is known as an "accident insurance company," engaged in the business of insuring persons against injuries resulting from accident. The petition avers that the accident to the plaintiff resulted in death from suicide while insane, by taking oil of mustard. By the fourth clause of the policy it is expressly stipulated that "in case of injuries, fatal or otherwise, intentionally inflicted upon himself by the insured, or inflicted upon himself or received by him while insane, the measure of this company's liability shall be a sum equal to the premium paid, the same being agreed upon as in full liquidation of all claims under this policy." As the petition does not count upon a claim for recovery only of the premium paid, but for the full amount of the policy as in case of death by accident, the demurrer raises the question that, by the express provision of the policy, the liability sued for has not arisen. To obviate this objection, the plaintiff invokes the provision of section 5855, Rev. St. Mo. 1889, which is as follows:

"Sec. 5855. In all suits upon policies of insurance on life hereafter issued by any company doing business in this state, it shall be no defense that the insured committed suicide unless it shall be shown to the satisfaction of the court or jury trying the cause that the insured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void."

The question of controlling importance to be decided is: Does this statute apply to an accident policy? The time at my command will not permit more than to briefly state the conclusions I have reached on this question. By the express terms of said section it is limited to "policies of insurance on life." Clearly, therefore, there is no escape from the proposition that, unless an accident policy can be held to be a policy of insurance on life, this statute affords no shelter to the defendant. It being a statute in contravention of the common-law

<sup>1</sup> Motion for rehearing pending.

rule, affirmative legislation changing the rule at common law is indispensable. From the very inception of any legislation in this state respecting the subject of policies on life insurance, such policies have been distinctively recognized as *sui generis*. Provisions peculiarly and exclusively applicable thereto have, in lines broad and distinctive, run through the different statutes. When accident insurance policies were provided for in acts of the legislature, provisions and requirements peculiar to them were as distinctively present and observed. This was confessedly so until the statute of 1889, when life insurance companies were for the first time authorized to engage in the business of issuing accident policies. Section 5811, Rev. St. Mo. 1889, amending section 5938, Rev. St. Mo. 1879. Prior to this amendment, no lawyer ever contended that these two business associations were not erected as separate departments, as distinct as any other two business concerns erected under the statutes of the state providing for the creation of business corporations. And, as up to the enactment of the last-named statute, no life insurance company created under the laws of the state of Missouri, or doing business therein, was permitted to enter into the business of issuing accident insurance policies in the state, when the legislature declared that, in suits upon policies of insurance for life, it should be no defense that the insured had died by suicide, the rule "*Expressio unius est exclusio alterius*," precluded carrying this special enactment over to any other claim of insurance than that of insurance on life proper. Reduced to its last analysis, therefore, the advocates for the application of the provision of section 5855 to an accident policy must base their contention upon the naked proposition that as, in 1889, the legislature authorized life insurance companies organized under the laws of the state to engage also in the business of issuing policies of accident insurance *ex vi termini*, it rendered the provision of section 5855 applicable to accident policies. This enabling act of 1889 in no wise altered or affected the other provisions of the antecedent statute in *pari materia*, for conducting the business operations of, and imposing separate obligations and conferring distinct privileges upon, two distinct branches of the insurance business. The act of 1889, after authorizing associations organized "for the purpose of making assurance upon the lives of individuals" to issue policies providing for "an indemnity against death, and for weekly or other periodic indemnity for disability occasioned by accident to the person of the insured," expressly declared that "such accident insurance shall be made a separate department of the business of a life insurance company undertaking it." To no extent did it obliterate the lines of distinction between the two classes of business. And as throughout the antecedent statutes providing for and regulating the operation and fixing the duties and obligations of the two branches of insurance companies the provision of section 5855 was restricted to life insurance companies, and the same provision in the same language was carried forward to and incorporated in the statute of 1889, denying the defense of suicide in "suits upon policies of insurance for life," by the well-known rule for the construction of statutes, the provision must receive the same application and be subjected to the same limitation given to it in the older statutes, un-

less the legislature, by express provision or unavoidable implication, gave to it a broader application, so as to embrace accident policies. I am unable to find anything in the antecedent or subsequent provisions of the statute of 1889 which can justify the court in holding that the provision which had for a number of years expressly and exclusively applied to policies of insurance on life, carried forward into the later statute under the same terms of limitation, can be applied to policies of insurance against accidents declared by the statute to be a separate department. If it had been the purpose or thought of the legislature to wipe out all distinction in the provision of section 5855 in its application to the two distinct classes of policies, it would have said so. But the legislature has gone no further than to say that a company engaged in the business of issuing policies of insurance on life may also engage in the business of issuing insurance policies against accidents as a separate department. Throughout the statute, separate, distinct provisions, regulations, and obligations are made and imposed upon the companies transacting such dual business, as much so as if existing and operating under separate franchises. It does therefore seem to me that to apply to this case the defense provided for in said section 5855 would justly expose the court to the criticism of judicial legislation.

The defense of death resulting from an act of suicide being good at common law (*Bigelow v. Insurance Co.*, 93 U. S. 284; *Salentine v. Insurance Co.*, 24 Fed. 159; *Billings v. Insurance Co.* [Vt.] 24 Atl. 656; *Scarth v. Society* [Iowa] 39 N. W. 658), and this rule not having been changed by statute, the demurrer to the petition on this ground is well taken. It is therefore unnecessary to consider the other question raised by the demurrer.

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### LUSK'S ADM'RS v. KIMBALL et al.

(Circuit Court, W. D. Virginia. May 11, 1898.)

#### 1. FOREIGN ADMINISTRATORS—ACTIONS.

An action commenced in Virginia by a foreign administrator without first taking out letters of administration in that state is a mere nullity, and no life can be imparted to it by subsequently procuring such letters, and then setting up the fact by amendment of the pleadings.

#### 2. PLEADING—AMENDMENT.

Rev. St. § 954, authorizes amendments only in cases properly instituted, and then only in matters of form. It does not go to the extent of allowing the court, where an action was originally brought without authority or sanction in law, to so amend the original writ and declaration as to make new parties plaintiff, and thereby sustain an action that was originally brought without authority to institute the same.

Isaac Harr and Burrow Bros., for plaintiffs.  
Fulkerson, Page & Hunt, for defendants.

PAUL, District Judge. This is an action at law brought by W. H. Hodges and E. B. McKeehan, styling themselves administrators of Samuel L. Lusk, deceased. The record shows that Samuel L. Lusk was an employé on the Norfolk & Western Railroad, and was,

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on the 30th day of March, 1895, while in the service of the said railroad company, on the Kenova Division thereof, killed, by being crushed between two cars; that this action was instituted in this court at Abingdon, in the month of August, 1895, by the plaintiffs, who, prior to the institution of the suit, had obtained, in the state of Tennessee, letters of administration on the estate of said Lusk, but had not taken letters of administration in the state of Virginia. After the institution of this action, one J. W. Mort, a citizen of Virginia, qualified in the corporation court of the city of Bristol, Va., as administrator of the estate of said Lusk. In the month of June, 1897, said Mort tendered his resignation as administrator of said estate, and his resignation was accepted by the corporation court of the city of Bristol, and the plaintiffs, E. B. McKeehan and W. H. Hodges, were then and there appointed by the said corporation court of the city of Bristol and qualified as administrators of said estate in the room and stead of said Mort. The defendants at the October term, 1897, of this court filed a plea in bar to the action, alleging that at the time the same was instituted the plaintiffs had obtained letters of administration upon the estate of Samuel L. Lusk, deceased, in the state of Tennessee; that they were not administrators of said estate in the state of Virginia, but that one J. W. Mort had qualified in the corporation court of the city of Bristol, Va., and was then administrator of said estate. To this plea the plaintiffs filed a replication, as follows:

"(1) It is true that before the institution of this action plaintiffs had obtained letters of administration upon the estate of Samuel L. Lusk, deceased, in the state of Tennessee. (2) It is true that at the time this action was instituted plaintiffs had not been appointed administrators of said estate in the state of Virginia. (3) It is not true that at and before the institution of this action one J. W. Mort had been appointed and qualified as administrator of said estate in the corporation court of Bristol, Virginia. (4) It is true that after the institution of this action said J. W. Mort was appointed and qualified as administrator of said estate in said corporation court of Bristol, Virginia, but on the ——— day of June, 1897, said Mort, having fully administered and made settlement of all the assets of said estate coming into his hands, tendered his resignation as administrator of the said estate, and said resignation was accepted by said corporation court of Bristol, and plaintiffs, E. B. McKeehan and W. H. Hodges, were then and there appointed and qualified as administrators of said estate in the room and stead of said Mort, and they are now the only administrators of the estate of Samuel L. Lusk, deceased."

The question presented by the pleadings for decision is, can this action, on this state of facts, be maintained? The plaintiffs insist that, although they had not taken out letters of administration at the time of the institution of the action, yet, having subsequently done so, they have a right to amend the declaration so as to make them parties plaintiff, and claim that the amendment so made will have relation to the time of instituting the action, and invests them with the right to maintain the action.

This is an action under section 2902 of the Code of Virginia of 1887, which provides for the recovery of damages where the death of any person is caused by the wrongful act of any person or corporation. Section 2903 of the Code of Virginia of 1887 provides:

"Every such action shall be brought by and in the name of the personal representative of such deceased person, and within twelve months after his death. \* \* \*

Section 2640 provides for the qualification of an administrator, as follows:

"Before any grant of administration, as of the estate of an intestate, the person to whom it is granted shall, in the court granting it, give bond and take an oath that the deceased has left no will, so far as he knows, and that he will faithfully perform the duties of his office to the best of his judgment. \* \* \*

Thus, it will be seen that, before an administrator is authorized to do any act under the laws of Virginia, he must comply with the requirements of the statute in the important particulars of taking an oath in open court and executing a bond with security. Until he complies with these requirements of the statute, he stands in the same relation to the estate of the decedent as any other individual, even though he has taken out letters of administration in another state. These can confer no authority upon him to exercise so important a power as instituting an action at law. This question has been so frequently decided by the courts, state and federal, that the doctrine is firmly established that letters of administration confer no authority outside of the territorial jurisdiction of the state granting the same, in the absence of a statute conferring such authority. A leading case on this subject is that of *Noonan v. Bradley*, 9 Wall. 394. This decision has been cited as a controlling authority in numerous cases subsequently arising in the federal courts. In that case the supreme court, Mr. Justice Field delivering the opinion of the court, said:

"All the cases on the subject are in one way. In the absence of any statute giving effect to the foreign appointment, all the authorities deny any efficacy to the foreign appointment outside of the territorial jurisdiction of the state within which it was granted. All hold that, in the absence of such a statute, no suit can be maintained by an administrator in his official capacity, except within the limits of the state from which he derives his authority. If he desires to prosecute a suit in another state, he must first obtain a grant of administration therein in accordance with its laws. So far has this doctrine been extended that in *Fenwick v. Sear's Adm'rs*, 1 Cranch, 259, where the plaintiff had obtained letters of administration in Maryland, before the separation of the District of Columbia from the original states, it was held by this court that he could not, after the separation, maintain an action in that part of the District ceded by Maryland, by virtue of these letters, but that he must take out new letters within the District."

In *Dickinson v. McCraw*, 4 Rand. (Va.) 158, it was held that an administrator appointed in the state of North Carolina cannot be joined as a party plaintiff with an administrator appointed in Virginia in an action brought in the latter state. 8 Enc. Pl. & Prac. 700, 701; *Vaughn v. Northup*, 15 Pet. 1; *Kerr v. Moon*, 9 Wheat. 565; *Dixon v. Ramsay*, 3 Cranch, 319; *Eells v. Holder*, 12 Fed. 668.

The statutes of Virginia have no provision authorizing an administrator to whom letters of administration have been granted in another state to bring an action in the former state. The doctrine of the common law, as recognized in England and in the United States, is unchanged, and an administrator cannot maintain a suit in this

state without first taking out letters of administration in some court in this state.

The contention that the want of authority on the part of a foreign administrator to bring an action in this state is cured by his procuring letters of administration in this state after he has instituted his action cannot be sustained. His failure to do so before he commences his action is a fatal defect in his right to maintain it. In this case not only did the plaintiffs fail to procure letters of administration in this state before commencing their action, but after its institution letters of administration were granted to Mort, a citizen of the state of Virginia. For two years he was invested with all the rights and interests of an administrator, and during that period they could, under no principle, or even fiction, of the law, be vested in any other person. It was only by his resignation that he was divested of his authority as administrator, and it was only by the subsequent qualification of the plaintiffs as administrators that they were invested with the rights and the authority pertaining to that fiduciary office. Prior to that time, any action brought by them in their representative character was a nullity. There was no legal proceeding pending which could be kept alive and prosecuted by their subsequent qualification as administrators. The authority conferred could not have relation so as to give vitality to a null and void proceeding.

Counsel for the plaintiffs insist that, under the provisions of section 954 of the Revised Statutes of the United States, they have a right to amend their declaration so as to make the administrators who qualified in the state court of Virginia after the institution of the suit in this court the plaintiffs, in place of the administrators who qualified in the state court of Tennessee. The section referred to is as follows:

"Sec. 954. No summons, writ, declaration, return, process, judgment, or other proceeding in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion, and by its rules, prescribe."

While this statute is very broad and liberal in the allowance of amendments to the process or pleadings, the amendments which it permits can only be made in a case that is properly instituted, and only then in matters of form. It does not go to the extent of allowing the court, where an action was originally brought without authority or sanction in law, to so amend the original writ and declaration as to make new parties plaintiff, and thereby sustain an action that was originally brought without authority to institute the same.

There is no question that, where an action is brought by a party having authority to institute it, the pleadings may be amended in

matters of form so as to perfect the jurisdiction of the court upon the record. But, when the parties instituting a suit have no authority to bring the same, the amendments authorized by the statute cannot cure the defect in the proceedings. The action cannot be maintained. The special plea in bar must be sustained, and the action dismissed.

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In re MURPHY.

(Circuit Court, D. Massachusetts. May 18, 1898.)

No. 1,833.

**1. HABEAS CORPUS—ISSUANCE OF WRIT.**

Where a petitioner, serving a sentence of a state court, has delayed nearly two years to apply for a writ, and his right of appeal in the state court is not yet barred, habeas corpus will not issue unless his case is clear.

**2. FEDERAL QUESTION—WHEN PRESENTED.**

The action of a judge of a state court in erroneously sentencing one convicted of crime under a statute not applicable to his case presents no question for the federal court.

**3. SAME—EX POST FACTO LAWS.**

When a statute providing for the sentence to prison of persons convicted of crime has been construed by the highest state court to apply to offenses committed prior to its enactment, the question whether it violates any provision of the federal constitution is directly in issue, on habeas corpus, to release one sentenced thereunder for a crime so committed.

**4. EX POST FACTO LAWS—CONSTRUCTION OF STATUTES.**

In order to render legislation unconstitutional as *ex post facto*, it is not necessary to show that it must be detrimental to all persons charged with offenses; it is sufficient that it materially alters their condition in a manner which may be detrimental to some.

**5. SAME—INDETERMINATE SENTENCE LAW.**

The Massachusetts indeterminate sentence statute (St. 1895, c. 504, §§ 1-3), declaring that the court "shall not fix the term of imprisonment," if taken literally, is unconstitutional, if applied to offenses committed prior to its enactment.

**6. SAME.**

Quære, whether the indeterminate sentence law of Massachusetts (St. 1895, c. 504, §§ 1-3), which is applicable to all sentences pronounced after its enactment, regardless of what the law was when the offense was committed, is invalid as an *ex post facto* law.

**7. HABEAS CORPUS—PRACTICE ON APPEAL.**

A writ of habeas corpus was denied, but, there being a constitutional question of great doubt involved in the application, the petitioner was given an opportunity to apply for an appeal to the supreme court, under rule 34, with an intimation that thereupon the order would be amended and a writ directed to issue, to be discharged upon its return, with leave to apply for admission to bail pending the appeal.

Brandeis, Dunbar & Nutter, Ezra R. Thayer, and Edward F. McClellan, for petitioner.

J. M. Hallowell, Asst. Atty. Gen., for respondent, Bridges.

PUTNAM, Circuit Judge. This is an application for a writ of habeas corpus, heard on the return of an order to show cause why a writ should not issue. The petitioner is in prison, under a criminal sentence of the superior court of the state of Massachusetts,

passed on him May 28, 1896, for a term of not less than 10, nor more than 15, years. It is conceded that, if the sentence was erroneous, the laws of the state gave him a remedy by a writ of error, which is not yet barred; and also nearly two years of his imprisonment have expired without his asking for a writ of error or other relief, prior to the petition at bar. In view of these facts, it is apparent that there are no special circumstances requiring the issue of a writ of habeas corpus, unless his case is clear. When the petitioner's offense was committed, the following statutes were in force in Massachusetts:

"Whoever commits larceny by stealing, of the property of another, money, goods, or chattels, or a bank note, bond, promissory note, bill of exchange, or other bill, order, or certificate, or a book of accounts for or concerning money or goods due or to become due or to be delivered, or a deed or writing containing a conveyance of land or any other valuable contract in force, or a receipt, release, or defeasance, or a writ, process, or public record, if the property stolen exceeds the value of one hundred dollars, shall be punished by imprisonment in the state prison not exceeding five years, or by fine not exceeding six hundred dollars and imprisonment in the jail not exceeding two years; or, if the property stolen does not exceed the value of one hundred dollars, shall be punished by imprisonment in the state prison or jail not exceeding one year, or by fine not exceeding three hundred dollars." Pub. St. c. 203, § 20.

"Every officer in charge of a prison or other place of confinement shall keep a record of the conduct of each prisoner in his custody whose term of imprisonment is not less than four months. Every such prisoner whose record of conduct shows that he has faithfully observed all the rules, and has not been subjected to punishment, shall be entitled to a deduction from the term of his imprisonment, to be estimated as follows: Upon a sentence of not less than four months and less than one year, one day for each month; upon a sentence of not less than one year and less than three years, three days for each month; upon a sentence of not less than three years and less than five years, four days for each month; upon a sentence of not less than five years and less than ten years, five days for each month; upon a sentence of ten years or more, six days for each month. When a prisoner has two or more sentences, the aggregate of his several sentences shall be the basis upon which the deduction shall be estimated. Each prisoner who is entitled to a deduction from the term of his imprisonment, as aforesaid, shall receive a written permit to be at liberty during the time thus deducted, upon such terms as the board granting the same shall fix. Said permits shall be issued as follows: To prisoners in the house of industry, jail, or house of correction of Suffolk county, by the board of directors for public institutions; to prisoners in the other jails and houses of correction, by the county commissioners of the several counties; to prisoners in the state prison and in the reformatory prison for women, by the commissioners of prisons; to prisoners in the state workhouse, by the trustees of said workhouse. The board issuing a permit as aforesaid may at any time revoke the same, and shall revoke it when it comes to their knowledge that the person to whom it was granted has been convicted of any offence punishable by imprisonment." Pub. St. c. 222, § 20.

The petitioner was charged with, and convicted of, several offenses in the same indictment; so that the maximum term for which he was imprisoned does not exceed the penalty permitted by the statutes which were in force when his crimes were committed. But, by the law as it then stood, his term of imprisonment was fixed by the court, and the determination of its length was a judicial act, subject, of course, to his option to avail himself of a permit to be at liberty, as provided by the statute cited, if he entitled himself

thereto. This clearly did not operate to limit the term of his imprisonment except at his own will. So it could not work to his prejudice, as it might possibly be conceived to be against the interest of a prisoner to be cast temporarily on the community at large against his own election, under circumstances which permitted him to be recalled at some indefinite period, also against his own election.

At the time the petitioner was sentenced the following statute was in force:

"Section 1. When a convict is sentenced to the state prison, otherwise than for life, or as an habitual criminal, the court imposing the sentence shall not fix the term of imprisonment, but shall establish a maximum and minimum term for which said convict may be held in said prison. The maximum term shall not be longer than the longest term fixed by law for the punishment of the offence of which he is convicted, and the minimum term shall not be less than two and one half years.

"Sec. 2. At any time after the expiration of the minimum term for which a convict may be held in the said prison under a sentence imposed as aforesaid, the commissioners of prisons may issue to him a permit to be at liberty therefrom, upon such terms and conditions as they shall deem best, and they may revoke said permit at any time previous to the expiration of the maximum term for which he may be held under said sentence. No such permit shall be issued without the approval of the governor and council, nor unless said commissioners shall be of the opinion that the person to whom it is issued will lead an orderly life if set at liberty. The violation by the holder of a permit issued as aforesaid of any of the terms or conditions thereof, or the violation of any law of this commonwealth, shall of itself make void such permit.

"Sec. 3. When any permit issued as aforesaid has been revoked, or has become void, said commissioners may issue an order authorizing the arrest of the holder of said permit and his return to said state prison. The holder of said permit, when returned to said prison, shall be detained therein according to the terms of his original sentence; and in computing the period of his confinement, the time between his release upon said permit and his return to the prison shall not be taken to be any part of the term of the sentence." Acts 1895, c. 504.

The petitioner was not sentenced as an "habitual criminal."

The question at once arises whether the act of 1895 is to be construed to apply to prior offenses. If not, the action of the court which sentenced the petitioner was a mere error, raising, in no event, any question for this court. But it was held in *Com. v. Brown*, 167 Mass. 144, 45 N. E. 1, that the statute is to be construed to apply to all sentences imposed after it came into force. Therefore the question whether it violates any provision of the constitution of the United States comes directly in issue.

With reference to what constitutes *ex post facto* legislation, it is not necessary, for this case, to refer to any authority except the discussion in *Kring v. Missouri*, 107 U. S. 221, 228-230, 2 Sup. Ct. 443. It is plain from that discussion, and also on fundamental principles, that, in order to render legislation unconstitutional as *ex post facto*, it is not necessary to show that it must be detrimental to all persons charged with offenses. It is sufficient that it materially alters their condition in a manner which may be substantially detrimental to some.

At the outset, the act of 1895 declares in its letter that the court "shall not fix the term of imprisonment." If this were to be taken

literally, it would clearly be unconstitutional if retroactive, because it would deprive a person charged of the right to a judicial determination of his sentence, given by the law existing when the offense was committed, as we have already shown. But the supreme judicial court of Massachusetts has said that it is not to be thus taken, notwithstanding the fact that, by the effect of the act, the term of actual imprisonment is practically fixed by the executive officers of the state. *Oliver v. Oliver*, 169 Mass. 592, 594, 48 N. E. 843. Under the Public Statutes, in force when the petitioner's offenses were committed, he could, by his own good conduct, entitle himself, as a matter of right, to a permit to be at liberty; and, although the permit would have been revocable at will, it would seem to have been a legal right of value in the eyes of the law, on the same principle that an employment is recognized at law as a thing of value to both employé and employer, even when terminable at the option of either. In addition, the option whether or not to revoke the permit was vested in a single executive board, while, under the act of 1895, no permit can issue without the approval of two executive boards; the practical result of which is that, under the later statute, the prisoner has the burden of securing a double approval before he can obtain his liberty. Under the act of 1895, he cannot entitle himself, as a matter of right, to a permit, but the whole is a matter of option on the part of the executive boards, to be exercised without any explanation or any reason given pro or con. Moreover, under that act, other important conditions were added which would permit the recall of a permit, and still others which would revoke it absolutely. The most serious new provision is that the act of 1895 directs that, if a permit is revoked, no portion of the time the prisoner may have been at liberty under it shall be taken to be any part of the term of his sentence.

It is true that, under the sentence imposed on this petitioner, there is a possibility of his going at liberty sooner than could have happened under the provisions of the Public Statutes, if, under them, he had been sentenced for the maximum period of 15 years, because no commutation for good behavior under those statutes could have reduced the period of imprisonment to 10 years; yet who can say whether, and, if yes, how much, the intended, and, probably, for the mass of criminals, the actual, leniency of the new system operated to influence the court, in the case at bar, to impose a maximum term longer than the fixed term would otherwise have been?

Therefore there is, on the whole, much difficulty in holding the act of 1895 constitutional as a retroactive statute. But the supreme judicial court of Massachusetts, in *Com. v. Brown*, 167 Mass. 144, 45 N. E. 1, already referred to, at page 146, 167 Mass., and at page 1, 45 N. E., construes this statute in connection with the body of the Massachusetts legislation on this topic, and declares that, as a whole, it concerns a policy familiar in that state. The court apparently regards it all as a matter of prison discipline, which affects no substantial rights. It is true the court states that the question was not argued, but, in the aspect in which it is put by that court, it is one peculiarly for local judicial tribunals. This fact, and the lack of

specialty in the circumstances of the case to which we have referred, which operate against the petitioner almost with the effect of laches, in connection with the numerous cautions given by the supreme court with reference to cases where writs of error may be sued out, the latest of which is *Baker v. Grice*, 169 U. S. 284, 18 Sup. Ct. 323, lead us to conclude that we ought to leave the petitioner to his remedy in the usual course.<sup>1</sup> We have, however, great doubts about the constitutionality of the statute of 1895, as a retroactive one; and we have explained our doubts in order to show that we ought to give the petitioner an opportunity to apply to give bail, if he desires, pending an appeal to the supreme court. Therefore, to enable him to do this under Sup. Ct. Rule 34, if the petitioner applies therefor, we will amend our order, and direct a writ to issue, with the expectation that, on its return, we will order the discharge of the writ, and thereupon consider any application that may be made for admitting to bail, pending an appeal, if one is taken. The petition is denied, without costs.

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UNITED STATES v. STEGE et al.

(District Court, D. Indiana. June 10, 1898.)

No. 5,857.

**INTOXICATING LIQUORS—SURREPTITIOUS SHIPMENT.**

One is not liable under Rev. St. U. S. § 3449, making it an offense to ship any liquors "under any other than the proper name or brand known to the trade as designating the kind and quality of the contents of the cases or packages containing the same," for shipping a keg of whisky on which the proper tax had been paid, and which had the proper brand affixed, packed inside of a sugar barrel which contained no brand at all.

This was an indictment against Julius H. Stege and others for shipping whisky inclosed in an unbranded barrel. The case was heard on a motion to quash the indictment.

Albert W. Wishard, U. S. Atty., and Jesse J. M. La Follette, Asst. U. S. Atty.

Frank B. Burke, for defendants.

**BAKER**, District Judge. The defendants are indicted for the violation of section 3449, Rev. St., which reads as follows:

"Whenever any person ships, transports, or removes any spirituous or fermented liquors or wines under any other than the proper name or brand known to the trade as designating the kind and quality of the contents of the cases or packages containing the same, or causes such act to be done, he shall forfeit said liquors or wines and casks or packages, and be subject to pay a fine of five hundred dollars."

The indictment charges:

"That on the 1st day of April, in the year of our Lord one thousand eight hundred and ninety-eight, the defendants unlawfully, knowingly, and feloniously did then and there agree and conspire together to violate section 3449, Rev. St. U. S., by then and there unlawfully, knowingly, and feloniously

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<sup>1</sup> Note by the Court. See *Tinsley v. Anderson*, 171 U. S. 101, 18 Sup. Ct. 805.

shipping from Louisville, Kentucky, to Salem, Indiana, one keg of whisky, and by then and there packing said keg of whisky inside of a sugar barrel, covering the same with sawdust, thereby wholly obscuring and concealing the brand upon said keg of whisky, and concealing the fact that it was whisky being shipped, but causing it to then and there appear that said shipment was one barrel of sugar, the same being then and there so packed, concealed, and shipped for the purpose of deceiving the citizens of Salem, Indiana, and having it appear to them as one barrel of sugar, contrary to the form of the statute," etc.

The defendants have interposed a motion to quash on the ground that the indictment does not state facts constituting an offense under the foregoing section of the statute.

This statute is highly penal, and must be strictly construed. It must be made to appear by the allegations of the indictment that the acts charged constitute an offense falling within the language of the statute. Counsel for the government contend that it is the declared policy of the statute to require all spirituous and fermented liquors on which the proper tax has been paid, contained in any cask or package upon which the proper name and brand have been affixed, to be shipped in such manner that the name and brand known to the trade as designating the kind and quality of the contents of such cask or package shall at all times be unobscured and plainly visible. In support of this contention, the attention of the court is called to the ruling of the acting commissioner of internal revenue of September 30, 1874 (20 Int. Rev. Rec. 109), and also to his ruling of September 2, 1884 (30 Int. Rev. Rec. 278), in which he cites the opinion of Attorney General Taft reported in 22 Int. Rev. Rec. 261. On September 30, 1874, the acting commissioner ruled that the marks, brands, and stamps required by law and regulations to be applied to casks of distilled spirits are designed to bear open witness of the legality of the merchandise in question, and they must not be obscured or covered by encasing the vessel containing the liquor in another, but must at all times be in such condition as to admit of the examination of the marks, brands, and stamps by the revenue officers. On September 2, 1884, he reaffirmed this ruling. Attorney General Taft held that the shipment of spirits under a false designation was an offense under section 3449. He further argued, in substance, that this section prescribes how lawfully distilled, stamped, marked, and branded spirits may be shipped; namely, that they may be shipped under their proper names and brands, and, in order that a shipment shall be under their proper names and brands, such names and brands must be visible. This latter statement was not essential to his decision. It must be taken as true that the keg of whisky mentioned in the indictment had paid the proper tax, and had the proper name, brand, and stamp affixed upon it, because the contrary is not charged. The gravamen of the alleged offense consists solely in placing for shipment, and shipping, a keg of whisky upon which the tax had been paid, and upon which the proper name, brand, and stamp had been affixed, in a sugar barrel, by which means the name, brand, and stamp on the keg of whisky were concealed, with intent to deceive the citizens of Salem, Ind. The charge that the act was done with the intent to deceive the citizens of Salem is

immaterial. The court knows of no statute which makes such an intent criminal. Hence the sufficiency of the indictment hinges upon the question whether the shipment of a keg of whisky on which the tax had been paid, and upon which the proper name, brand, and stamp are affixed, inside another inclosure which obscures such name, brand, and stamp, is made criminal by the statute.

The keg of whisky was a lawful subject of commerce. The government had no further claim upon or interest in it. It was lawfully shipped unless the method of inclosure rendered its shipment unlawful. It had no false name, brand, or designation either upon the keg of whisky, or on the barrel containing it. Hence the question before the court does not fall within the case decided by Attorney General Taft. The case decided by him was that a shipment of spirits under a false designation was a violation of the statute. Such would clearly be the case because the statute in express terms forbids the shipment under a false name or brand. All else said by the learned attorney general was unnecessary to the decision of the question before him: Does the statute, properly construed, make criminal the shipment in question? It is quite clear that the statute does not in express terms declare that the inclosure of a properly stamped and branded cask or package of spirits inside another receptacle, which obscures the name and brand, shall be unlawful. Such construction can only be deduced from the language employed by highly artificial reasoning. It does not seem to the court that such a construction is warranted by the language of the statute. The prohibited shipment must not be made "under any other than the proper name or brand known to the trade," etc. This language evidently means "under any other name or brand than the proper name or brand known to the trade," etc. Its manifest purpose was to prevent the use of a false name or brand in making such shipment. But can it be said that, where the inclosing receptacle has no name or brand, it has another name or brand than the proper one? The having no name or brand is not the same thing as having a false name or brand. If it had been the intention of congress to make penal all shipments of spirits unless the receptacle containing the cask or package was visibly branded or stamped so as to designate the kind and quality of its contents, it is to be presumed that congress would have said so in plain and explicit terms. Had congress provided that it should be unlawful for any person to ship spirits without the name or brand known to the trade being visibly branded or stamped upon the inclosure containing the properly stamped and branded cask or package, there could have been no doubt as to its meaning. The court is of opinion that the statute does not make penal the acts set out in the indictment. If any governmental policy requires that such shipments should not be permitted except in casks or packages having the name or brand of their contents plainly stamped and unobscured, such policy ought to be disclosed in clear and unambiguous terms. The statute fails to do this. Whether the failure arises from oversight or design is immaterial. In my opinion, the statute does not make it an offense to ship goods which are lawful subjects of commerce, simply because they are

shipped in an unmarked or unbranded box or barrel, if the contents inclosed therein have paid the proper tax, and the proper name or brand known to the trade as designating the kind and quality of the contents is affixed upon the cask or package within such box or barrel. The motion to quash will be sustained.

### AMERICAN GRAPHOPHONE CO. v. WALCUTT.

(Circuit Court, S. D. New York. January 11, 1898.)

#### 1. PATENTS—LICENSE TO MAKE—INFRINGEMENT.

A license merely to make, without a right to sell, does not impair the right of the owner of the patent to sue either at law or in equity for an infringement outside the license; and the purchase of tools and materials from the licensee, which he had a right to use under the license for making only, would not carry the right to sell the product, or any greater right than the licensee had.

#### 2. SAME—VALIDITY AND INFRINGEMENT—SOUND-RECORDING DEVICE.

The Bell & Tainter patent, No. 841,214, and the Tainter patent, No. 841,288, for improvements thereon, both of which are for recording tablets, consisting of a hollow cylinder or tube of paper or other suitable material, coated with wax or a waxlike composition, preferably of beeswax and paraffine, held valid and infringed.

This was a suit in equity by the American Graphophone Company against Cleveland Walcutt for alleged infringement of two patents for recording and reproducing speech and other sounds.

Philip Mauro, for plaintiff.

H. Albertus West, for defendant.

WHEELER, District Judge. This suit is brought upon patent No. 341,214, granted to Chichester A. Bell and Samuel Tainter, and No. 341,288, granted to Tainter, dated May 4, 1886, for recording and reproducing speech and other sounds. As to the parts in question, the inventors in the first patent say:

"The invention consists, secondly, in engraving or cutting the record in a waxy or amorphous and slightly cohesive substance; preferably a compound of beeswax and paraffine (the latter in excess) is employed. This compound has no tendency to clog the style, but is readily removed thereby in chips or shavings. This part of the invention also consists in a recording material composed of a wax or waxy surface on a paper or pasteboard foundation. Heretofore it has been proposed to use soft paper saturated or coated with paraffine as the material for recording by the indenting method; but its use does not appear to have been successful, and an outer layer of tin foil was therefore employed to receive the indentations."

"It is evident that various modifications other than those indicated can be made, and the invention still be employed in whole or in part, and also that parts of the invention may be used separately. In the foregoing description details have been given with some minuteness. This has been done to furnish the best information in our power for enabling those skilled in the art to make and use the invention, and not with the intention of limiting the invention to the precise dimensions, proportions, shapes, and materials stated."

And the inventor in the other says:

"First. A new recording-tablet is employed. It consists of a hollow cylinder or tube of paper, or other suitable material, coated with wax or waxlike com-

position, preferably a compound or mixture of beeswax and paraffine. The record is cut in the coating. The advantages of this form of tablet are that it may be very light, while having sufficient stiffness to retain its form, and avoid the danger of cracking the coating; that it is compact, and adapted for transmission through the mails or otherwise; that the recording surface is continuous, and that it can very readily be placed on and removed from the holder by which it is supported, and rotated in recording and reproducing." "The present invention is to be considered as an improvement upon or modification of what is shown and described in the application for letters patent of C. A. Bell and myself, \* \* \* so far as they relate to common features, and no claim is made herein to any matter described and shown in that application."

The claims relied upon of the first patent are:

"(7) A sound-record, consisting of a tablet or other solid body having its surface cut or engraved with narrow lines of irregular or varied form corresponding to sound-waves, substantially as described. (8) A sound-record, consisting of a tablet or solid body having its surface cut or engraved with a number of lines of variable cross section, the irregularities or variations corresponding in form to sound-waves, substantially as described." "(10) The sound or speech record cut or engraved in wax or a waxlike composition, substantially as described." "(17) The sound-record in the form of an irregular groove with sloping walls cut in solid material, substantially as described. (18) The sound-record cut in wax or waxlike composition in the form of an irregular groove with sloping walls, substantially as described."

And of the second are:

"(1) A recording-tablet for a phonograph, consisting of a hollow cylinder, provided with a wax or waxlike coating for receiving the sound-record, substantially as described." "(4) A tubular self-sustaining tablet for recording sounds or sonorous vibrations, substantially as described." "(37) A recording-tablet consisting of a hollow cylinder provided with a wax or waxlike coating, and having a sound-record cut in said coating, substantially as described."

These patents were before the circuit court of the Northern district of Illinois in *Graphophone Co. v. Amet*, 74 Fed. 789, on final hearing, and were well explained, and as to claims for a combination including these sound-records were sustained by the very clear opinion of Judge Grosscup. A motion for a rehearing there stood in the way of granting a preliminary injunction in *Same v. Leeds*, 77 Fed. 193. That motion has now been denied, and a preliminary injunction as to the sound-records was granted there in *Same v. Boswell* (Nov. 29, 1897) against structures understood to be like this defendant's. The defendant here has put the plaintiff to proof of title, and denied novelty and infringement. The plaintiff has produced copies of assignments of the patents from the patentees to the Volta Graphophone Company, and from that company to the plaintiff, which are stipulated in evidence as original, but with a denial of liability for anything coming from a plant bought from the North American Phonograph Company, which may have had a right to make, but, if so, not a right to sell. This limited license would not, however, impair the right of the owner to sue, either at law or in equity, for an infringement outside the license (Walk. Pat. § 400), nor justify such infringement. And the purchase of tools and materials which the seller had the right to use for making what would be an infringement, without the right to sell, would not carry the right to sell the product, nor any greater right than the seller of the tools and materials had.

The defendant's sound blanks are testified by himself to be composed of stearine, caustic soda, acetate of aluminum, and sometimes ozocerite; and the plaintiff's expert has testified as to one:

"It is a self-sustaining, rigid, hollow, cylindrical tablet of a material which is waxlike in its properties, the material being amorphous, slightly cohesive, solid; it cuts smoothly, and it is adapted to be cut or removed in chips or shavings. This exhibit resembles in all material respects the commercial tablets now used and sold by the complainant. This exhibit is of just the size to be placed upon and used with one of the ordinary commercial graphophones of complainant's manufacture. This tablet has a sound-record engraved or cut therein, composed of narrow lines constituting the convolutions of a continuous spiral groove, said groove having sloping walls, and being of varying depth and cross section, the variations and irregularities of the groove in form corresponding with the character of the sounds through the medium of which the groove was made. The exhibit is, hence, a reproducing tablet. The exhibit, when placed on an ordinary graphophone of complainant's manufacture, repeats the original producing sounds; and this particular exhibit, thus employed, repeats a song."

The reasoning upon which the temporary injunction was granted by Judge Grosscup has not been shown, and may have been, and probably was, that of the other case there on the final hearing, except, perhaps, as to infringement. The plaintiff's expert has testified further that the defendant's sound-record obviously contains the features of these claims of the patents; and that in this he does not overlook that it is composed of waxlike material throughout, whereas the patents describe a waxlike recording surface with a stiff paper backing, which he regards as immaterial, because these claims are silent in this respect, and "the essential office of the tablet of the claims in question is to have a sound groove engraved or cut thereon, and for the accomplishment thereof the substance of the outer surface of the tablet is alone material, and, so far as the performance of this office is concerned, it makes no difference of what material the inner and nonactive portion of the tablet is composed." The inventors could not have a valid patent for anything but their improvement upon Edison's tin foil surface on a paper backing, and if the defendant's structures are different improvements he does not thereby infringe. *Railway Co. v. Sayles*, 97 U. S. 554. The tin foil admitted making a record of sound-waves only by comparatively imperfect indentations, this invention was of a surface of a tablet which would admit it by a very exact furrowed groove. The defendant appears to have taken the substance of this improvement, and not merely to have used a different one. These patents and the infringement are somewhat similar to those in *A. B. Dick Co. v. Fuerth*, 57 Fed. 834, *Same v. Wichelman*, 74 Fed. 799, and *Same v. Henry*, 75 Fed. 388, where a similar conclusion was reached. Decree for plaintiff.

## BYRAM v. FRIEDBERGER.

(Circuit Court, E. D. Pennsylvania. December 20, 1897.)

## 1. DESIGN PATENTS—INFRINGEMENT.

To constitute an infringement of a design patent covering a combination of old parts with new, it is not enough that the old parts have been used, if for the new parts others are substituted which are not the same as those used by the patentee.

## 2. SAME.

In considering the question of infringement of a design patent, the method of production is irrelevant. The subject for consideration is not the process of creation, but the effect produced upon the eye by the things created. If there be such resemblance as to deceive a purchaser giving attention to design, there is an infringement.

## 3. SAME—TRIMMINGS.

The Byram patent, No. 23,886, for a design for trimmings for ladies' underwear, construed, and *held* not infringed.

This was a suit in equity by Frank A. Byram against defendant Friedberger for infringement of letters patent No. 23,886, granted December 25, 1894, to Frank A. Byram, for a design for trimming for ladies' underwear.

Jerome Carty, for complainant.

Harding & Harding, for defendant.

DALLAS, Circuit Judge. This is a suit in equity for alleged infringement by the defendant of design patent No. 23,886, dated December 25, 1894, issued to the plaintiff for a design for trimming. In the specification it is said:

"My invention has for its object the provision of a new and original design for trimming for ladies' underwear of the character fully disclosed by the accompanying drawings, wherein figures 1 and 2 are views of the back and front, respectively, of a portion of such trimming."

The drawings thus referred to are here reproduced:

Fig. 1.

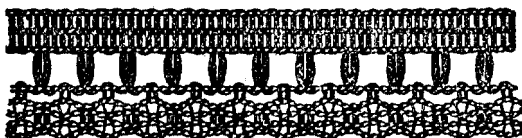


Fig. 2.



The claim is:

"The design for trimming for ladies' underwear, substantially as shown and described."

There was no novelty in the two upper portions of this trimming; that is to say, the upper or gimp-like portion, called the "heading,"

and the parts immediately below it, consisting of bars or loops and intervening open spaces, called the "ribbon space," were, separately considered, undoubtedly old. All that, with any show of reason, could be asserted to have been in itself new, is the lower portion, consisting of the line with which the bars or loops before mentioned are connected, and the wheel-like figures connected with that line, as shown in the drawings. It is not, however, a valid objection to such a patent that some of the constituents of the design claimed had existed in the prior art. Old figures may by rearrangement or by being combined with new parts produce a novel effect; but, while I think this must be conceded, it is, in my opinion, also true that, to constitute infringement of such a combination, it is not enough that the old parts have been used by the alleged infringer, if for the new parts others which are not, in the sense of the patent law, the same as those of the patentee, are used.

In considering the question of infringement of a design patent, the method of production is irrelevant. *Glass Co. v. Macbeth*, 28 U. S. App. 106, 12 C. C. A. 70, and 64 Fed. 118. The subject for consideration is not the process of creation, but the effect produced upon the eye by the things created. If there be such resemblance between them as to deceive a purchaser, inducing him or her to purchase the one supposing it to be the other, the one which is patented is infringed by the later one. It is, however, always to be borne in mind, in applying this criterion, that the purchaser referred to is one who, in fact, does give some attention to design (*Monroe v. Anderson*, 17 U. S. App. 184, 7 C. C. A. 272, and 58 Fed. 398); and that the character of the design and of the fabric to which it is related, and the extent of discriminative examination likely to be made by the purchasers thereof, are to be taken into account. The patent in this case expressly states that the design in question is intended for trimming for ladies' underwear, and the evidence shows that there are very many such trimmings, and that the variations in their designs are generally so minute that to the casual masculine observer they would all no doubt seem to be very much alike. Yet between the patented trimming and that of the defendant, and in that part where, only, the plaintiff introduced any new element, there are differences which, though slight, may readily be discerned, and which (fabric and design both being nicely delicate) are quite sufficient to change the pattern. *Jennings v. Kibbe*, 24 Fed. 697. I am persuaded that no ordinary woman (who, if giving any attention to such a design, would probably closely scrutinize it) would purchase the defendant's trimming supposing it to be that of the plaintiff, and there is no proof that any one has in fact been so misled. Upon all the evidence I find that the charge of infringement has not been sustained, and therefore the bill is dismissed, with costs.

## BRINTON v. KUTZ et al.

(Circuit Court, E. D. Pennsylvania. May 16, 1898.)

**PATENTS—CONSTRUCTION OF CLAIMS—KNITTING MACHINES.**

The Brinton patent, No. 445,494, for improvements in loop-holding mechanism for knitting machines, consisting in a "novel construction and arrangement of the holders or sinkers, and of other supporting and operating parts," must, in view of the prior state of the art, be strictly confined to the specific means described and claimed.

This was a suit in equity by Henry Brinton against Jarius Kutz and Ellen Diefenderfer, co-partners trading as the Boss Knitting-Machine Works, and James L. Eck, for alleged infringement of a patent.

Joshua Pusey, for complainant.  
Fraley & Paul, for defendants.

DALLAS, Circuit Judge. This bill charges the defendants with infringement of letters patent No. 445,494, dated January 27, 1891, issued to Henry Brinton. The specification states that the invention is of certain new and useful improvements in loop-holding mechanism for knitting machines, and that "the improvement consists in a novel construction and arrangement of the holders or sinkers, and of other supporting and operating parts, whereby certain advantages are gained." The holders or sinkers here referred to are the devices "which are used in connection with knitting machines to feed forward or take up the fabric as rapidly as produced, and to prevent the fabric from rising and moving with the needles as they are successively advanced to engage the yarn in the knitting operation"; and these devices, the specification informs us, "consist, ordinarily, of a series of metallic plates or blades which are constructed to slide in a plane at right angles to the line of movement of the needles, or substantially so, being supported in suitable guideways formed radially in the outer surface of an annular bed surrounding the outer end of the cylindrical needle-bed, and reciprocating in such guideways by means of a suitable cam." Further on it is said that the loop-holders had heretofore been made straight, and that "this construction necessitated the placing of the sinker-bed and the actuating cam-ring on or above the horizontal top-plane of the needle-cylinder," which was objectionable. This objection the patentee says he obviated, "in that by providing each of the sinkers or holders with a vertical limb, the cam-ring, E, and sinker-bed will be located below the top of the needle-cylinder, as herein described and illustrated." The claims involved in this suit are as follows:

"(1) The combination, with a needle-cylinder provided at the top with grooves, a-2, and having also the radially-grooved flange, B, below the top of said cylinder, of the needles and their operating cams, and the holders or sinkers, D, provided with a notch, d-4, and operative mechanism therefor, said holders or sinkers engaging and working in the grooves of the flange, B, and the grooves of the cylinder, substantially as described.

"(2) The combination, with a needle-cylinder provided at the top with a portion reduced to the plane of the bottom of the needle grooves, of a radially-grooved flange below such reduced portion, and loop-holders engaging and

working in the grooves of said flange, and provided each with a loop-engaging offset above the top of the cylinder, and means for operating said loop-holders, substantially as described."

"(5) The combination, with a radially-grooved cylinder and flange, the grooves of the two parts being in different horizontal planes, of the holders or sinkers having parts engaging the radial grooves of the cylinder and flange, substantially as described."

It is not necessary to consider these claims separately and in detail. It has been conceded that the gist of the invention is covered by the first one, which, in substance and essence, seems to be for a special form of holders, which, by reason of what has been called their "gooseneck" configuration, are adapted to work at their functional end in "the grooves of the cylinders," and at their cam-engaging end "in the grooves of the flange, B," placed below the level of the top of the cylinder. In other words, Brinton's object was to overcome the objection pointed out in his specification to the ordinary holders (shown in United States letters patent to Shaw, No. 218,460, August 12, 1879), namely, to their being made straight, so that "their notched yarn-engaging fingers were in or about in line with their limbs, d-2"; and to attain this object he provided a radially-grooved flange below the top of the cylinder, and made his holder of such shape that it would engage and work partly in the grooves of that flange and partly in those of the cylinder. The changes which he made were very slight, and there is room for serious question as to whether, in view of the prior patents which have been introduced in evidence, and especially of the German patent to Bonamy, of November 12, 1884, his performance should be regarded as involving invention. Notwithstanding that the oral and printed arguments of counsel, as well as the proofs, have received my most careful consideration, I find it impossible to free my mind from doubt upon that question; but of this doubt, in view of the weight to be accorded to the patent, the complainant is entitled to the benefit. It is, however, perfectly clear to me that the prior state of the art as disclosed in this case requires that the complainant's monopoly shall be absolutely restricted to the specific means which he has described and claimed, and, with reference to this limitation of his rights, I cannot find infringement. In the defendants' construction, although the work-engaging portion of the holder is located in the plane of the top of the cylinder, and its other part is below that plane, yet it is so formed and arranged as to slide in grooves, not at different levels, but at one level only; and this variation from the patented contrivance, however trifling it may appear, cannot, I think, be considered immaterial. As I have said, the prior art, and especially the Bonamy patent, before referred to, requires that it shall be regarded as substantial. The character and importance of this variation is pointed out by an expert witness on behalf of the defendants as follows:

"Complainant's sinker, as shown and described in the patent in suit, comprises three distinct portions, which he has separately lettered, as follows: d-2 refers to the body portion which forms the base, so to speak, of said sinker; d-1 is what he has termed the forward nose or finger, which exists some distance above said base portion. These two portions, the base or main body and the nose or finger, are separately supported in different

grooves in different portions of complainant's structure; that is to say, the base portion of d-2 engages and works in the radial grooves of the flange, B, but the nose or finger engages and works in a separate groove at a higher level, and in the needle bed or cylinder. Said two parts, the base and nose or finger, are connected by what he has termed a vertical limb, d, which does not engage or work in either of said two separate grooves which support the two separate portions of the sinker aforesaid. On the contrary, as shown both in Fig. 2 and Fig. 3 of the Brinton patent, the said vertical limb moves freely in an open space between two separate supporting grooves. Referring now to the sinkers which form part of complainant's exhibit defendants' machine, I find that there is no such separate supporting at different levels of said sinker as exists in complainant's patent in suit, the supporting function, so to speak, in defendants' device being performed by what is in effect a single groove, the groove in the radial flange exactly coinciding with the groove of the defendants' cylinder, so that said grooves, if they may be said to be separate grooves, are not at different levels, but, on the contrary, are at a single common level. Defendants' sinker therefore is so constructed as to work in said grooves on a single level, and whilst it is true that the work-engaging portion of defendants' sinker is not located in the plane of the cam-engaging portion of said sinker, yet said two portions do not exist as separate portions of said sinker, as do similar portions in the Brinton device of the patent in suit. On the contrary, said sinker engages as a whole, and works as a whole, in a groove which has but a single level. It is true that a portion of said groove has side walls which extend above the level of the cam-engaging portion, but said side walls do not in any sense afford a separate and distinct support for the work-engaging portion, but, on the contrary, serve to support said sinker throughout its entire height, and thus insure that it shall not be displaced by any lateral strain which may be put upon it. There is, therefore, no necessity in defendants' machine for a separate supporting groove for the work-engaging portion of his sinker, as such necessity exists in complainant's device, where a large portion of the sinker body, namely, what he has termed the vertical limb, d, is wholly unsupported and works in an open space intermediate of two separate grooves at different levels."

The bill is dismissed, with costs.

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LALANCE & GROSJEAN MFG. CO. et al. v. HABERMAN MFG. CO.

(Circuit Court, S. D. New York. May 6, 1898.)

1. PRIVILEGED COMMUNICATIONS—ATTORNEY AND WITNESS.

Communications between a party litigant or his counsel and one whose sole connection with the case is that of a witness, whether expert or not, called to testify by the party, are not privileged.

2. SAME—PATENT CAUSES—EXPERT EMPLOYED BY PARTY.

The rules of privilege applicable to communications between attorney and client, or counsel and associate, govern communications of a party to patent litigation or his counsel, with an expert in the art in question, employed by the party to manage the litigation in his behalf, or with such an expert employed as assistant to counsel, in so far as he acts as such assistant, and not as a witness.

Briesen & Knauth, for complainants.

Betts, Betts, Sheffield & Betts, for defendants.

LACOMBE, Circuit Judge. The question presented upon this application is whether a certain letter written by counsel for the complainants to Mr. Banks, a witness called on behalf of the complainants, which letter is entirely concerned with the matters in

controversy in this suit, is privileged. That communications between client and counsel, and between counsel and associate counsel, are privileged, is, of course, undisputed. This rule is founded upon a public policy, which undertakes to secure the freest and fullest statement of a party's case to the lawyer whom he retained to prosecute or defend. On the other hand, I know of no principle of law which would extend a similar privilege to like communications passing from the party litigant, or his counsel, to one whose sole connection with the case is that of a witness called to testify by the party; nor would the fact that the witness is a scientific man, testifying to the result of his own experiments, at all change the situation. To hold that such communications were privileged might very well open the door to gross abuses.

While I do not find any express authority dealing with the question to what extent, if at all, communications passing between counsel and client on the one side and the so-called "expert" on the other are privileged, the conditions of patent litigation are such that a similar public policy would seem to require an extension of the doctrine of privilege. It is quite conceivable that a patent may be owned by a corporation which would be the actual party litigant, but the entire management of its affairs touching the use of such patent, and the taking of whatever steps may be necessary to sustain it and prevent infringement, be confided to some general manager or superintendent skilled in the art, upon whose judgment solely the officers of the corporation might be accustomed to rely in deciding whether they should prosecute an action, or refrain from doing so, and be the sole one finally to determine upon what lines and to what extent the litigation should be conducted. In such a case the expert would be in reality, so far as litigation upon the particular patent was concerned, the alter ego of the complainant; and the privilege which public policy secures to the individual litigant could not be secured to the corporation litigant unless it was so extended as to include him. So, too, questions of science and art are frequently so mingled with questions of patent law, in controversies arising upon some patent, that a party substantially retains an expert to conduct the case almost as associate counsel with the solicitor. In such a case it would seem fair to apply the same rule to the expert as to the counsel. It would seem, however, that in such a case the privilege should be lost when the expert ceases to act as counsel, and allows himself to be made a witness; at least, to the extent to which he testifies.

In the case at bar the testimony as to the exact position of the witness relative to the parties and to the litigation is somewhat meagre. Complainants' counsel may recall him, and see if proof can be made which will bring him within one or other of the categories above set forth, defendants, of course, being allowed cross-examination. When this evidence is taken and submitted, the point now presented will be decided. I may add that, upon a more careful examination of the record as it stands, I do not find sufficient to support the statement contained in my former memorandum,

namely, "Dr. Banks being the expert employed by complainants," in the sense in which the word "expert" was used.

(June 20, 1898.)

This case again comes here upon additional proofs taken as suggested in memorandum filed May 6, 1898, the sole question to be determined being whether a certain letter is or is not privileged. There seems to be an entire failure of proof that the witness to whom the letter was addressed is or was the alter ego of the plaintiff corporation, within the terms of that memorandum. It does, however, appear that he has been retained by plaintiffs as an expert to assist them in the presentation of their case. As such the witness would seem to come within the privilege suggested in the former memorandum,—as similar to that of counsel. More careful reflection has still further confirmed the impression that such privilege should be forfeited if the "scientific counsel" assume the role of a witness. The point raised here, however, seems to be a new one, and therefore, if counsel for complainants will consent to strike out all the testimony of the witness Banks, such witness will not be required to produce for inspection the letter received by him from the counsel for complainants. Unless, however, Dr. Banks is thus relegated from the category of witnesses to the category of counsel, such letter must be produced by him.

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#### THE ANACES.

(District Court, E. D. North Carolina. May 12, 1898.)

##### 1. MARITIME LIENS—WHEN EXISTING—INJURY TO STEVEDORE.

A laborer employed by a stevedore who has contracted to load a vessel has no right to proceed in rem against the vessel for a personal injury received in the course of such employment, where there is no defect in the vessel's machinery, and no negligence on the part of her officers.

##### 2. MASTER AND SERVANT—FELLOW SERVANTS—STEVEDORES.

A member of a stevedore's gang operating the engine used for hoisting cargo into a vessel is the fellow servant of a member of the same gang engaged in stowing the cargo in the vessel's hold, and the vessel is not liable for an injury to the latter resulting from negligence of the former.<sup>1</sup>

Iredell Mears and Bellamy & Bellamy, for libellant.

George Roundtree and Junius Davis, for the Anaces.

PURNELL, District Judge. Alexander McCullum filed his libel in rem against the British steamship Anaces, and, the cause being regularly called, the proctors for respondent moved to dismiss the libel—First, because the libel does not state facts sufficient to constitute a cause of action; and, second, because, this court having no jurisdiction to hear this libel in rem, no action in rem would lie. For the purposes of the motion, the allegations set forth in the libel must be taken as true. They are as follows:

<sup>1</sup> As to who are fellow servants, generally, see note to *Railroad Co. v. Smith*, 8 C. C. A. 668, and supplemental note to *Railroad Co. v. Johnston*, 9 C. C. A. 596.

Alexander McCullum, a laborer, of the city of Wilmington, state of North Carolina, brings this his libel against the British steamship *Anaces*, hailing from Fleetwood, England, whereof Charles S. Roberson is, or lately was, master, now lying in port at Wilmington, N. C., in the district aforesaid, her tackle, sails, apparel, furniture, boats, engines, boilers, and machinery, and other appurtenances, and all persons intervening for their interest in said vessel, in a cause of damage, civil and maritime; and the said libelant alleges and propounds as follows: First. Libelant is a resident of the state of North Carolina, and of the Eastern district of this honorable court, and is by occupation a laborer and stevedore. Second. The said steamship is, or was at the time of the facts herein set forth, lying in the port at Wilmington, at the wharves of the Wilmington Compress Company, and engaged in loading a cargo of cotton. Third. The said steamship, through its agents or captain, had contracted with one A. J. Walker, a contracting stevedore, to load the said steamship with cotton, and the said A. J. Walker employed your libelant as a laborer in the hold of the said ship, to assist and work in the receiving and stowing of the cotton as the same is hoisted from wharves and lowered into the hold of the ship; that, by and under the custom of the port, the terms of the contract of stevedoring, and the duties and obligations of the said ship, the said steamship furnishes and operates the dummy engine, tackle and ropes, and all apparatus necessary and customarily used in hoisting the cotton from the wharves into the ship; that the said dummy engine is a part of the equipment of the said ship, attached to her, as engines and boilers, and is operated by means of a winch or lever from the deck of the ship, and requires in the operation thereof a man of experience and familiarity with the work; that, while such loading is going on, men are in the hold of the ship, receiving the cotton as it is lowered, and unless the engineer, or man at the lever, operating the engine which is used in hoisting and lowering the cotton, is experienced, there is danger of injury to the men below, in carelessly lowering or letting into the hold bales of cotton; that it is the duty of the officers of the said ship to provide a man of care and experience in operating the said engine. Fourth. That on or about the 5th day of October, 1897, while your libelant, with others, was working in the hold of the said steamship, several bales of cotton were suddenly, carelessly, and negligently dropped into the hold of the said ship, through the careless operation of the dummy engine, falling against your libelant, jammed him against the side of the ship with tremendous force, and caused him a serious and perhaps permanent injury, breaking three of his ribs, utterly rendering him incapable for work for many months, if not for years to come, and causing him great physical injury and pain, and that he is now laid up, under the care of physicians, and by them advised of the serious injuries herewith complained of. Fifth. That the accident here complained of by your libelant was caused immediately and proximately by the gross negligence and incompetence of the man employed by the said officers of the said steamship to operate the said engine; that the said party operating the same at the time of the said accident was not a regular engineer or experienced person, but that the captain of the said ship, after having one of his own crew to operate the same, who was experienced, detailed the said person to other work, and substituted a man not connected with the said ship, and not one of its crew, whose name is unknown to your libelant, who was nothing more than an ordinary laborer, and utterly inexperienced in the work of handling such an engine, in hoisting and loading such cargo, which requires experienced judgment in order to avoid such accidents as this one here complained of. Sixth. That the master or officials of the said ship, in employing an inexperienced man to operate the lever or winch of said dummy engine, were guilty of gross carelessness, negligence, and want of care, and failed to perform or exercise a proper care and prudence, as in duty bound to do, to your libelant, who was engaged in work in the hold below, and that for such act of negligence, done in their official capacity, said steamship is liable for the injuries inflicted upon libelant as aforesaid in consequence thereof. Seventh. That by reason of the said accident here complained of, that the plaintiff has suffered physical pain, mental anguish, and impairment of strength and ability as a laborer, and has been damaged thereby in the sum of two thousand five

hundred dollars. Eighth. That the said accident was through no fault or carelessness, or contributory fault or carelessness, of your libelant. Ninth. That, all and singular, the premises are true, and within the admiralty and maritime jurisdiction of the United States and this honorable court.

For the purposes of the motion, the answer, which traverses many of the allegations in the libel, must be disregarded, and the case considered as upon demurrer ore tenus.

Whether a stevedore's contract is maritime has been much discussed, often doubted, and the decisions are conflicting and confusing. In the case of *The Gilbert Knapp* (E. D. Wis. 1889) 37 Fed. 209, the conflicting decisions are considered by Jenkins, District Judge; and it is held that such contracts are maritime, within the principles of admiralty jurisdiction, but no lien on the vessel is allowed in admiralty for such services rendered in the home port. In the same year, and the same volume of the report, at page 367, in the case of *The Magnolia*, Pardee, Circuit Judge, in an appeal from the district court for the Eastern district of Louisiana, held that a contract to stow and load a vessel is not a maritime contract, and not enforceable in admiralty. This decision is based upon the decision of Justice Bradley in the case of *The Ilex*, 2 Woods, 229, Fed. Cas. No. 10,842. But in *The Main* (1892) 2 C. C. A. 569, 51 Fed. 954, in the circuit court for the Fifth circuit (Pardee, Circuit Judge, delivering the opinion), it is held that a stevedore rendering services in loading and unloading cargoes in other than the home port has a maritime lien therefor. The case of *The Ilex* is overruled. This principle is recognized in this district in the case of *The William Brantfoot*, 8 U. S. App. 129, 3 C. C. A. 155, and 52 Fed. 390, and in *The Elton*, 83 Fed. 519. The stevedore's contract is, under the authorities cited, maritime, and within the admiralty jurisdiction; and, if the injury had resulted from a defect in the machinery of the vessel, there could be no doubt, under these authorities, that defendant would have a lien, and be entitled to proceed in rem to enforce this lien. But how is it under the allegations of the libel? There is no complaint of defects in the machinery furnished by the ship, nor is there any complaint that the parties employed to operate the machinery of the ship were known by the master, the captain, or any other person authorized or empowered to bind the ship, to be negligent or incompetent; but, after having detailed one of the crew who was experienced, some one else, unknown even to the libelant, who was an ordinary laborer, and inexperienced in handling the winch, was temporarily operating the same; and this is alleged to be the proximate cause of the accident complained of, by which libelant was injured. There is no contention that libelant is not entitled to his remedy in personam, or that he has a remedy; but the contention is that the allegations are not sufficient, and a proceeding in rem will not lie for the causes set out in the libel. The admiralty rules, from 12 to 20, were intended, says Justice Brown in *The Corsair*, 145 U. S. 341. 12 Sup. Ct. 949, "to prescribe a remedy appropriate to each class of cases in admiralty; allowing in certain cases a joinder of ship and freight, or ship and master, or alternative actions against the ship, master, or owner alone. \* \* \* These rules were adopted in pur

suance of an act of congress of August 23, 1842 (5 Stat. 516), \* \* \* and have always been regarded as having the force of law. They are little more than a recognition and formulation of the previous practice of courts of admiralty in this country and in England." But they are always treated by the courts as obligatory. In the case cited (*The Corsair*) it was held that a proceeding in rem for injuries causing death was properly dismissed, because, though by the local law a right of action survives to the administrator, no lien is expressly created thereby. Lord Campbell's act is discussed at length, and it is held that a United States district court, sitting in admiralty, cannot entertain a libel in rem for damages incurred for loss of life. The local laws of North Carolina do not give a lien for injuries such as those complained of in the case at bar.

Maritime liens are *stricti juris*, and will not be extended by construction. *The Yankee Blade*, 19 How. 82. The advocates of the largest measure of admiralty jurisdiction admit that they have not jurisdiction to enforce maritime contracts by proceedings in rem unless the contract, expressly or by implication, creates a lien on the ship. *The Draco*, 2 Sumn. 180, Fed. Cas. No. 4,057. From whence, and how, did libellant acquire a lien, and a right to proceed in rem? Liens are created by the acts of the parties, or by operation of law. Libellant had no contract with the master of the ship, or any one representing the owner, but was employed by A. J. Walker; and as a subcontractor he had no claim upon the ship, either for his wages or for a tort, for Walker had no authority to bind the ship. He must therefore look to the law, *stricti juris*, for his right to proceed in rem. The statutes give a lien on the vessel for seamen's wages, bottomry, and to passengers for the violation of the laws of navigation, and for some other causes; but nowhere is it provided in the statute law of the United States that there shall be a lien on even a foreign vessel for accidents such as that of which libellant complains. Nor can it be found in the admiralty rules before quoted (from 12 to 20), intended to prescribe a remedy appropriate for each class of cases in admiralty. Suits by material men (rule 12) may be in rem or in personam. Suits for mariners' wages (rule 13) may be in rem against the ship or freight, or in personam. Suits for pilotage may be in rem or in personam. Rule 14. Suits for damage by collision (rule 15) may be in rem or in personam, or both. Suits for assault and battery can be in personam only. Rule 16. Suits for hypothecation (rule 17) may be in rem or in personam. Suits on bottomry bonds (rule 18) may be in rem under certain circumstances, and in personam under others. Suits for salvage (rule 19) may be in rem against the property saved, or in personam against the party at whose request and for whose benefit the salvage service was performed. Suits between part owners, petitory or possessory suits (rule 20), may be in rem and in personam. So that the right to proceed in rem in an action like that at bar is not conferred by the admiralty rules, and it must be sought elsewhere, if, indeed, these courts derive any authority as to proceedings in admiralty from any source save the statutes of the United States and the rules in admiralty, which "have always been regarded as having the force of a statute, \* \* \* and always treated by

the courts as obligatory." Liens have been given in rem by act of congress, as in sections 4270, 4493, Rev. St., which extend the lien in rem to passengers; but to "other persons" only an action in personam is given, under the latter section. These liens, too, are given for the violations of the navigation laws by passenger vessels, and there is no allegation that the Anaces was a passenger vessel. She was, in fact, a freight vessel,—a tramp. The burden is on the libelant to establish a maritime tort, a lien, and a right to proceed in rem. *Bors v. Preston*, 111 U. S. 255, 4 Sup. Ct. 675; *Grace v. Insurance Co.*, 109 U. S. 283, 3 Sup. Ct. 207; *Robertson v. Cease*, 97 U. S. 646. Libelant's proctors have cited no authorities which are at all satisfactory on these points,—in fact, have furnished no authorities, but left the court to work out a conclusion. While it may seem to conflict with some of the decisions cited, and to be a *novo impressio* in this old branch of the law, I must conclude that the decision would have been different in the cases cited, and others on the same line, if the question now raised had been pressed in those cases, and that the courts would have held that a member of a stevedore's gang has no right to proceed in rem for a personal injury (especially where there is no defect in the ship's machinery, and no negligence on the part of the ship's officers) for an accident caused as described in the libel.

The above, being a new and interesting question, was considered first, though the other question raised by the motion is of equal importance. The negligence complained of was that of a fellow servant; and, in order to recover against the master for the negligent act of a fellow servant, the employé must allege that the fellow servant whose negligence caused the injury was incompetent, and that the master had knowledge of such incompetency, or by the exercise of reasonable care could have known of it. The winchman and libelant were fellow servants, and the vessel is not liable unless there was some negligent act or failure of duty on the part of the owner or his legal representative. *Steamship Co. v. Merchant*, 133 U. S. 375, 10 Sup. Ct. 397. The winchman was one of the crew, but the man at the winch at the time of the injury was a common laborer, like the libelant. If he was a fellow servant,—even the master himself, or one he had placed there,—the ship would not be liable. *The Coleridge*, 72 Fed. 676. The libelant could only recover against the vessel or the owner by alleging and proving (a) that the servant operating the winch was incompetent; (b) that such incompetency was known to the master, or by the exercise of reasonable care might have been known to him; (c) that the incompetence—not the occasional carelessness—of the servant directly contributed to, and was the proximate cause of, the accident. It is not sufficient to allege merely that an act was negligently done. There is no presumption of negligence, but the burden is on the libelant. *Railroad Co. v. Barrett*, 166 U. S. 617, 17 Sup. Ct. 707. For the foregoing reasons the motion of the defendant is allowed, and the libel herein dismissed. Dismissed.

## THE LISNACRIEVE.

## GRASSO v. THE LISNACRIEVE.

(District Court, E. D. New York. May 2, 1898.)

## SHIPPING—MASTER AND SERVANT.

Where the owners of a ship furnish a winchman to assist in unloading, they are liable to an employé of the stevedore, who is unloading the ship under a contract, for injuries caused by the negligence of the winchman, although they were under no contractual obligation to furnish the winchman, and although such winchman is working under the orders of the stevedore.

This was a libel in rem by Mattee Grasso against the steamship Lisnacrieve, to recover damages for personal injuries.

Francis L. Corrao, for libellant.

Convers & Kirlin, for claimant.

THOMAS, District Judge. On the 17th day of August, 1896, the libellant, a longshoreman, was working aboard the steamship Lisnacrieve, under the employment of T. Monaghan, a stevedore, with whom a contract had been made by the charterers to discharge a cargo of asphalt. The ship was lying at the foot of Fifty-Second street, in the city of New York. The asphalt was brought up from the hold of the vessel by means of iron tubs, furnished by the contracting stevedore, hoisted by means of a block and tackle, passing to one of the winches of the vessel, which was run by one of the seamen of the vessel's crew. The libellant, together with other longshoremen, was engaged in the lower part of the cross bunker hold of the steamship, loading asphalt into the tubs, dragging them towards, but not directly under, the hatchway, and fastening the hook attached to the line to the bail of the tub. A gangwayman, with an assistant, employed by the stevedore, was stationed at the mouth of the main deck hatch of the hold, whose duty it was to guide the tubs as they were hoisted out of the hold, so as to prevent them from catching against the coamings or other obstructions, and also to give signals to the winchman of the No. 3 winch when to start and when to stop, these signals being given by means of a whistle, as the winchman was not in sight of the gangwayman. It appears that the casement of the donkey boiler protruded beneath the hatch into the hold of the vessel, and that a man in the employ of the stevedore was stationed upon such casement, to prevent the tub striking the casement in its descent, and to steady the tub, until it reached the top of the casement, and thereafter give it proper direction. When it had been thus steadied, and was in a proper line of the hatch opening, it was allowed to proceed rapidly upon its way out of the hatch. When the tub was ready to be lifted from the bottom of the hold, one sharp whistle was given by the gangwayman on the main deck. This meant that the winchman should start easily and go slowly. When the tub reached the top of the casing, if it was not in proper position, another signal was given, which meant that the winch should be stopped, to allow the person stationed on the casing to adjust the position of the tub to the opening above. This having been done, a long reverberating whistle was

given, which indicated that the winch should go rapidly, to carry the tub onto the main deck. Generally speaking, speed was desirable, as it expedited the fulfillment of the stevedore's contract.

It is claimed on the part of the libelant that he was injured in the following manner: A tub, drawn partially towards, but not directly under, the open hatch, received the hook, and the signal to start and go easily was given. Instead of starting slowly, the winchman started rapidly, causing the tub to swing into the hatch, and oscillate from one side to the other, in a dangerous manner, and so as to strike against the casing about the boiler, or the coamings of the hatch, or both. The gangwayman, seeing this condition, gave a signal to stop, but the winchman did not stop, and thereupon the gangwayman gave three more shrill whistles, indicating, as he says, that the winchman should stop, but the tub was drawn up through the open hatchway. While the tub was making this passage, one or more pieces of asphalt fell from it, striking the libelant, who was in the hold below.

The evidence seems to be preponderating that, in first lifting the tub from the bottom of the hold, the custom was to go slowly, and that previous to this time the winchman had observed that custom. The libelant shows by several witnesses that the winchman lifted the tub in question with an unusually rapid motion, and it appears fairly that the unusual swinging motion was given to the tub by the rapidity of the motion thus imparted. If this evidence is to be believed, the winchman was negligent. And as the claimant produces no satisfactory and competent evidence of due speed, but rather relies upon inferences to be drawn from the previous good work, capacity, and skill of the winchman, the evidence of the libelant in this regard must be accepted. Therefore, as the negligent act of the winchman is a sufficient cause for the injury, the question remains whether the claimant must respond for this negligent act.

It is a rule well settled that, although a person undertakes to do an act gratuitously, yet he is not relieved from using suitable care in so doing. And although the ship in the present case equipped and operated the winch without being constrained thereto by any contractual obligation, yet the undertaking imposed the duty of due care.

It is said that the winchman, although furnished by the shipowners, was not at all under their charge or direction, but for the time was in the service of the contracting stevedore, subject to his orders, and that he thereby became a fellow servant of the libelant, and that if, therefore, the accident happened from the negligence of the winchman, it was the negligence of a fellow servant, for which neither the contracting stevedore nor the shipowners would be liable.

The stevedore made his contract with the charterers, and it does not appear who was to furnish engines for hoisting and men to operate the same. The claimant contends that the stevedore stated that he could not get a man to properly drive the winch, and that thereupon the ship furnished the winchman in question. The day previous to the accident, however, as the winches were otherwise in use, the ship employed a floating engine and an engineer to do the same work, and bore the expense thereof. This would seem to indicate some sense of obligation on the part of the shipowners to

furnish the hoisting power. In any case, the ship did undertake to do a certain portion of the work of unloading. Such an undertaking is not merely loaning a servant to the stevedore. It is a co-operation on the part of the ship in the work of unloading the cargo, precisely to the same extent as if two independent stevedores had contracted for a division of labor in discharging the cargo, one furnishing the tackle and hoisting power, and the other furnishing men and appliances for the remainder of the work. It does not change this relation that the winchman was to run his winch, or stop his winch, or graduate the speed thereof, as the stevedore's servant signaled him to do. Independent contractors and their servants are often called upon to direct and advise each other in movements and acts relating to the common work, and such often is the case between the contractor and the person with whom the contract is made. The fact that the servant of one of the parties regulates his acts by the actions of the servants of the other does not make them co-servants. In the present case the winchman was a general servant of the ship. He was put in charge of the ship's machinery, to perform a duty that the ship had assumed the duty of performing. He went to his post of duty, or left the same, by no command of the stevedore, but simply because his master or his delegated agent so directed him. True, the stevedore gave him a signal, and it was his duty to obey it; but this duty sprang from no contract of hiring made by the winchman with the stevedore, but purely or wholly from the relation of master and servant that existed between the winchman and the shipowners. When the stevedore signaled him to hoist, he was at perfect liberty to disobey this order, so far as the stevedore was concerned, and the stevedore was helpless. Nay, if the stevedore had signaled him to hoist, and his master had directed him not to hoist, is there any doubt to whom he owed and would have rendered obedience? There is no lending of a servant or subhiring of a servant in this case. The master, in effect, said to his servant: "I have undertaken to furnish the power and operators of the power to hoist the cargo from the hold. The stevedore is engaged to do the remaining work. You will take charge of the winch and operate it, co-operating, by means of signals, with the stevedore's servants." The stevedore had not selected the winchman. The shipowners chose him. The stevedore was obliged to take him or no one. The ship alone had knowledge of his competency; had alone investigated or tested it. The ship placed or retained him in charge of the winch. The stevedore could not send him to or from it. The stevedore did not pay him, and could not discharge him.

Assume that a person, not connected with the ship, but having a right to pass along the deck thereof, had, while so doing, been injured by the stevedore's culpably negligent operation of the winch; would it have been an excuse for the ship that it had for a while loaned this winch and winchman to a stevedore? Assume that another of the ship's servants had been injured by the winchman's culpable negligence; could such servant have recovered against the shipowner, upon the ground that the winchman had been borrowed by a stevedore, and that, therefore, the former and general relation

of master and servant was so in abeyance that the doctrine of the negligence of co-servants would not apply?

There has been some diversity of judicial opinion in similar cases; but the difficulty has arisen at times from not sufficiently recognizing that, instead of loaning or subhiring a servant, the master himself has undertaken to perform a portion of the work. Cases may well arise where the servant of one person is engaged to assist another in respect to work in which the master had no interest. In such a case the servant would be temporarily released from his usual employment, and would ally himself to a new master, and recognize obedience to such master. It will be observed that, in such a case, it would be quite within the power of the new master at his will to end the service of the servant. But in the present case the stevedore could not order the winchman to leave the winch. He could not replace him by another operator. In fact, he had no power over him whatever except through the will and direction of the owners of the ship.

It would not be useful to review the authorities. The following decisions support, or tend to support, the conclusion above reached: *Johnson v. Navigation Co.*, 132 N. Y. 576, 30 N. E. 505; *Coyle v. Pierrepont*, 33 Hun, 311 (see holding on reargument); *Higgins v. Telegraph Co.*, 8 Misc. Rep. 433, 28 N. Y. Supp. 676 (the opinion in this case is instructive); *Kilroy v. Canal Co.*, 121 N. Y. 22, 24 N. E. 192, distinguishing *Murray v. Currie*, L. R. 6 C. P. 24; *The Harold*, 21 Fed. 428; *Sanford v. Oil Co.*, 118 N. Y. 571, 24 N. E. 313; *Sullivan v. Railroad Co.*, 112 N. Y. 643, 20 N. E. 569, affirming 44 Hun, 304; *Svenson v. Steamship Co.*, 57 N. Y. 108; *King v. Railroad Co.*, 72 N. Y. 607 (see facts and opinion 66 N. Y. 181); *Davi v. Victoria*, 69 Fed. 160.

The claimant calls attention to *Transport Co. v. Coneys*, 28 C. C. A. 388, 82 Fed. 177, which is easily distinguishable from the case at bar; *Murray v. Currie*, L. R. 6 C. P. 24, distinguished in *Kilroy v. Canal Co.*, *supra*; *Rourke v. Colliery Co.*, L. R. 1 C. P. Div. 556, on appeal L. R. 2 C. P. Div. 205; *Donovan v. Laing* [1893] 1 Q. B. 629; *Johnson v. City of Boston*, 118 Mass. 114; *Ewan v. Lippincott*, 47 N. J. Law, 192; *Railway Co. v. Cox*, 21 Ill. 20.

The principles stated in some of these cases are of general application, and some of the cases do not necessarily conflict with the view here adopted, that the master of the offending servant was himself taking a part in the work, and was not merely parting temporarily with the services of a person in his general employment. So far, however, as such cases apparently conflict with the views here expressed, they are deemed also in conflict with the federal decisions and those of the courts of the state of New York. To the cases stated as above by the claimant may be added *Rook v. Concentrating Works*, 76 Hun, 54, 27 N. Y. Supp. 623.

Pursuant to this opinion, decree should be entered for the libellant for an amount that shall fairly compensate him for his injuries. A suitable examination of the evidence leads to the conclusion that the sum of \$750 would be reasonably compensatory, for which let a decree be entered, with costs.

## THE ILLINOIS.

BALANO et al. v. THE ILLINOIS.

(Circuit Court of Appeals, Third Circuit. April 27, 1898.)

No. 10.

**1. COLLISION—TUG WITH TOW—STARTING FROM DOCK.**

A tug starting out into the Delaware river, from behind piers which obstruct her view, with a tow on a hawser, must exercise caution, but is not bound absolutely to ascertain beforehand whether any vessel is approaching; and where she gives the proper signal to enable a vessel actually approaching to avoid the tow by proper and reasonable navigation, she is not to be held liable for a collision between them.

**2. SAME—STEAMSHIP IN CHANNEL.**

Where a schooner towed by a tug on a hawser was struck in the Delaware river, by a passing steamship, shortly after the tug and steamer had emerged from behind piers that obstructed their view, *held*, that the steamship was solely at fault, in that, while proceeding in a narrow channel, where vessels and tows were likely to be encountered, she failed to perform her duty of running slowly, keeping a careful lookout, and listening attentively for signals.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

This was a libel in rem by James W. Balano, master of the schooner Mabel Jordan, against the steamship Illinois, whereof the International Navigation Company was owner, to recover damages caused by a collision. The tug Gladisfen was subsequently made a co-defendant, on the petition of the claimant of the Illinois. The district court, after a final hearing on the merits, found the Illinois solely in fault, and decreed accordingly. 65 Fed. 123; 84 Fed. 697. The claimant thereupon appealed to this court.

N. Dubois Miller, for appellant.

John F. Lewis, for the Mabel Jordan.

Henry R. Edmunds, for the Gladisfen.

Before ACHESON and DALLAS, Circuit Judges, and BRADFORD, District Judge.

DALLAS, Circuit Judge. The schooner Mabel Jordan was run into and sunk by the steamer Illinois on June 9, 1893; and, upon the latter being libeled for the loss, her owners filed a petition under which the Gladisfen, a steam tug which at the time was engaged in towing the schooner, was made co-respondent. Unquestionably, the collision was occasioned by negligence either of the steamer, or of the tug, or of both. The court below held that it resulted wholly from fault of the former; and it is now insisted that this conclusion was erroneous, because, as is alleged in the petition of the Illinois—

"Those in charge of said steam tug Gladisfen were in fault as follows: (1) In towing said schooner out into the channel, from behind the covered piers, without giving proper and lawful signals to approaching vessels. (2) In towing the schooner into the channel, from behind the covered piers, without ascertaining whether any vessels were approaching. (3) In not keeping a vigilant outlook, and failing to observe the steamship Illinois in time to avoid the collision. (4) In towing the schooner Mabel Jordan into the channel with a hawser of excessive length. (5) In cutting the hawser by which the schooner was being towed. (6) By conducting and managing said towage service so negligently, carelessly, and unskillfully that the collision occurred."

In so far as it is possible to regard these allegations as being well founded in law, they were not only unsupported by proof, but the weight of the evidence was clearly against them.

1. The fact that the tug, in towing the schooner out into the channel, gave the "proper and lawful signals," was established by abundant testimony. When starting from the dock, and before emerging from behind the piers, she whistled, as is customary, to give notice of her approach to all vessels which might be moving either up or down that part of the river; and when she passed outside of the dock, and sighted the Illinois, she immediately signaled that vessel to pursue a course which, if followed, would have averted the disaster.

2. It was the duty of the Gladisfen to be cautious in moving out from behind the piers, but she was not required to absolutely ascertain whether any vessels were approaching. She was bound to be careful, but not to insure safety. Therefore the second of the allegations of the petition sets up a false standard of liability; and, because it charges no specific wrongful act or omission, it presents no distinctive question of fact for consideration.

3. We are fully convinced that a proper lookout was maintained at the bow of the Gladisfen, and that the Illinois was observed promptly and without delinquency.

4. The proofs conclusively establish that the towing hawser was not of excessive length.

5. The cutting of the hawser did not in the slightest degree contribute to cause the collision. It was entirely proper to cut it at the time it was cut, with the object which induced the cutting.

6. The last allegation asserts, in general terms, that the tug was in fault in its conduct and management of the towage; and with reference to this broad averment, but without needless prolixity, the case will be further considered. The schooner which was sunk was laden with coal, and was lying in the dock at Greenwich Piers, on the west side of the Delaware river. Her intended course was down the river. She was in tow of the Gladisfen, which, in starting to draw her from the dock, gave the customary signal,—a long blast of the whistle. The view from vessels within the dock, and of such vessels from the river, was much obscured by the adjacent covered piers. When the bow of the Gladisfen came beyond the outer line of these piers, the Illinois was seen to be coming down the channel, and the Gladisfen signaled to her to pass to the westward of the tow. The tide was running up, and when the schooner came out into the river she was carried upward, and to the eastward. The tug was headed down the river, and the schooner, being then subject to the influence of the slack hawser, and also to the antagonistic force of the tide, was, practically speaking, not moving. It is contended on behalf of the Gladisfen that the schooner, before being struck, had passed over to the eastward side of the channel, while for the Illinois it is insisted that she was at its western edge. Our investigation of the evidence has convinced us that neither of these views is correct; but we are satisfied that the schooner must have reached a point sufficiently to the eastward of the western side of the channel to admit of the Illinois passing her as the Gladisfen's

signal required her to do, and this, as it seems to us, is all that it is necessary to determine respecting the schooner's position. The pilot of the Illinois did not suppose that he could not pass with safety to the westward of the tow, for the evidence shows, and the part of the schooner which was struck plainly indicates, that this is precisely what was attempted; and that this attempt was not successful resulted, we think, wholly from the fault of the Illinois. Those on board of that vessel testified that they did not hear the signal of the Gladisfen, but there is no room to doubt that it was given. A steamboat which was alongside of the Illinois, and in a less advantageous situation for hearing, heard it, and, being of light draft, kept out of the way by going over the flats to the eastward. We can see no possibility of excuse for the conduct of the Illinois. She was proceeding in a channel which at this point is quite narrow, and where it was to be expected that vessels and tows might be encountered as in this instance. It was therefore her especial duty to run slowly, and to keep a careful lookout, and to attentively listen for signals; and the record shows that in all of these particulars she failed to exercise even ordinary care. On the other hand, the Gladisfen appears to have done everything which by law or custom she was called upon to do. In addition to the points already considered, counsel has suggested that she ought to have sent a man to the masthead of the Mabel Jordan, that she should have had a watch stationed at the outer end of one of the piers, and that she should have been prepared with means for "snubbing," and should have employed those means to check the progress of the tow from the dock. But none of these suggestions can be accepted. It was not incumbent upon either the tug or the schooner to station a lookout upon the mast of the latter, and we are unable to perceive that a lookout so placed would have been of any use. He might have seen the Illinois sooner than she was seen by the man upon the bow of the tug, but, if he had seen and reported her, still, under the circumstances, the tug would have been justified in proceeding into the river as she did. When she arrived there, the duty was cast upon her to signal the Illinois. This she did, and then the collision occurred, not because the tug had wrongfully issued from the dock, but because the Illinois was so negligently navigated as to render the tug's signal unavailing. A man at the end of the pier would have been in no better position for observing the approach of the Illinois than was the one upon the bow of the tug; but, aside from this, we do not think it was in this case the duty of the tug to set a watch upon the land. As to snubbing the vessel (that is to say, stopping her advance after she had started), what was said by the witness Capt. Hudson is manifestly true. Arrangements could have been made "to have somebody on the tug with some hawser to hold, but you never get a hawser to hold any vessel of any size and weight. It would tear out the chocks and part the line."

We do not deem it necessary to exhaustively review this voluminous record. To what has been said, it must suffice to add that a careful examination of it discloses no error in the judgment of the district court, and it is accordingly affirmed.

## MILWAUKEE ELECTRIC RAILWAY &amp; LIGHT CO. v. CITY OF MILWAUKEE.

## CENTRAL TRUST CO. OF NEW YORK v. SAME.

(Circuit Court, E. D. Wisconsin. May 31, 1898.)

## 1. STREET RAILROADS—MUNICIPAL REGULATIONS.

An ordinance requiring a street railroad charging 5 cent fares to sell 6 tickets for 25 cents, or 25 tickets for \$1, is unreasonable, when the road is only making yearly net earnings of 3.3 per cent. to 4.5 per cent. on its bona fide investment, and paying 5 per cent. interest on its bonds, in a city where the current rate of interest on first mortgage real-estate security is 6 per cent. Such an ordinance is void, under the fourteenth amendment, as depriving the company of its property without due process of law.

## 2. SAME—REASONABLENESS OF ORDINANCES.

The power of a municipality to regulate street-railroad fares is subject to the limitations (1) that there is reasonable need on the part of the public, considering the nature and extent of the service, of lower rates and better terms than those existing; (2) that the rates and terms fixed by the ordinance are not clearly unreasonable, in view of all the conditions.

Final hearing in two actions,—one wherein the street-railway company is complainant, and the other brought by the trustee for the bondholders,—each seeking a decree declaring null and void, in respect of the complainant, a purported ordinance of the defendant city entitled "An ordinance to regulate the rate of fare upon the street railways in the city of Milwaukee, and providing for the sale of packages of tickets thereon," approved June 11, 1896, and to perpetually enjoin its enforcement.

Miller, Noyes, Miller & Wahl, Winkler, Flanders, Smith, Bottum & Vilas, and W. J. Curtis, for complainant.

Howard Van Wyck, for defendant.

SEAMAN, District Judge. The main controversy in each of these actions is whether the ordinance of June 11, 1896, unreasonably fixes rates of fare which would deprive the complainant of its property without due process of law, and thus violates the fourteenth amendment to the constitution of the United States. A further question is raised by the bill filed on behalf of the bondholders, and is pressed by argument in support of both bills, whether the municipality had power to regulate rates beyond the provisions contained in the several franchises which are vested in the complainant street-car company, limiting only to a five-cent fare. Both contentions are of serious import, involving, on the one hand, consideration of the rights of the community in respect of a great public utility, and interference with acts of municipal control, which are presumptively inviolable; and, on the other hand, affecting the preservation of private rights of property, where investment has been made in a great undertaking of public nature, on the faith of existing and probable conditions, and where, by reason of its nature, there can be no withholding of operation by the company, even if unremunerative. *Ames v. Railway Co.*, 64 Fed. 165, 177; *Wright v. Railway Co.*, 95 Wis. 29, 36, 69 N. W. 791. Further investigation has confirmed the im-

pressions stated at the hearing, that the constitutional question was so clearly presented by the pleadings and testimony, and was so distinctly of federal cognizance, that it should be first considered. Certain rules to interpret and apply the limitations of the constitution in this class of cases are well settled by decisions of the supreme court. If the state of facts shown by the evidence clearly establishes a case of impairment within these rules, it will be unnecessary to pass upon the complicated question of general power, as one of first instance, calling for the interpretation of various statutes and ordinances.

The ordinance under consideration provides that tickets shall be sold, good for one fare, including one transfer, "in packages of six for twenty-five cents, and twenty-five for the sum of one dollar," thus making a reduction of the regular five-cent rate to all who so purchase tickets. Assuming, therefore, without so deciding, that the general power to fix and regulate the terms and rates to be charged subsists in the municipality,—namely, that by delegation it became vested with and still retains the full extent of legislative power undoubtedly possessed by the state,—there can be no inquiry here as to the wisdom or good policy of exercising the power so delegated, that being a matter of municipal discretion, over which the courts have no right of supervision or review. Nor is it open to inquiry in this case whether there is a public demand or need for the enactment, or whether it is just and reasonable in all its provisions, except for the single purpose of ascertaining its infringement of rights which are guarantied to the complainant by the constitution.

Upon this record it must be taken as true that enforcement of the ordinance would operate to reduce materially the net revenues of the street-car company. There is effort on the part of the defendant to show that the probable increase of passengers through the method of commutation tickets would make up for the reduction in rate, but no reliable basis is furnished, and the argument is too speculative for acceptance; while on the part of the complainant the testimony is founded upon practical and varied experience, and clearly shows it to be improbable that any increase in travel would yield receipts, over and above the additional expense necessarily entailed, to offset the decrease in gross receipts appearing *prima facie* from the reduction in fares. The claims are that a loss of income would result of "somewhere between 10 and 15 per cent. of the gross earnings," and estimates are presented by several witnesses of a net loss ranging from \$87,000 to \$140,000 per annum. It is sufficient, for the present consideration, that the ordinance must be regarded as a measure which reduces the rates of fare materially, and consequently would impair materially the net revenue produced by the property, and no analysis of the testimony upon that point is necessary, nor is any attempt required to state, even approximately, the amount of loss.

The law which must govern, when the facts are determined, is concisely and pertinently stated in the opinion by Mr. Justice Harlan, speaking for the supreme court, in *Smyth v. Ames*, 18 Sup. Ct. 418, 426, as follows:

"In view of the adjudications, these principles must be regarded as settled: (1) A railroad corporation is a person, within the meaning of the fourteenth amendment, declaring that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. (2) A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad, that will not admit of the carrier earning such compensation as, under all the circumstances, is just to it and to the public, would deprive such carrier of its property without due process of law, and deny to it the equal protection of the laws, and would therefore be repugnant to the fourteenth amendment of the constitution of the United States. (3) While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the state, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry."

And this opinion reviews the line of decisions upon the subject, and clearly approves the application of the same doctrine to legislative regulation of charges over toll roads, in *Road Co. v. Sandford*, 164 U. S. 578, 594, 17 Sup. Ct. 198. Therefore it must be regarded as established beyond question that the power to regulate the rates of fare, which is here assumed to rest in the municipality, is subject to these limitations: (1) That there is reasonable need on the part of the public, considering the nature and extent of the service, of lower rates and better terms than those existing; (2) that the rates and terms fixed by the ordinance are not clearly unreasonable, in view of all the conditions. Neither of these considerations is independent of the other, and, although the public interest is of the first importance, the test is not what is desirable upon the part of either, but what is reasonable in respect of the rights of both. As stated in *Smyth v. Ames*, supra: "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of the public highways than the service rendered by it is reasonably worth." So, in *Road Co. v. Sandford*, supra, it is clearly held, in the same view of mutual consideration, that it is neither the right of the corporation to subject the public "to unreasonable rates in order simply that stockholders may earn dividends," nor of the public to have the use of the conveniences thus furnished except "upon payment of such tolls as, in view of the nature and value of the service rendered by the company, are reasonable," but that "each case must depend upon its special facts"; and the reasonableness of rates must be measured by all the conditions, including, of course, the reasonable cost of operation and of maintenance "in good condition for public use, and the amount which may have been really and necessarily invested in the enterprise."

The difficulties presented in this case do not, therefore, rest in any doubt as to the general principles which must be observed, nor in ascertaining the actual facts disclosed by the testimony as a whole, so far as material to this controversy. Although the testimony on the part of complainant makes a volume of 1,445 printed pages, and

that of the defendant 163 pages, the only substantial contentions of fact relate to items of expenditure and claims of credit by way of depreciation, presented on behalf of the complainant as entering into the showing of net revenue, and to the present or reproduction value of the plant. And it may be remarked, in passing, that this testimony is so well classified and indexed, with such fair summaries in the briefs, that the task of examination has been materially lightened. But the sole embarrassment in the inquiry arises from the wide divergence which appears between the actual and undisputed amount of the cash investment in the undertaking, and the estimates, on either hand, of the amounts for which the entire plant could now be reproduced, in the view that the line of authorities referred to does not attempt to define or specify an exact measure or state of valuation, and leaves it, within the principles stated, that "each case must depend upon its special facts." Therefore the twofold inquiries of reasonableness above indicated are of mixed law and fact, and start with the presumption, in favor of the ordinance, (1) that the prevailing rates exacted too much from the public, and (2) that those prescribed are reasonable.

1. Are the terms and rates fixed by the company excessive demands upon the public, in view of the service rendered? The Milwaukee Street-Railway Company, of which the complainant is the successor in interest, was organized in December, 1890, for the purpose of establishing an electric street-railway system, which should cover the entire field for the city of Milwaukee. There were then in operation five distinct lines, owned separately, operated mainly by horse or mule power, each charging separate fares, and having no system of transfers. It is conceded that the service was slow and antiquated, was not well arranged for the wants of the city, and was generally inadequate and unsatisfactory. As the old lines occupied the principal thoroughfares, and the public interest prevented the allowance of double lines in such streets, the improvement could not be made effective unless those lines were purchased, or in some manner brought into the proposed system. They were gradually acquired, at prices which may appear excessive when measured by results, and during the ensuing period of about three years the work of installing the new system was carried on, involving an entire reconstruction and rearrangement of the old lines and extensions, and new and improved equipments throughout, at an expenditure of over \$3,000,000, aside from the cost of the old lines. As a result, at the time the ordinance was adopted, the mileage of tracks had increased from the previous aggregate of 110 miles to 142.89 miles, reaching every section of the city, with shorter and better routes, and furnishing 38 transfer points, with a universal transfer system,—a feature of special value to the public, as a single fare of five cents gives a maximum length of ride more than double the old arrangement. The service was improved in speed and regularity 50 per cent. or more, with better cars and less inconvenience, and it appears beyond question that it was generally more satisfactory and economical from the standpoint of the public. In other words, the service was materially enhanced in its value to the public, without any increase

in either normal or maximum charges, affording rides for five cents which had previously cost two and even three fares; and against all these advantages there appears only a single benefit extended by three out of the five constituent companies which is not given under the new arrangement, namely, in the sale of commutation tickets,—an omission for which there seems to be plausible excuse and offset in the universal system of transfers, aside from the other advantages. Surely, therefore, no imposition upon the public appears through any comparison between the old and the new service and rates. Nor does it find any countenance in comparison with either service or rates which prevail in other cities, for it is shown in this record, and is undisputed, that the five-cent rate is almost universal; that commutations are exceptional in cities of like class, and arise out of exceptional conditions, which are not fairly applicable here; and that instances of lower rates are so clearly exceptional that they cannot have force for any affirmative showing of reasonableness in the instant case. Nevertheless, with the burden of proof on the defendant, these considerations are not controlling, unless it further appears that the earnings of the company are insufficient, in view of the amount which may justly be regarded as the investment in the undertaking, to warrant the making of rates and terms which are more advantageous to the public. The interests of the public in its highways are paramount, and, if the service can reasonably be afforded more cheaply in Milwaukee than in other cities of like class, the community is entitled to the just benefit of any possible conditions which may tend to that result. The issue in that regard must be met under the second branch of inquiry, but I am clearly satisfied that this first question must be answered in favor of the complainant, if the evidence sustains its claim that lower rates would be confiscatory, and not compensatory.

2. Are the earnings of the property insufficient, in view of all the conditions, to justify this reduction in the rates of fare? Solution of this inquiry depends upon the showing (1) of earning capacity at existing rates, and (2) of the "amount really and necessarily invested in the enterprise," and upon the conclusion (3) whether the ratio of return upon the investment is excessive. In the statements which are referred to both parties have adopted a ratio, so far as necessary, to separate the electric lighting plant owned by the complainant, so that the statements which follow relate exclusively to the street-railway plant, except where otherwise mentioned.

First. The question of earning capacity is confined by the testimony to the results of three years' operation, being after the system was fairly installed, and inclusive of the year in which the ordinance was adopted, namely, 1894, 1895, and 1896. It is suggested on behalf of the defendant that those years were exceptional, for one cause and another, and are not a fair criterion for future earnings under more favorable circumstances; but the suggestion is without force in this case, because the ordinance operates upon these very conditions, and must, of course, be predicated upon them,—upon existing facts, and not upon mere future possibilities,—and, so determined, the instant case cannot affect rights under new conditions.

The proofs on the part of the complainant furnish, in detail, from the books of account, the gross earnings, the various items of expense and of charges for which deduction is claimed, excluding any payments of, or allowance for, interest on the bonded indebtedness, and state the net earnings as follows: In 1894, \$64,868.77; in 1895, \$269,202.30; in 1896, \$100,628.81. In this showing it appears that deduction of \$247,324.88 is made in 1894 for "depreciation," being the amount apportioned in that year to meet the alleged annual loss by physical depreciation of the plant, to keep the capital intact. No such deduction is made in 1895 and 1896, because not shown in the books, although it is insisted that like credit is due in each year, for the purposes of this case.

The defendant concedes the correctness of the showing as to the gross earnings, but disputes certain large items for which deductions are made in the above statement, corrects some items, and denies that any allowance should be made for depreciation. Aside from the fact that reports and statements of financial condition made from time to time by the company omit many of the deductions here asserted, these contentions on the part of the defendant rest solely upon the books of account kept by the company, and the testimony of Mr. De Grasse, stating his conclusions as an expert accountant from examination of such books, with the following result as to net earnings: In 1894, \$387,074.70; in 1895, \$479,621.11; in 1896, \$66,520.99. But this total for 1896 erroneously includes an allowance of \$160,550 paid for interest on bonds, which should be excluded on the basis assumed, and would make the net earnings for that year, on his computation, \$227,070.99. In this statement the allowance for depreciation in 1894 is excluded by Mr. De Grasse, because that item was in fact charged off upon change in the system of bookkeeping. He also excludes large amounts of undoubted expenditures upon the hypothesis that they belong to "construction account," as covering permanent improvements, and not to "expense of maintenance," as stated; rejects certain payments as accruing on account of previous years, and certain sums apportioned and charged off to meet damage claims; and makes corrections as to taxes, for which the book entries were made in advance upon estimates by way of apportioning the expenses of the year, pending litigation and other causes. However valuable this testimony is for analysis of the bookkeeping methods and for correction of certain charges, it is clearly insufficient, without other support, to contradict the undisputed testimony, both positive and expert, on the part of complainant, which verifies substantially its contention upon the disputed subjects of deduction, namely, that the expenditures so charged were largely, if not wholly, of such nature as to justify deduction for "maintenance"; and that depreciation is a well-recognized fact in all such plants, for which allowance must be made to save the capital from impairment, without regard to any question of its entry upon the books.

Making allowances for maintenance alone, in accordance with the analysis presented by the expert witnesses Goodspeed, Coffin, McAdoo, and Beggs, taking in each instance the estimate most favorable to the defendant, I am satisfied that the defendant's claim of net earnings

must be materially reduced, and that the largest amounts which can be assumed upon its theory, excluding any allowance for depreciation (except that for 1894 the "maintenance" allowance is increased, to bring it—the general allowance—up to the minimum estimate by the experts), would approximate the following sums:

In 1894 .....	\$230,000
In 1895 .....	340,000
In 1896 .....	115,000
	<hr/>
	\$685,000

—Making the average earnings per year, say, \$228,333.

In reference to the element of depreciation, the witness Beggs gives the following explanation:

"I think experience has demonstrated that the utmost life that can be expected from the best roadbed that can be laid to-day would be, at the outside, ten to twelve years, when it would have to be almost entirely renewed. The Milwaukee Company is in that condition to-day, because of the different periods that their track went down, and due to the fact that it was not all put down at one time, and it must now of necessity commence to lay about 12 miles of track annually, being about one-twelfth of its total mileage; and will be required, whether they wish to or not, to lay that amount annually hereafter, and will thereby be keeping their tracks fairly up to the standard. The same applies, I might say, to the equipment. In my estimate I have calculated that the Milwaukee Company must do this year, which, as a matter of fact, it is doing, what it did last year,—in other words, put on not less than 20 of the most modern, best-constructed equipments, thereby keeping its standard up to the minimum it has now, of 240 equipments; because I think it is fair to assume that the average life of the double equipment, taken as a whole, will not exceed 12 years, the life of the motor being somewhat less than that, and that of the car we hope may exceed it possibly several years,—I mean the car bodies; but that, in the main, we hope that we will get an average life of twelve years out of them. So, taking 20 equipments annually, you would keep to your standard of 240 equipments, which is absolutely necessary to maintain—to operate—the Milwaukee Street Railway. I mean cars complete, with motors and complete electrical equipment."

For the causes thus stated, within general rules which are well known, it is manifest that this element must be taken into account before it can be determined that earnings derived from a plant are excessive; and in the same line there is much force in the argument of counsel that consideration should also be given to the factor of depreciation by amortization of franchises, as all the franchises in question terminate in the year 1924. The latter item, if allowed, would be a matter of simple computation; but a just measure of physical depreciation seems, to some extent, although only partially, involved in provisions for maintenance, and, while the testimony is very full and instructive upon this subject, it does not clear the case from serious difficulties in the way of stating a definite ratio or sum for such allowance. I am, however, clearly of opinion that neither of these elements is essential to the determination of the issues upon any aspect presented by the testimony, and that depreciation may be left to serve as an important factor of safety, in either view.

Second. As to valuation: For purposes of the company, the value of the property, including both railway and lighting plants, appears to have been placed at \$14,250,000, represented by the issue of bonds

for \$7,250,000; preferred stock, \$3,500,000; and common stock, \$3,500,000; but this aggregate was clearly excessive, after excluding the electric lighting department, and on no view can it be taken as the basis for the present consideration. The statements of the actual cost of the constituent street-railway properties, including the cash investment for improvements, are necessarily complicated, from the fact that payments were partly made in stocks and bonds, and the aggregate amount varies according to the ratio of valuation placed upon the bonds alone,—in two statements in which the stock is excluded, and in one statement which values both stock and bonds,—the minimum being \$9,024,107.85, and the maximum \$11,313,829.84. The former amount was subsequently modified (page 465, Complainant's Proof), making the statement of cost \$8,885,644.17; and as this excludes any valuation of stock, and places the value of the bonds at the discount agreed upon between the parties, which also seems fair, it may justly be taken as representing the true amount invested. But adoption of this purchase amount does not meet the issue, as it is the value of the investment, and not the amount paid, which must control. On the other hand, both parties introduce testimony placing valuations upon the various items of the plant as it exists in fact, upon the basis of its reproduction value. This amount, as stated by the witnesses for complainant, aggregates \$5,153,287.76; while, on the face of defendant's proofs, the value of the tracks and equipment is placed at \$2,358,799; the real estate and buildings being valued separately, and the highest valuation of the real estate being \$236,949, and of the buildings \$208,449, making the aggregate \$2,804,197. It appears, however, that these estimates on behalf of the defendant omit 27 miles of track, many parcels of real estate, and other items, so that counsel for defendant concedes that this aggregate should be increased to \$3,679,631. The wide difference in these amounts is mainly due to divergence in the estimates upon tracks and equipment. So the amounts on real estate and buildings, after allowance for the omissions, would appear higher on the valuations submitted by the defendant than those of the other side. For the valuation of tracks and equipment, the defendant relies upon the estimate made by Mr. Partenheimer, a witness of apparent ability and experience as a street-railway contractor, engaged in business at Chicago; but his examination of the plant was cursory, being made within three days, and could not give the detailed information upon which a just estimate for this inquiry must be based, and it is conceded that he left out of consideration many important items (aside from the error in mileage) which should enter in and would greatly increase the amount as estimated on his basis. Both upon its face and by reference to other source of information, this estimate is far below any fair valuation, for the purpose in view, either at the sum stated by the witness, or with the additions conceded on behalf of the defendant; the former amount being in fact \$320,000 short of the actual cash expenditures by the company for construction and equipment. Opposed to this, the estimate for complainant is made by Mr. Clark, an expert of distinction in this line, who gave weeks to the examination, with the aid of a corps of assistants, and presents the results in detailed state-

ments, so that his testimony and estimates impress me as well founded; and they are supplemented and supported by the testimony of Mr. Coffin, Mr. Payne, and other witnesses, and by comparative showing of mileage valuations in Massachusetts, which appear in the noteworthy system of reports published by that state. I am satisfied that the property of complainant represents a value, based solely upon the cost of reproduction, exceeding \$5,000,000. And I am further satisfied that this amount is not the true measure of the value of the investment in the enterprise. It leaves out of consideration any allowance for necessary and reasonable investment in purchase of the old lines and equipments, which were indispensable to the contemplated improvement, but of which a large part was of such nature that it does not count in the final inventory. No allowance enters in for the large investment arising out of the then comparatively new state of the art of electric railways for a large system, having reference to electrical equipment, weight of rails, character of cars, and the like, of which striking instance appears in the fact that the electric motor which then cost about \$2,500 can now be obtained for \$800; so that work of this class was in the experimental stage in many respects, and the expenditures by the pioneer in the undertaking may not fairly be gauged by the present cost of reproduction. Of the \$5,000,000 and over paid for the acquisition of the old lines, it would be difficult, if not impossible, from the testimony, to arrive at any fair approximation of the share or amount of tangible property which enters into the valuation in this inventory. It does appear that the roadways required reconstruction with new rails and paving, and that the amount stated was actually paid by the investors, making their investment nearly \$9,000,000. How much of this may be defined or apportioned as the amount which was both "really and necessarily invested in the enterprise" (vide *Road Co. v. Sandford*, supra) I have not attempted to ascertain, except to this extent: that I am clearly of opinion that at least \$2,000,000 of those preliminary expenditures are entitled to equitable consideration, as so invested, beyond the reproduction value, if the valuation of the investment is not otherwise found sufficient for all the purposes of this case, but no opinion is expressed in reference to the remaining \$1,885,644.

Third. The final inquiry, whether the net earnings shown are in excess of or equal to a just return upon the investment, presents no serious difficulty, under the premises above stated. Assuming \$5,000,000 as the basis of investment, the ratio of earnings would be as follows: (1) At the extreme computations of defendant, the yearly average would be \$364,000, which would yield .072 per cent.; (2) at the complainant's figures, after adding the corrections for taxes, the return would be .033 per cent.; (3) at the amounts which are above stated as my deductions from the testimony, the yearly average, being \$228,333, would make .045 per cent. Assuming \$7,000,000 as the basis, the ratio of earnings would be, upon each of said versions, as follows: For the first, .052 per cent.; for the second, .023 per cent.; for the third, .032 per cent.

The interest rate fixed in the bonds issued by the company is 5 per

cent. The rate which prevails in this market, as shown by the uncontroverted testimony, is 6 per cent. for real-estate mortgages and like securities. If the \$5,000,000 basis be adopted, surely a better rate must be afforded for the risks of investment than can be obtained on securities of this class, in which there is no risk. Upon the basis of \$7,000,000, which is more logical and just, the 5 per cent. named in the bonds is clearly not excessive, and should be accepted by a court of equity as the minimum of allowance; and, even upon the defendant's partial showing, the return would be less than one-quarter per cent. above that, with the large margin for depreciation left out of account.

I am of opinion that the testimony is not only convincing in support of the material allegations of the bill, but is uncontradicted and conclusive that the improved service received by the public, with the universal system of transfers, is well worth the five-cent rate charged therefor; that the company has not received earnings in excess of an equitable allowance to the investors for the means necessarily invested in furnishing such service; that enforcement of the ordinance would deprive complainant of property rights, by preventing reasonable compensation for its service; and that, therefore, the ordinance clearly violates the constitution of the United States, and is invalid. Decree must enter accordingly, and for an injunction as prayed in the bill.

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McGORRAY v. O'CONNOR et al.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1898.)

No. 407.

1. EQUITY—PLEADING—MOTIONS TO STRIKE.

A motion was made to strike out answers for want of certificates of counsel that the answer was well founded in law. The court denied the motion, "with leave to said defendants to further verify their answers, and add certificates, if so advised." *Held*, that this order was merely permissive, and not a decision, constituting the law of the case, that certificates to the answer were necessary.

2. SAME—CERTIFICATES TO ANSWER.

There is no equity rule requiring a certificate of counsel that an answer to the merits is well founded in law.

3. SAME—MOTION TO STRIKE.

A motion to strike out parts of the answer must be denied when not sufficiently specific to identify the portions to be stricken.

4. EQUITY PRACTICE—SETTING DOWN FOR HEARING.

Where over 90 days elapse after the filing of the replication without the taking of any testimony by plaintiff or any motion to extend the time for taking testimony, and thereafter plaintiff gives notice of motions to strike out certain portions of the answer, which motions are denied, there is no error in then setting the case down for hearing on the bill and answers.

5. MORTGAGE FORECLOSURE—RIGHT OF REDEMPTION—HEIRS AND SURVIVING PARTNER.

In California, where the law gives to a surviving partner absolute power of the control and disposition of the assets of the partnership (Code Civ. Proc. § 1585), the heirs of a deceased partner have no such interest in the partnership property as entitles them or their judgment creditors to redeem such property from a sale under a mortgage. 79 Fed. 861, affirmed.

**Appeal from the Circuit Court of the United States for the Northern District of California.**

Amos H. Carpenter, for appellant.

Olney & Olney and Dudley & Buck, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The appellant, Bernard McGorray, was the complainant in a bill in equity brought to redeem certain real property from a mortgage sale. C. W. Carpenter and C. K. Bailey were partners in farming and stock raising. They mortgaged a portion of their real estate to Myles P. O'Connor. Carpenter died, leaving a will, devising the greater portion of his property to his partner's children. The mortgage was subsequently foreclosed, and the mortgaged property was sold to the mortgagee. The complainant filed a bill in equity against O'Connor and others, claiming that the sheriff's deed which O'Connor had received was void, and praying that it be canceled, and that the complainant be allowed to redeem the premises described therein, basing his right to redeem upon the fact that he was the assignee of a judgment which had been obtained in an action at law against Clinton H. Carpenter, a brother of the said C. W. Carpenter, deceased, and one of his heirs at law. The defendant O'Connor filed a separate answer to the bill, and the other defendants united in a joint answer. Thereupon the complainant filed, on April 1, 1896, his replication to both answers. On June 29, 1896, the complainant gave notice to the defendants of a motion to strike out certain portions of the answers, on the ground that they were sham, redundant, and conclusions of law, and noticed the motion for July 6, 1896. Said motion was continued by the court to August 3, 1896. The complainant took no testimony on the issues; but on July 14th, and after the expiration of the 90 days allowed to take testimony, the defendants in the suit gave notice that they would set the cause down for trial. Three days later, the complainant served notice of a motion to strike the answers of the defendants off the files, on the ground that they were not accompanied by certificates of counsel, as required by rule 10 of the circuit court, certifying that, in the opinion of counsel, the answer "is well founded in point of law." On August 3, 1896, the motions came on to be heard. The motion to strike out the answers for want of the certificates was denied by the court, "with leave to said defendants to further verify their answers, and add certificates if so advised." The motion to set the cause for hearing upon the bill and answer was denied, and it was ordered that the motion to strike out parts of the answers and the motion for judgment on the pleadings be submitted upon briefs. Some months later the said order was revoked by the court. On March 27, 1897, the complainant filed and served a second notice of motion to strike the answers from the files, on the ground specified in the former motion, and because the defendants had failed to comply with the order of the court requiring them to attach said certificates. On March 31, 1897, that and the other mo-

tions pending were argued and submitted; whereupon the motion to strike out the answers for want of certificates and the motions to strike out portions of the answers were denied. Thereafter, on April 12, 1897, a final decree was entered, reciting that, the cause having been heard on the bill and the respective answers, it was decreed that the complainant was not entitled to any of the relief prayed for in his bill, and his bill was dismissed. 79 Fed. 861.

The appellant contends that upon the hearing before Judge Morrow, on March 31, 1897, the motion to strike the answers from the files for want of certificates was erroneously denied, since the law of the case was decided by Judge McKenna by his order of August 3, 1896, giving the defendants leave to attach the certificates, citing *Wakelee v. Davis*, 44 Fed. 532, and *Warswick Mfg. Co. v. City of Philadelphia*, 30 Fed. 625. To this it is sufficient to say that the order of court of August 3, 1896, did not require the defendants to attach such certificates. It was permissive in its terms, and left the defendants free to attach the certificates if they were advised that the same were necessary. The defendants evidently did not consider their answers open to objection upon that ground, and they very properly declined to avail themselves of the permission afforded them by the court. If the omission of such certificates had been ground for striking the answers from the files, the right to take advantage of such defect had clearly been waived by filing replications to the answers. But there was no necessity for such certificates. Rule No. 10 is a common-law rule, and has no application to suits in equity, and there is no equity rule requiring a certificate of counsel to an answer to the merits of the bill. Nor do we discover error in the ruling of the court upon the motions to strike out portions of the answers. As the record is presented in this court, it is impossible to identify any of the portions of the answers to which the motion was directed.

Counsel for appellant contend that the cause was wrongfully set for hearing upon the bill and answers before the pleadings were settled, and that they objected to said hearing for that reason, and upon the ground that they desired to take testimony as soon as the issues were complete. The record shows that more than 90 days had elapsed after the replications were filed before any motion against the answers was filed in court. The record shows no application to the court to extend the time for taking testimony, nor any affidavit stating grounds on which such extension could have been ordered. There was no error, therefore, in setting the case down for hearing upon the bill and answers on March 31, 1897.

We find no error in the decree dismissing the complainant's bill upon the hearing had upon the bill and the answers. One of the material allegations of the bill was the averment that the complainant was the assignee of the judgment which had been rendered against Clinton H. Carpenter. This was distinctly denied in O'Connor's answer. In a hearing upon the bill and answers under this condition of the pleadings, it would have been impossible for the court to have awarded relief against the principal defendant, the holder of the legal title to the property which was sought to be re-

deemed. But, aside from this, a further and complete answer to the asserted right of the complainant to the relief sought by his bill is found in the fact that the land which was mortgaged to O'Connor was the partnership property of the mortgagors. After the foreclosure of a mortgage on real estate and the sale of the mortgaged property, the right to redeem from the sale is purely statutory. Section 701 of the Code of Civil Procedure of California confers the right upon—First, the judgment debtor or his successor in interest in the whole or any part of the property; and, second, a creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The property belonged to the firm of Bailey & Carpenter. It may be assumed from the facts stated in the pleadings that the title was vested in the firm. Upon the death of Carpenter, the possession of the partnership property was vested in the surviving partner. He had the absolute right of possession, and the power to control the property until the affairs of the partnership were wound up. It is still in his hands as such surviving partner. No right of redemption has descended to the heirs of Carpenter. *Allen v. Hill*, 16 Cal. 113; *Theller v. Such*, 57 Cal. 447; *Robertson v. Burrill*, 110 Cal. 568, 42 Pac. 1086; *Smith v. Walker*, 38 Cal. 388. The appellant clearly comes within neither of the classes of persons who are given the statutory right to redeem the mortgaged property after a mortgage foreclosure and sale. His assignor is not the judgment debtor, nor is he his successor in interest, nor was he a creditor having a lien by judgment or otherwise on the property sold. The decree of the circuit court must be affirmed.

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ALLEN B. WRISLEY CO. v. GEO. E. ROUSE SOAP CO. et al.

(Circuit Court, E. D. Wisconsin. May 9, 1898.)

TRADE-MARKS—UNFAIR COMPETITION.

A solid blue label for packages of laundry soap, bearing the words "Old Country," is not infringed, or unfairly imitated, by the use of a label having on it the national colors of the United States, with the words "Our Country."

On motion for preliminary injunction to restrain the defendants from using the words "Our Country" as the designation of their manufacture of laundry soap, with the colors and form of labels on the packages shown in exhibits, based upon either of two grounds: (1) Infringement of complainant's trade-mark "Old Country," as applied to a brand of laundry soap; or (2) fraudulent simulation to palm off defendants' goods as those of complainant's manufacture.

Poole & Brown, for complainant.

Wigman & Martin and W. H. Timlin, for defendants.

SEAMAN, District Judge. The resemblance in form, size, and weight of the packages of soap in question and in the Manilla wrapper referred to in the bill filed is conceded to be common to other makes of laundry soap, and is clearly not actionable. There is no possible

confusion in the names of the respective manufacturers or their locations, but the similitude for which infringement or fraudulent appropriation is asserted rests in the use of the word "Country," with the qualifying word "Our," having the same initial letter and the same number of letters as in the word "Old" employed by the complainant; and that blue, which is the sole color printed on the complainant's label, is also made quite distinctive as one of the colors in defendants' label. On the other hand, the label of the defendants, taken as a whole, presents an appearance of contradistinction from the other. Instead of the sober single coloring of blue on the "Old Country" design, the defendants give emphasis to their assumption of patriotism in the title "Our Country" by taking on the national colors, so that the label is made in red, white (or buff), and blue; the stars and stripes being dominant in the general effect, and red, rather than the blue, the dominant color. The design, more effusive than æsthetic, has the effect of a challenge rather than a disguise. Surely, there can be no reasonable presumption that any purchaser of sufficient intelligence to know the want of a special brand, and looking for one marked as an "Old Country" production, would expect to find it under this fervid display of nativity.

I have carefully considered the authorities cited on behalf of the complainant, and not only recognize, but heartily concur in, the doctrine which prevails in this circuit, strongly favoring the equitable remedy against fraudulent means to divert or attract the legitimate trade belonging to another by disguises which impose upon unwary purchasers. *Pillsbury v. Mills Co.*, 24 U. S. App. 395, 12 C. C. A. 432, and 64 Fed. 841; *Johnson v. Bauer*, 27 C. C. A. 374, 82 Fed. 662. See, also, *N. K. Fairbank Co. v. R. W. Bell Mfg. Co.*, 45 U. S. App. 190, 23 C. C. A. 554, and 77 Fed. 869; and note to *Scheuer v. Mueller*, 20 C. C. A. 165. But within the utmost extension of that doctrine no ground is established here, in my opinion, to grant the preliminary injunction prayed for. It must be left to final hearing to determine the weight which may be given to the term "Country," so far as that word may have been appropriated by the complainant to designate its manufacture of soap, especially in view of the showing on behalf of the defendants that the term has long been in popular use as some portion of the trade name of numerous other productions of soap, at least antedating the recording of complainant's trademark, and apparently unquestioned. Therefore the injunction pendente lite is denied.

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GENERAL ELECTRIC CO. v. LA GRANDE EDISON ELECTRIC CO. et al.

(Circuit Court of Appeals, Ninth Circuit. May 10, 1898.)

No. 416.

**MORTGAGES—FORECLOSURE—TRUSTEES—SECURED BONDHOLDERS.**

A holder of bonds secured by a general mortgage, to a trustee for the benefit of all the bondholders, although the right to sue belongs to him individually, may not bring a suit to foreclose the mortgage either for the interest or the principal due, without alleging that the trustee has been requested to bring the suit, and has refused, or without showing some other reason why the trustee may not represent him in the suit.

Appeal from the Circuit Court of the United States for the District of Oregon.

Frederick V. Holman, for appellant.

Dolph, Mallory & Simon, for appellee Security Savings & Trust Co.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The appellant was the complainant in a suit in which its bill was dismissed in the circuit court, upon the ground that, as holder of certain bonds, it had brought a suit for foreclosure, without alleging that it had requested the trustee to commence the suit, or alleging any reason for instituting the suit in its own name, save the fact that the mortgagor has failed to pay certain interest coupons, and the trustee has failed to bring suit or to foreclose the mortgage. The mortgage to the trustee provides that upon default by the mortgagor in payment of interest or taxes or any of the bonds as they should fall due, and the continuance of such default for the period of 30 days after notice by the trustee, the trustee might take possession of and operate the mortgaged property. The trustee was "also authorized, instead of so doing, and with or without taking of said plant, to treat the whole amount of the principal of said bonds, together with all accrued and unpaid interest, as immediately due and payable, and thereupon to proceed to sell and dispose of said property at public auction after due notice and advertisement, as provided therein, and, from the proceeds arising from such sale (after the payment of all taxes, expenses, and charges upon said property, and expenses of such sale, including compensation to said trustee, and reasonable allowance for attorney and counsel fees), to pay the said bonds and coupons." And it was further provided, as one of the conditions of said mortgage or deed of trust, that the foregoing provisions for the sale of said property by the said trustee, under the above-recited powers, should be cumulative upon the ordinary remedies of foreclosure by entry or suit therefor. The appeal challenges the ruling of the circuit court in dismissing the bill.

The rule that a holder of bonds which are secured by a general mortgage to a trustee, for the benefit of all the bondholders, may not bring a suit to foreclose the mortgage either for the interest or the principal due, without alleging that the trustee has been requested to bring the suit, and has refused, or without showing some other reason why the trustee may not represent him in the suit, has been, we believe, so generally acquiesced in that the courts have rarely been called upon either to apply the rule or to consider the reasons on which it is founded.

Said the court in *American Tube & Iron Co. v. Kentucky Southern Oil & Gas Co.*, 51 Fed. 826:

"The preference in favor of a trustee in the absence of a contract giving a preference is because the trustee is presumed to represent all of the bondholders, and its convenience in practice; but, if the trustee has accepted a

position antagonistic to his duty as such trustee, then he forfeits this preference as against a bondholder."

In section 6210 of Thompson on Corporations it is said:

"Ordinarily, such bondholders have no right to bring an action to foreclose the mortgage, but the trustee in the mortgage, as stated in the preceding section, is the proper person to sue. But if he neglects to sue, after the happening of the condition which entitles the bondholders to a foreclosure, and after being requested by them so to do, they may bring the action to foreclose, making him a party defendant,"—citing *Owens v. Railroad Co.*, 20 Fed. 10; *Beekman v. Railway Co.*, 35 Fed. 3.

The appellant earnestly contends that the rule so quoted is not sustained by the authorities. We have carefully considered all the cases to which our attention has been directed, and we will briefly review them.

*Alexander v. Railroad*, 3 Dill. 487, Fed. Cas. No. 166, was a case in which the bill to foreclose the mortgage contained the allegation that the bondholders, who were the complainants in the suit, brought the same for themselves and all other bondholders similarly situated. The bill alleged that they had requested the trustee of the mortgage to bring the suit, and that it had refused. It contained no allegation that the complainants were a majority of the bondholders, or that a majority had made the request to the trustee. On demurrer to the bill the court said:

"There is no restriction in the deed of trust before us, upon the right of the coupon holder to foreclose for interest upon default, although a majority of the bondholders do not unite in the suit, or request the trustee to bring it. The provision in question gives a majority of the bondholders, on default of the payment of interest, the option or election, after the expiration of a year from the default, to have the whole principal sum become due at once, and the mortgage security enforced accordingly. This is not inconsistent with the unabridged right of any coupon holder to foreclose for interest, in the manner sought in the present bill; and it was not necessary that a majority of the coupon holders should unite in bringing the bill, or in a request to the trustee to bring it. As the bill alleges that the trustee refused to bring suit, the bill was properly brought in the name of the plaintiffs, for themselves and the other coupon holders, making the trustee a defendant."

This authority surely does not sustain the appellant's contention. As we read it, it is clearly in harmony with the rule which we have quoted from Thompson on Corporations. In recognizing "the unabridged right of any coupon holder to foreclose for interest, in the manner sought in the present bill," the court undoubtedly had in view the right of such a complainant to foreclose only after a request to the trustee and the trustee's refusal, for such was the manner pursued in the "present bill."

The case of *Howell v. Railway Co.*, 94 U. S. 463, is cited. That was a case in which the right of a bondholder to foreclose the mortgage for due and unpaid interest was recognized. No question was raised before the appellate court concerning the right of the bondholder to bring the suit. The record is silent concerning the reason why it was not brought by the trustee. It may fairly be presumed that the bill contained the averment that the trustee had, upon request, refused to bring the suit, or some other averment satisfactorily explaining to the court the reason why the suit was brought by the bondholder.

In the case of *Railroad Co. v. Fosdick*, 106 U. S. 47, 1 Sup. Ct. 10, the court said:

"We are of the opinion that, independently of the provisions of the other articles, the trustees, or, in their failure to do so, any bondholder, on nonpayment of any installment of interest on any bond, might file a bill for the enforcement of the security by the foreclosure of the mortgage and sale of the mortgaged property. This right belongs to each bondholder separately, and its exercise is not dependent upon the co-operation or consent of any others, or of the trustees. It is properly and strictly enforceable by and in the name of the latter, but, if necessary, may be prosecuted without, and even against, them."

We search this case in vain for any expression of the court which gives countenance to the appellant's contention. The language above quoted, that the "right belongs to each bondholder separately, and its exercise is not dependent upon the co-operation or consent of any others, or of the trustees," is not pertinent to the question now before us. No issue is raised in the present case to which that language is applicable. It may be admitted that the right of the bondholder to sue belongs to him individually, and, in its exercise, he is not required to obtain the co-operation or consent of other bondholders or of the trustee. All that he is required to do is to give the trustee the opportunity first to bring the suit, in the interest of all the beneficiaries, by requesting him to do so, or to show some reason why the trustee may not represent him in the proceedings.

In the case of *Hammond v. Tarver* (Tex. Sup.) 34 S. W. 729, a collateral attack was made upon the decree of a court foreclosing a trust deed, and confirming the sale of property thereunder, upon the ground that the trustee had not been made a party to the suit. The supreme court of Texas held that in that state the trustee in such a mortgage is not a necessary party to the foreclosure suit. It does not follow from that ruling, however, that a holder of bonds under such a trust deed could foreclose in the courts of Texas without averring in his complaint that the opportunity had first been afforded the trustee to bring the suit.

The case of *Dupee v. Rose* (Utah) 37 Pac. 567, is authority for the proposition that a power to sell, contained in a trust deed, does not divest a court of chancery of jurisdiction to enforce the rights of the parties thereto; that such power is merely cumulative to that granted by law. In that case the plaintiff was the sole beneficiary of the trust deed, and no question was raised of his right to prosecute the suit.

None of the other cases cited by counsel for the appellant are believed to be in point upon the question which the appeal presents. In the main, they support the proposition that a bondholder is not deprived of the usual remedies which a court of equity recognizes as his from the fact that the trust deed contains conditions and recitals prescribing the method in which foreclosure shall be had, and imposing conditions upon the exercise by the bondholders of the right to foreclose.

We find no error in the decree of the circuit court dismissing the bill, and it is accordingly affirmed.

LOUISIANA, A. & M. R. CO. v. BOARD OF LEVEE COM'RS OF TENSAS  
BASIN LEVEE DIST.

(Circuit Court of Appeals, Fifth Circuit. April 26, 1898.)

No. 650.

1. APPEAL AND ERROR—SUFFICIENCY OF ASSIGNMENTS OF ERROR.

Assignments of error that in substance amount to only that the court erred in deciding the case for the opposite party are not specific enough to demand consideration.

2. LEVEES—POWERS AND DUTIES OF BOARDS.

The act of July 3, 1886 (Sess. Laws, p. 96), of the Louisiana legislature, creating the Tensas Basin Levee Board, authorizing it to assess taxes, collect and receive funds, and hold and administer the same, and granting to it large tracts of public lands to be expended by it discreetly for the purpose of carrying out the purposes of the act, created not a merely ministerial and executory functionary, but a full-fledged municipal corporation, with large discretion as a fiduciary agent, and with full power to sue in regard to the trust imposed.

3. SAME—POWER OF BOARDS TO CONTRACT.

The constitution of Louisiana (article 214) authorizes the legislature to create levee districts, the boards of which shall have supervision of the levees in said districts. Article 216 gives power with the concurrence of the adjacent state or states to create levee districts composed of territory partly in the state and partly in adjacent states. Act No. 59, 1886, § 17, provides that the Tensas Basin District, in Louisiana, shall have the right to join with any levee district embracing the counties of Chicot and Desha, in Arkansas, for mutual protection. *Held*, that a contract by the Tensas Basin District for the building of a levee in Chicot county, Ark., in opposition to the levee authorities of that state, was ultra vires and void.

4. SAME—CONTRACT BY RAILROAD FOR EMBANKMENT.

Defendant, an Arkansas railroad company, contracted with plaintiff, a Louisiana levee district, to build a portion of its railroad in Arkansas in the form of a levee embankment, of a certain height, which should serve the purpose of a levee as well as a railroad bed. The statutes of Arkansas forbid the building of railroad embankments which will interfere with the natural flow of the water, and the levee authorities in the district where the road was proposed to be built opposed it by legislation. *Held* that, the contract being impossible of performance, it should be rescinded.

5. SAME—WHAT ARE PUBLIC IMPROVEMENTS.

Acts La. 1888, No. 77, § 2, gave the Tensas Basin Levee District all the state lands within the district to be used for the purpose of building a system of levees or other public improvement for the purpose of protecting the district from disastrous floods, and authorized the board to dispose of the lands in such manner as it should deem proper. Const. La. art. 56, prohibits the granting of the property of the state to private enterprise. The board contracted with a railway company for the building of a portion of its road in the form of a levee embankment, which the state engineer reported would be of great value to the district. *Held*, that the railway was, to the extent it would protect the district, a "public improvement," contemplated by the statute, though owned at its completion by private persons, and used for another purpose besides being a mere levee.

6. CONTRACTS—TIME OF PERFORMANCE—RESCISSION.

A railroad company agreed to perform certain work by a stipulated time unless it is "by reason of the elements, litigations, strikes, financial panics, epidemics, or any other cause unforeseen or beyond the control of said railroad company, its successors or assigns, hindered or delayed or otherwise prevented from properly prosecuting said work. In such case, time not being the essence of this contract, the date herein fixed for completion \* \* \* will not be adhered to, but credit for the time so lost shall be given and allowed to said railroad company, its successors or assigns, and the time so lost shall be added to that herein required for

the completion of" this contract. *Held* that, whether or not the company could ever be defaulted under the contract, Rev. Civ. Code La. art. 2765, providing that "the proprietor has a right to cancel at pleasure the bargain he has made, even in case the work has already been commenced, by paying the undertaker for the expense and labor already incurred, and such damages as the nature of the case may require," gave the contracting parties the right to declare the contract at an end at any time before its completion.

Appeal from the Circuit Court of the United States for the Western District of Louisiana.

The following statement is reprinted from appellee's brief:

The appellee, the Board of Levee Commissioners of the Tensas Basin Levee District (whom we will hereafter designate as the "Levee Board"), brought suit in the district court of Richland parish, La., against the Louisiana, Arkansas & Missouri Railroad Company (which we will hereafter designate as the "Railroad Company"), to annul certain contracts and conveyances made by the Levee Board to the Railroad Company, of some 700,000 acres of land granted to the Levee Board by the state of Louisiana. The suit was removed for trial into the United States circuit court for the Western district of Louisiana; and, from an adverse judgment, restoring the lands in controversy to the Levee Board, the Railroad Company has appealed. The appellant asserts title to the lands in controversy by virtue of the following contracts between it and the Levee Board, which, for the convenience of the court, we print in full:

First Agreement.

"Dy. Sheriff of Richland Parish, La.

"Exhibit A. Contract.

"These articles of agreement, made and entered into this third day of May, A. D. 1889, at Rayville, in the state of Louisiana, by and between the Board of Levee Commissioners of the Tensas Levee District and the Louisiana, Arkansas and Missouri Railroad Company, of Arkansas, witnesseth: That for and in consideration of the payments hereinafter provided for, and agreed to be made by the said Board of Levee Commissioners of the Tensas Basin Levee District, the said the Louisiana, Arkansas and Missouri Railroad Company agrees and binds itself to construct and complete above overflow, in a thorough and workmanlike manner, under the supervision and direction of the Board of State Engineers of the State of Louisiana, and thereafter to maintain, all that certain embankment or portion of its roadbed proposed by said Railroad Company to be located in the state of Arkansas, between a point where the line of railroad projected by said company shall cross Crooked Bayou, in section —, township — south, range — west, and a point on the northern terminus of what is known as the 'Bayou Macon Ridge,' in section —, township — south, —, range — west. Said embankment or roadbed, when constructed, may be forever afterwards used as its roadbed by the said Louisiana, Arkansas and Missouri Railroad Company, its successors and assigns. The course of said embankment is to be in a general northerly and southerly direction on the west of Bayou Macon. Said embankment shall be constructed according to either one of the two following specifications, except where the same, or either of them, may hereafter, upon the request of said Railroad Company, be modified by the said board of state engineers, that is to say:

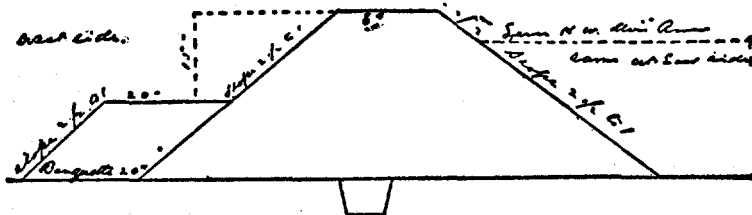
"Specification 1.

"Said embankment shall have a width on top not less than eight (8) feet, and side slopes not steeper than three feet horizontal to one foot vertical. It shall be built and maintained up to a height of not less than three and one-half (3½) feet above the elevation of the highest known water marks in the Mississippi river, in the same latitude. It shall be constructed of earth, free from all trash, brush, or perishable matter. All stumps, logs, roots, stalks, weeds, grass, trash, and perishable matter of every kind shall be removed. A muck ditch shall be cut along the center line four (4) feet wide on

top, two (2) feet wide on the bottom, and three feet deep. All trees coming within the base of the embankment shall be cut to the surface of the ground, and all decayed roots and stumps shall be grubbed out. All buried logs, brick walls, and other material considered unsuitable shall be removed. A berme of not less than fifteen (15) feet in width must be left undisturbed on the east side, and of not less than fifty (50) feet on the west side of the line.

"Or, Specification 11.

"Said embankment shall have a width on top of not less than eight (8) feet, and side slopes not steeper than two and one-half ( $2\frac{1}{2}$ ) feet horizontal, to one (1) foot vertical. It shall be built and maintained up to a height not less than two and one-half ( $2\frac{1}{2}$ ) feet above the elevation of the highest known water marks in the Mississippi river in the same latitude. Whenever said embankment is over fifteen (15) feet high, there shall be added thereto on the west side thereof an 'Extra Base' or 'Banquette,' twenty (20) feet wide, level on top, and extending up to within fifteen (15) feet of the top of the main embankment, as shown in the following diagram:



"Said embankment shall be constructed of earth, free from all trash, brush, or perishable matter. All stumps, logs, roots, stalks, weeds, grass, trash, and perishable matter of every kind shall be removed. A muck ditch shall be cut along the entire line, four (4) feet wide on top, two (2) feet wide on the bottom, and three (3) feet deep. All trees coming within the base of the embankment shall be cut to the surface of the ground, and all decayed roots and stumps shall be grubbed out. All buried logs, brick walls, and other material considered unsuitable shall be removed. A berme of not less than fifteen (15) feet in width shall be left undisturbed on the east side, and of not less than fifty (50) feet on the west side of the line.

"In consideration of the covenants and agreements hereinabove contained, and made by the Louisiana, Arkansas and Missouri Railroad Company, the Board of Levee Commissioners of the Tensas Basin Levee District agrees and binds itself and its successors to pay or cause to be paid to the Louisiana, Arkansas and Missouri Railroad Company, its successors or assigns, for the construction of said embankment and the annual maintenance thereof, as follows, viz.: First. Upon the completion of said embankment, fifty thousand (\$50,000) dollars in cash, or in the bonds the said Board of Levee Commissioners is or may be authorized to issue. Second. A five (5) mill tax in cash, annually, upon all taxable property subject to taxation for levee purposes, that now is, as well as that which may hereafter be, embraced within the limits of the Tensas Basin Levee District, for a period of twenty years from the first day of January, A. D. 1891; said tax shall be paid annually. The first installment shall be paid on the first day of May in each and every year thereafter, until the completion of said time of twenty years. Third. A one and one-half cents per acre tax, in cash annually, upon all lands subject to taxation for levee purposes, that are now, as well as those that may hereafter be, embraced within the limits of the Tensas Basin Levee District, for a period of ten (10) years from the first day of January A. D. 1891. Said tax shall be paid annually, at the same time and in the same manner as the five-mill tax hereinbefore provided for is to be paid. Fourth. Ninety per centum of the gross proceeds derived from the sales of land located within the limits of the Tensas Basin Levee District, if any such sales have been made by the state of Louisiana, from and after the sixth day of January,

A. D. 1888, and to which proceeds the said Board of Levee Commissioners became and were entitled by virtue of Act No. 59 of the Laws of 1886; also ninety per centum of the gross proceeds derived from the sales of any and all lands now belonging, or that may hereafter belong, to, and become the property of, said Board of Levee Commissioners by virtue of Act No. 77 of the Laws of 1888, and now, as well as those which may hereafter be, embraced within the limits of the Tensas Basin Levee District, for a period of ten years next ensuing from and after the date hereof, whether those are lands originally granted by congress to the state of Louisiana, or whether said lands be lands heretofore or hereafter forfeited to, or bought in by or for, or sold to, the state at tax sales, for nonpayment of taxes: provided, however, and it is expressly understood and agreed, that no payment shall be asked for, nor made under this provision, until the work herein contemplated and agreed to be constructed shall be completed. The first payment shall be for all lands sold prior to such completion, and after the sixth day of January, A. D. 1888. Thereafter payments shall be made on the first days of November and May, in each and every year until the full end of said period of ten years from the date hereof, for all lands sold during the six months immediately preceding. And the state of Louisiana, having, by legislative enactment (Act No. 77, Laws 1888), given, granted, bargained, donated, conveyed, and delivered unto the Board of Levee Commissioners of the Tensas Basin Levee District all the lands which at the date of the passage of said act belonged, or that might hereafter belong, to said state of Louisiana, and embraced within the limits of the Tensas Basin Levee District, as said limits were in and by said Act No. 77 of the Laws of 1888 reconstituted and enlarged, and therein made provision for the conveyance of said lands to said Board of Levee Commissioners, by proper instruments of conveyance, and further provided that, upon said deeds being properly recorded, the title to said lands, with the possession thereof, should vest absolutely in said Board of Levee Commissioners, its successors and grantees, with full power and authority to said board to sell, mortgage, pledge, or otherwise dispose of said lands, in such manner and at such times and for such prices as to said board shall seem proper. The Louisiana, Arkansas and Missouri Railroad Company, its successors and assigns, may, at any time after the completion of said work, in lieu of receiving said ninety per centum of said cash proceeds, select at its option, in such localities and in such quantities as it or they may from time to time desire, ninety per centum of the lands that are now, as well as those which may hereafter be, embraced within the limits of the Tensas Basin Levee District, and be so conveyed to said Board of Levee Commissioners. And, immediately after each selection of aforesaid said lands so selected, with the immediate possession thereof, shall be conveyed to said Railroad Company, its successors or assigns, by said Board of Levee Commissioners, or its successors, by proper instruments of conveyance.

"It is further stipulated and agreed that said Railroad Company shall, from and after the execution and delivery of this contract, be permitted and have the right to exercise said option, which, however, shall take effect only from and after the completion of the work herein provided for. But, from and after the exercise of said option, no lands shall be sold by said Board of Levee Commissioners until after the selection of the ninety per centum to which said company may be entitled, without the written consent of said company be first obtained. Active operations on the work herein contemplated and agreed to be performed by said Railroad Company shall be commenced within ninety days next ensuing after the date hereof; and the whole of said embankment shall be fully completed on or before the first day of October, A. D. 1890, unless said Railroad Company, its successors or assigns, are, by reason of the elements, litigations, strikes, financial panics, epidemics, or any other causes unforeseen or beyond the control of said Railroad Company, its successors or assigns, hindered and delayed or otherwise prevented from properly prosecuting said work. In such case, time not being the essence of this contract, the date herein fixed for completion will not be adhered to, but credit for the time so lost shall be given and allowed to said Railroad Company, its successors or assigns; and the time so lost shall be added to that herein required for the completion of this contract. It is

understood and agreed that no payment shall be asked for nor made under any of the several provisions hereinabove contained until the work herein contemplated and agreed to be constructed shall be completed.

"Said Board of Levee Commissioners further agree to give, grant, bargain, sell, and convey unto said Railroad Company, its successors or assigns, a certain piece or strip of land contained and included between two parallel lines, two hundred (200) feet apart, situated one on each side of the center line of the roadbed of said Railroad Company as the same has been, now is, or may hereafter be, selected and located by said Railroad Company, its successors and assigns, through, across, and over any of the lands that now do or may hereafter belong to said Board of Levee Commissioners. Together with the right to take from lands outside of said limits so much and such parts thereof as may by said Railroad Company, its successors or assigns, be deemed necessary for its purposes or for the construction of the embankment herein provided for. Said Railroad Company, its successors or assigns, may, by their agents or otherwise, enter at once into and upon said lands, and construct their road. It is further understood and agreed that the covenants, conditions, and provisions herein contained shall in all things be valid, subsisting, and binding upon the successors and assigns of the respective parties hereto.

"In witness whereof, the said Board of Levee Commissioners of the Tensas Basin Levee District hath caused its official seal to be hereunto affixed, and the same to be attested by its secretary, and these presents to be executed in duplicate, and subscribed by its president. And the said the Louisiana, Arkansas and Missouri Railroad Company hath caused its seal to be hereunto affixed, and these presents to be executed in duplicate, and subscribed by its president, the day and year first hereinabove mentioned.

"In presence of W. G. Wright & Wiley P. Mangham, competent witnesses.

"The Board of Levee Commissioners of the Tensas Basin Levee District,  
 "[Seal.] By H. P. Wells, President.

"Attest:

"Stephen Faulk, Secretary.

"The Louisiana, Arkansas and Missouri Railroad Company,  
 "[Seal.] By Harlow M. Hoyt, President.

"Witnesses:

"W. G. Wright.

"Wiley P. Mangham."

#### Second Agreement.

##### "Exhibit B.

#### "Articles of Agreement.

"These articles of agreement, made and entered into this twenty-fifth day of July, A. D. 1890, at Rayville, in the state of Louisiana, by and between the Board of Levee Commissioners of the Tensas Basin Levee District and the Louisiana, Arkansas and Missouri Railroad Company, of Arkansas, witnesseth:

"That whereas, an agreement was heretofore entered into by and between the parties hereto, bearing date the 3d day of May, 1889, providing for the construction by the Louisiana, Arkansas and Missouri Railroad Company of a certain portion of its embankment or roadbed in the state of Arkansas, according to certain specifications in said contract set forth, and providing further for certain payments to be made therefor by the Board of Levee Commissioners of the Tensas Basin Levee District; and whereas, said Railroad Company, having been so requested, has agreed to relinquish and forever discharge said Board of Levee Commissioners of the Tensas Basin Levee District from making a part of the payments in and by said contract of May 3d, 1889, agreed to be made, and has also agreed to do and perform certain other acts as hereinafter set forth, but only in consideration of said Board of Levee Commissioners changing the date of completion of said embankment, from October 1st, 1890, to October 1st, 1891, and conveying and transferring the lands now owned by said Board of Levee Commissioners to said Railroad Company upon the execution and delivery of this contract: Now, therefore, in consideration of the premises, and of the sum of one dollar each to the other in hand paid on or before the ensealing and delivering of

these presents, the receipt whereof each from the other is here acknowledged, said parties hereto do mutually covenant, promise, and agree as follows, viz.: First. The fifty thousand dollars in cash or bonds, and the one and one-half cents per acre tax in and by said contract of May 3rd, 1889, agreed to be paid to said Railroad Company, is hereby relinquished by said Railroad Company, and the Board of Levee Commissioners of the Tensas Basin Levee District is forever discharged from the payment of the same, or either thereof. Second. The Louisiana, Arkansas and Missouri Railroad Company agrees to execute and deliver to said Board of Levee Commissioners its corporate bond in the sum of one hundred thousand dollars, conditioned to keep the embankment in and by said contract of May 3rd, 1889, agreed to be constructed, in repair during the corporate existence of said the Louisiana, Arkansas and Missouri Railroad Company, but no longer, and to renew said bond whenever, during said corporate existence, a surety thereon shall die or become insolvent. Third. The Louisiana, Arkansas and Missouri Railroad Company covenants, promises, and agrees to begin work, or cause work to be commenced, at Delhi, Louisiana, with a good force of hands, within ninety days after work is resumed upon the embankment, in said contract of May 3rd, 1889, mentioned, and to continue actively and earnestly at work until a railroad is completed and in operation, northward from Delhi to and as far as the northern terminus of the Bayou Macon Hills, at the Boeuff Cut-Off, in Chicot county, Arkansas. And said Railroad Company further covenants, promises, and agrees so [to] complete said embankment in said contract agreed to be constructed, and entire line of railroad from Helleys, Arkansas, to Delhi, Louisiana, on or about the first day of October, A. D. 1891, unless it, its successors or assigns, are by reason of the elements, litigations, strikes, financial panics, epidemics, or any other cause unforeseen or beyond the control of said Railroad Company, its successors or assigns, hindered or delayed or otherwise prevented from properly prosecuting said work. In such case, time not being the essence of this contract, it is particularly understood and agreed that the date herein fixed for the completion of said embankment and said railroad will not be adhered to, but credit for the time so lost shall be given, and allowed to said Railroad Company, its successors or assigns; and the time so lost shall be added to that herein required for the completion of said contract of May 3rd, 1889, and the fulfillment of this contract. Fourth. The Louisiana, Arkansas and Missouri Railroad Company further covenants, promises, and agrees, not only to keep said embankment across said Boeuff Cut-Off, in Chicot county, Arkansas, in repair, but also to place thereon a standard-gauge railroad, and to maintain and operate the said railroad after it is completed.

"The Board of Levee Commissioners of the Tensas Basin Levee District, on its behalf, agrees for itself and its successors as follows: First. The date in the contract of May 3rd, 1889, fixed for the completion of said embankment in Chicot county, Arkansas, viz. the first day of October, 1890, shall be, and is hereby, changed and extended to October 1st, A. D. 1891, to the same intent and with the like effect as though the date originally designated in said contract had been October 1st, A. D. 1891, instead of October 1st, A. D. 1890. Said change of date, however, shall not abrogate nor in any manner affect any of the provisions in said contract contained, relative to the various contingencies and conditions therein provided for allowance of additional time, but the same shall remain and continue as in said contract set forth. Second. Immediately upon the execution and delivery of this contract, said Board of Levee Commissioners of the Tensas Basin Levee District shall convey, by proper instruments of conveyance, executed by its president in behalf of and in the name of said board, to the said Louisiana, Arkansas and Missouri Railroad Company, its successors or assigns, all of the land now belonging to said Board of Levee Commissioners of the Tensas Basin Levee District. Said instruments of conveyance shall respectively contain the following provisions, viz.: 'In the event of the failure of the said the Louisiana, Arkansas and Missouri Railroad Company, its successors or assigns, to construct that certain portion of its roadbed or embankment in Chicot county, Arkansas, described in a certain contract made by and between the parties hereto, bearing date the 3rd day of May, 1889, according to either one or two spec-

fications prescribed in the said contract, which said contract is of record in the office of the recorder of the parish in which the said lands are situated, within the periods and additional times allowed to said Railroad Company, and upon the judicial determination of such failure, then and in such cases said the Louisiana, Arkansas and Missouri Railroad Company covenants, promises, and agrees to reconvey and return the lands herein conveyed to said Board of Levee Commissioners of the Tensas Basin Levee District.' 'The transfer and conveyance of said lands is made under and in pursuance of the authority given to said board in and by the laws of the state of Louisiana, and as a means and mode of making part payment for the construction of an embankment according to certain specifications prescribed by the Board of State Engineers of the State of Louisiana, and fully set forth in said contract of May 3rd, 1889, which said embankment, when completed, said Board of State Engineers have certified will aid in protecting the Tensas Basin Levee District from overflow.' It is mutually understood and agreed, and with the exception of the change and modifications herein made or provided for, the contract of May 3rd, 1889, between the parties hereto, shall remain unchanged and in full force and effect.

"In witness whereof, the said parties have caused their respective corporate seals to be hereunto affixed, and these presents to be subscribed by their respective presidents, the day and year hereinabove first mentioned.

"In presence of William J. Curtis and Thomas C. Wellman, competent witnesses.

"The Board of Levee Commissioners of the Tensas Basin Levee District,

"[Seal.]

H. P. Wells, President.

"Attest:

"Stephen Faulk, Secretary.

"The Louisiana, Arkansas and Missouri Railroad Company,

"[Seal.]

Harlow M. Hoyt, President.

"Witnesses:

"W. J. Curtis as to H. P. W.

"T. C. Wellman as to H. M. H."

### Third Agreement.

#### "Exhibit C.

#### "Articles of Agreement.

"These articles of agreement, made and entered into this, the twelfth day of October, A. D. 1891, at Rayville, in the state of Louisiana, by and between the Board of Levee Commissioners and the Louisiana, Arkansas and Missouri Railroad of Arkansas, witnesseth: That for and in consideration of the sum of one dollar each to the other in hand paid, on or before the ensealing and delivery of these presents, the receipt whereof each from the other is hereby acknowledged, said parties hereto do mutually covenant, promise, and agree as follows, viz.: First. The several dates named in said contracts of May 3rd, 1889, and July 25th, 1890, for the completion of said contracts, namely, October 1st, 1890, and October 1st, 1891, shall be, and they are hereby, changed and extended to December 31st, 1893, to the same intent and with the like effect as though said date, December 31st, 1893, had been the date originally designated in said contracts, instead of October 1st, 1890. And, second. The period in said contracts limited for the levy and payment of the five-mill tax shall be, and it is hereby, changed to and held to mean a period of twenty years from the first day of January, in the year following that year in which the work in said contracts contemplated shall be completed, instead of twenty years from the first day of January, A. D. 1891. The first installment shall be paid on the first day of May, in the year following that year in which the work contemplated shall be completed, and the subsequent installments on the first day of May in each year thereafter, until the full end and completion of said time of twenty years. Third. With the exception of the changes and modifications herein provided for, the contracts of May 3rd, 1890, and July 25th, 1890, between the parties thereto, and shall remain unchanged and in full force and effect.

"In witness whereof, the said parties hereto have caused their respective corporate seals to be hereunto affixed, and these presents to be subscribed

by their respective presidents, the day and year hereinabove mentioned, in presence of L. N. Polk and A. L. Hopkins, competent witnesses.

"The Board of Levee Commissioners of the Tensas Basin Levee District,  
[Seal.] By H. P. Wells, President.

"The Louisiana, Arkansas and Missouri Railroad Company,  
[Seal.] By Harlow M. Hoyt, President.

"Witnesses:

"L. N. Polk.

"A. L. Hopkins."

Conveyance to Railroad Company.

"Exhibit 5.

"Deed of Land Situated in Richland Parish, Louisiana, from the Board of Levee Commissioners of the Tensas Basin Levee District to the Louisiana, Arkansas and Missouri Railroad Company.

"State of Louisiana, Parish of Richland. Know all men by these presents, that I, Hansel P. Wells, acting herein for and as president of the Board of Levee Commissioners of the Tensas Basin Levee District of the State of Louisiana, and acting herein also in pursuance to a resolution passed by said Board of Commissioners at a regular meeting thereof held on the 25th day of July, A. D. 1890, and in pursuance to the terms of a contract entered into by said board on said date with the Louisiana, Arkansas and Missouri Railroad Company, a corporation duly organized under and by virtue of the laws of the state of Arkansas, have this day sold, and I do by this act sell, transfer, set over, and deliver unto said the Louisiana, Arkansas and Missouri Railroad Company, the following described tracts or parcels of land, situated in the parish of Richland, and in the state of Louisiana, belonging to said Board of Levee Commissioners, to wit: [Description omitted.] To have and to hold said tracts or parcels of land unto the said the Louisiana, Arkansas and Missouri Railroad Company, its successors and assigns, forever. The consideration for which the above sale is made is the completion on the part of said Railroad Company of the embankment in the state of Arkansas agreed to be constructed by said Railroad Company in and by a certain contract dated May 3rd, 1889. In event of the failure of the said the Louisiana, Arkansas and Missouri Railroad Company, its successors or assigns, to construct that certain portion of its roadbed or embankment in Chicot county, Arkansas, described in a certain contract made by and between the parties hereto, bearing date the 3rd day of May, 1889, according to either one of two specifications prescribed in the said contract, which said contract is of record in the office of the recorder of the parish of Richland, in which the lands aforesaid are situated, within the periods and additional to said Railroad Company, and upon the judicial determination of such failure, then and in such cases said the Louisiana, Arkansas and Missouri Railroad Company covenants, promises, and agrees to convey and return the lands herein conveyed to said Board of Levee Commissioners of the Tensas Basin Levee District, free from any incumbrances thereon placed by said Railroad Company, its successors or assigns. The transfer and conveyance of said lands is made under and in pursuance of the authority given to said board in and by the laws of the state of Louisiana, and as a means and mode of making part payment for the construction of an embankment according to certain specifications prescribed by the Board of the State Engineers of the State of Louisiana, and fully set forth in said contract of May 3rd, 1889, which said embankment, when completed, said board of state engineers has certified will aid in protecting the Tensas Basin Levee District from overflow. It is agreed and understood that said Board of Levee Commissioners only transfers such right, title, and interest in and to said land as it owns. It is agreed and understood that the deed is made subject to such release and deductions as may be made previous to the first day of March, A. D. 1891, by said Board of Levee Commissioners, under and in accordance with certain rules adopted by said board on the 17th day of December, A. D. 1889. It is further agreed and understood that said Board of Levee Commissioners, upon the final completion of said embankment, shall make a full and complete transfer to said Railroad Company of all such lands as it, said Board of Levee Commission-

ers, may at that time own in said parish of Richland, and shall then further ratify and confirm in said Railroad Company, its successors or assigns, the transfer of the within described lands in such manner and in such form as its or their counsel learned in the law may advise or require from it, save and except such of the said lands as may be released to other and former owners previous to said first day of March, A. D. 1891, under and by virtue of said rules.

"Thus done and signed, this fifteenth day of September, one thousand eight hundred and ninety, in the presence of Simon Stein and Stephen Faulk, competent witnesses who sign hereto with me, the president of said Board of Levee Commissioners.

"The Board of Levee Commissioners of the Tensas Basin Levee District,  
"By H. P. Wells, President.

"Attest:

"Simon Stein.

"Stephen Faulk."

#### Authority of the Levee Board.

The asserted authority of the Levee Board to make the foregoing contracts and conveyances of land to the Railroad Company must be found, if found at all, in Act No. 26 of 1884, Act No. 69 of 1886, and Act No. 77 of 1888, and in articles 214, 215, and 216 of the state constitution.

The constitutional provisions are as follows:

"Art. 214. The general assembly may divide the state into levee districts, and provide for the appointment or election of levee commissioners in said districts, who shall, in the method and manner to be provided by law, have supervision of the erection, repairs and maintenance of the levee in said districts; to that effect it may levy a tax not to exceed five mills on the taxable property situated within alluvial portions of said districts subject to overflow."

"Art. 215. The provisions of the above two articles cease to have effect whenever the federal government shall assume permanent control and provide ways and means for the maintenance of levees in this state. The federal government is authorized to make such geological, topographical, hydrographical and hydrometrical surveys and investigations within the state, as may be necessary to carry into effect the act of congress to provide for the appointment of a Mississippi river commission for the improvement of said river, from the head of the passes near its mouth to the headwaters, and to construct and protect such public works and improvements as may be ordered by congress under the provisions of said act."

"Art. 216. The general assembly shall have power, with the concurrence of an adjacent state or states to create levee districts composed of territory partly in this state, and partly in such adjacent state or states, and the levee commissioners for such district or districts shall possess all the powers provided by article 214 of this constitution."

These articles are amended by Act No. 112 of 1884, subsequently adopted, and which reads as follows, to wit:

"The general assembly may divide the state into levee districts and provide for the appointment or election of levee commissioners in said districts, who shall, in the method and manner to be provided by law, have supervision of the erection, repair and maintenance of the levees in said districts; to that effect the levee commissioners may levy a tax not to exceed ten mills on the property situated within the alluvial portions of said district subject to overflow; provided that in case of necessity to raise additional funds for the purpose of constructing, preserving, and repairing any levees protecting the lands of a district the rate of taxation herein limited may be increased, when the rate of such increase, and the necessity and purpose for which it is intended, shall have been submitted to a vote of the property tax payers of such district, paying taxes for himself, or in any representative capacity, whether resident or non-resident, or property situated within the alluvial portion of said district subject to overflow, and a majority of those in number and value voting at such an election shall have voted therefor."

It will hereafter be seen that, as far as this case is concerned, the amend-

ment above cited does not in the least alter the questions at issue in this case. The Tensas Basin Levee District was created by Act No. 26 of the Acts of 1884. It is unnecessary to recite the provisions of that act in extenso, because it was repealed by Act No. 59 of the Acts of 1886. We call attention, however, to the fact that the object of the creation of the board, as declared in the law, was "to order the construction of levees within the limits of the district, on such streams and such places as shall be recommended by the State Board of Engineers; to construct and maintain, out of the funds of the district, a levee across the Boeuff Cut-Off, a stream connecting the waters of Bayou Macon with the headwaters of Boeuff river, in Arkansas, provided the assent of the authorities of the state of Arkansas can be obtained," and also to join in the construction of certain levees in the state of Arkansas, named in the act, if the assent of the authorities of the state of Arkansas can be obtained, and the citizens, corporations, and other persons interested shall contribute one-half of the expense of such construction. The act of 1886 practically repeated the declared purposes of the act of 1884. Under section 17 of this last-cited act, the Levee Board is authorized "to join in with any levee district embracing the counties of Chicot and Desha, in the state of Arkansas, for mutual protection, in compliance with article 216 of the constitution." By Act No. 77 of the Acts of 1888 the foregoing was amended in the following particulars: Section 1 was amended by declaring that the purpose of the board was to raise, by taxation or otherwise, a revenue to protect the lands located therein from inundation, by constructing, maintaining, and repairing levees and other works of public improvements. Section 9 was amended by reducing the power to levy local assessments to 5 cents per acre, instead of 10 cents, and that in order to provide additional means to carry out the purposes of the act, and to furnish resources to enable the board to assist in developing, establishing, and completing, either within or without the state, a system of levees and other works of improvement designed to aid in protecting property in the Tensas Basin Levee District from all disastrous floods, all lands belonging to the state situated in said district, whether granted to it by the federal government, or acquired by it by the forfeiture for nonpayment of taxes, were "given, bargained, and donated," etc., to the Levee Board, who were invested with the power and authority "to sell, mortgage, pledge, or otherwise dispose of the same in such manner, and at such times and at such prices, as to the board shall seem proper." But that all proceeds derived therefrom shall be deposited in the state treasury, to the credit of the Tensas Levee District, and shall be drawn out only upon warrants of the president of the State Board, properly attested, as provided by this act. Section 17 of the act of 1888 remained unrepealed and unaffected by this act. That section authorized the board to join in with any levee district embracing the counties of Chicot and Desha, in the state of Arkansas, for mutual protection, in compliance with article 216 of the constitution.

#### Pleadings.

Complainant attacks the agreements had with the railroad company, culminating in the attempted conveyance to the latter of the immense body of land therein described, as void, on substantially the following grounds: (1) That the agreement to convey and conveyance were conditional only, and upon the express stipulation and agreement that the failure of the Railroad Company to perform the conditions therein recited within the time stated (the last date being December 31, 1893) dissolves and avoids the contracts and conveyance; that the limit within which the Railroad Company had the right to do the work has long since expired; the Railroad Company has abandoned the work, and had done so long prior to the institution of this suit; and the grant is therefore forfeited. (2) That the performance of the condition is now impossible, because the laws of the state of Arkansas forbid the same. (3) That the alleged conveyance was void as a sale, because no price was paid, or was agreed to be paid. (4) That it was void as an exchange, because no property was given or stipulated to be given in exchange. (5) That the act was void if considered as an onerous donation, because not made pursuant to the forms of law. (6) That said board of commissioners had no power or authority to sell or dispose of said lands, except for the purposes of con-

structing or repairing levees and other works of public improvement, to protect the Tensas Basin Levee District from inundation and injury by floods of the Mississippi river, and that there was no authority to dispose of them in aid of the construction or maintenance of a railroad. (7) That the law authorizing the sale required that the proceeds should be deposited in the state treasury. From all of which it results (1) that the contracts and conveyance were ultra vires and void; and (2) if not so, have become forfeited by the failure of the grantee to perform the conditions subsequent annexed to the grant.

In an amended bill the same allegations in effect are made, and the nullity of the various agreements asserted on the ground, substantially, that the obligations assumed by the Levee Board in the several agreements were ultra vires, and prohibited by article 56 of the state constitution; that the board was without authority to contract for the construction of any sort of works in the state of Arkansas, without the consent of the authorities of that state; that the works contemplated were forbidden by the laws of Arkansas, and therefore any obligation to pay for such works was void ab initio; that the contracts with the Railroad Company contemplated the construction of a continuous line of embankment between certain designated points, and the construction and operation of a railroad between certain points; the railroad to run over the embankment as far as necessary; that the contract was an indivisible one, and utterly beyond the power of the Levee Board to make; that the statement made in the last agreement reciting that the transfer was made in consideration of the release by the Railroad Company of the obligation of the Levee Board to pay \$50,000 in bonds, and to levy a certain tax, and the statement that the transfer was part payment for work already done, were false and fraudulent, in that the obligation of the Levee Board to issue bonds and levy taxes, if not ultra vires, was conditional only, and had lapsed by reason of the failure of the company to perform the conditions precedent; that the Railroad Company had never, even if the contract had been valid, earned any part of it, and the pretended release of the Levee Board from an obligation which did not exist, as a consideration for the transfer of property admitted to be worth \$500,000, is fraudulent and void upon its face. The grounds of attack of the conveyance to the Levee Board may be summarized under two heads: (1) Ultra vires; (2) failure of the Railroad Company to perform the conditions and do the work which were the alleged consideration of the transfer.

The Railroad Company answers, substantially, as follows: After admitting the capacity of the complainant company, the organization of the board, etc., it admits the execution of all contracts alleged upon in the petition; claims, however, that the statement of these contracts, made by the complainant, is not fair; and therefore inserts the contracts at length in its answer. It specially denies that the Levee Board "was imperatively required by each of said acts to deposit the price or proceeds of said lands, when sold or disposed of, in the treasury of the state"; on the contrary, avers that the proceeds which were to be deposited in the treasury of the state, under the acts aforesaid, were such cash proceeds as might arise from the sale or mortgage of the lands, and has no reference to such lands that might be disposed of otherwise than by sale or mortgage. It is admitted that plaintiff and defendant, on the 3d of May, 1889, entered into a contract substantially as alleged, but that the plaintiff has failed to note an important qualification of said contract, which it sets out as follows: "If, by reason of the elements, litigations, strikes, financial panics, epidemics, or any other causes unforeseen, or beyond the control of the Railroad Company, its successors or assigns, be hindered or delayed or otherwise prevented from properly prosecuting said work, in such case, time not being the essence of this contract, the date herein fixed for the completion will not be adhered to, but credit for the time so lost shall be given and allowed to said Railroad Company, its successors or assigns, and the time so lost should be added to that herein required for the completion of the contract." The defendant admits that the Railroad Company entered into another contract on the 25th day of July, 1890, which it sets forth at length. It admits that the present Board of Commissioners

of the Tensas Basin Levee District did make and sign the conveyance mentioned and referred to in the bill of complaint, which it sets forth at length. It avers that prior to entering into the contract of October 12, 1891, the Levee Board appointed a committee composed of its members, to confer with the officers of the defendant in relation to the delay in the completion of said embankment and railroad, under the contracts of May 3, 1889, and July 25, 1890; that said committee, in writing, reported to the Levee Board the result of their investigation, and recommended the execution of said contract of October 12, 1891. It gives the report of the committee in full; avers that the said report was laid before the Tensas Basin Levee Board; that the Levee Board adopted the report, and extended the time for the completion, as set forth in the contract which follows. It denies that the time within which said embankment was to have been completed, under the terms of the contract of October 12, 1891, has expired, and avers that it is provided in and by said contract, by the third paragraph therein, that, with the exception of the changes made therein or provided for, the contracts of May 3, 1889, and July 25, 1890, between the parties thereto, are in all things confirmed, ratified, and fully approved, and so remained unchanged and in full force and effect. Substantially, the defendant alleges that the contracts were entirely within the power of the Levee Board to make; that they were supported by a lawful consideration; that the Railroad Company has diligently endeavored to carry them out, and is not in default because the delay has been prevented by financial panics, overflows, and litigation which, under the terms of the contract, "time not being of the essence," extended the term indefinitely, as long as for any of the aforesaid causes, or for reasons unforeseen or beyond the control of the Railroad Company, the work was hindered, delayed, or retarded. It claims their work has been so hindered, delayed, and retarded; that the abandonment of the work was caused by the action of the Levee Board in revoking or attempting to revoke the grant; and, in effect, that the grant means that the Railroad Company is to build whenever it may see fit to do so, and that, if it never sees fit to do so, the land belongs to it as payment for what it has already unsuccessfully attempted to accomplish.

John McClure, for appellant.

F. P. Stubbs, R. P. Williams, Chas. J. Boatner, and F. G. Hudson, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

PARDEE, Circuit Judge. The statement of this case is a somewhat lengthy matter, and, as we find in the first 27 pages of the brief submitted by Messrs. Boatner & Hudson, of counsel for the appellee, a full and fair statement, we adopt the same without reproducing it in this opinion.

It is conceded that as all the contracts involved in this suit were entered into in the state of Louisiana, and, as the lands involved are wholly situated in the same state, the law of Louisiana governs in the determination of the nature and validity of the contracts, and as to the relief which can be given by the courts. The trial judge gave no reasons for his conclusions, and his decree is limited to rescinding the contracts between the parties, rescinding and declaring void the deeds of conveyance of the lands in question, and to enjoining the Louisiana, Arkansas & Missouri Railroad Company from claiming or setting up any rights under the said contracts or deeds of conveyance.

The claims of the appellee (complainant below) are (1) that the contracts are executory only; (2) that on the part of the Board of Levee Commissioners they were ultra vires and void ab initio; (3) that

the engagements of each of the parties were prohibited by law at the date of each of the contracts; (4) if the contracts were not *ultra vires* and void, they had become forfeited by the failure of the grantee to perform the conditions subsequent annexed to the grant.

The contention of the appellant is, of course, the contrary of the foregoing propositions. In the assignments of error the appellant contends that the trial court erred as follows:

"First, in decreeing that the contract made on the 3d day of May, 1889, between the Board of Levee Commissioners of the Tensas Basin Levee District and the Louisiana, Arkansas and Missouri Railroad Company, and all subsequent renewals, modifications, and amendments thereof, and especially the contract between the same parties of date July 25, 1890, and that dated October 12, 1891, be, and the same are, resolved and rescinded and declared null and void; second, in not finding and decreeing for the defendant as prayed in its answer and amended answer; third, in decreeing that the defendant be enjoined from setting up or claiming any rights, privileges, benefits, or advantages arising under the contracts between the plaintiff and defendant, and the deeds of conveyance executed by the plaintiff; fourth, that the court erred in decreeing a reconveyance of said lands without stipulating that the defendant be reimbursed in the amount of such expenditures as it may have made in the performance of such contracts; fifth, that the court erred in decreeing that the contracts between the plaintiff and the defendant were *ultra vires*; sixth, that the court erred in not dismissing the plaintiff's bill as prayed in defendant's answer; seventh, that the court erred in not decreeing that the plaintiff had full power and authority to make the contracts which were made between the plaintiff and the defendant, set forth in the answer of defendant; eighth, the court erred in not decreeing that the lands mentioned in the conveyances were conveyed to the defendant voluntarily, as a part payment, and that, having been so conveyed, no reconveyance could be decreed; ninth, the court erred in not decreeing that the contracts between the plaintiff and the defendant were valid, binding, and subsisting contracts."

The first, second, third, sixth, and ninth of these assignments are not as specific as are required by our rules, and, in substance, amount to no more nor less than that the circuit court erred in deciding the case for the complainant, instead of for the defendant. The fifth, seventh, and eighth raise the same questions as are embraced in the appellee's contention. The fourth assignment of error presents the question whether the Railroad Company is entitled to a reimbursement of expenditures in case the reconveyance of the lands is decreed.

The counsel for appellant argues that the Tensas Basin Levee Board is one of the public functionaries of the state of Louisiana upon which only ministerial and executive duties devolve, and that, as such creature of the law, it has no standing to question the constitutionality of any law of the state conferring powers and duties upon it. So far as this contention affects the issues in this case and the right of the said board to bring this suit, and therein set up the unconstitutionality of so much of the act of July 3, 1886 (Sess. Acts, p. 96), as authorizes the Levee Board to use the donated lands for the purpose of assisting in building or completing a system of levees and other works of public improvement without the state of Louisiana, it may be noticed that, by the terms of the act of 1886, the Tensas Basin Levee Board was created a full-fledged corporation, authorized to assess taxes, collect and receive funds, and hold and administer the same; and that, by the same act, a large grant of public lands was

made to the said board to be expended discreetly in carrying out the general purposes of the act; and that, so far from being a purely ministerial and executive functionary, it was vested with large discretion, and was made and constituted a fiduciary agent. As a fiduciary, it would seem unquestionable that, if the property belonging to the trust should be appropriated and disposed of in an unlawful manner, it would be not only within its right and power, but its duty, to sue for and recover the same. The question, however, is not very material in this case, because it is not so much the constitutionality of the acts of 1886 and 1888 that is attacked by the complainant as it is the proper construction of the said acts.

It may be noticed, further, that, by article 214 of the constitution of the state of Louisiana, the general assembly is authorized to create levee districts within the state, who shall have supervision of the erection, repairs, and maintenance of the levees in said districts, and of course within the state, and that by article 216 the general assembly is given the power, with the concurrence of the adjacent state or states, to create levee districts composed of territory partly in the state, and partly in adjacent states. It is conceded that the two articles cited are limitations on the power of the legislature; and thus the grave question is presented whether the general assembly has the power to create a levee district wholly within the state, but authorized to build and construct levees outside of the state. The supreme court of the state of Louisiana, in *Fisher v. Steele*, 39 La. Ann. 448, 1 South. 882, have held that this identical act is constitutional; but the report does not show that this precise question was considered, and it will be observed in regard to this decision that it appears to be based upon the fact that the laws in force at the time negatively prohibited the Tensas Basin Levee Board from undertaking any works in the state of Arkansas except by the consent of and in conjunction and co-operation with the authorities of that state. The learned counsel for the appellee says:

"The state has the power to execute through any agencies which it chooses to select any power which it possesses itself. Therefore the power of the legislature to grant to the Tensas Basin Levee District all of the public lands lying within the state for the purpose of aiding in the construction, within or without the state, of levees or other works of public improvements for the protection of the alluvial lands of the district from overflow, was strictly within the constitutional powers of that body, because, among other reasons, the bulk of the land granted by the state to the Levee Board was granted to the state by the United States government for this very purpose."

As this is the standpoint of the counsel for the appellee, we are inclined to agree with them that they are not attacking the constitutionality of any of the acts of the legislature of Louisiana. It is contended by the appellee that the contracts in question and the grants of lands thereunder were ultra vires and void, because they contemplated levees and other works wholly without the levee district, and within the state of Arkansas, without the consent of the authorities of said state, and because the railway embankment contracted for was not, and could not be, a system of levees or other work of public improvement, within the meaning of section 9 of the act of 1886, as amended by the second section of the act of 1888.

The act of 1886 (section 17) provides that the Board of Levee Commissioners of the Tensas Basin Levee District shall have the right to join in with any levee district embracing the counties of Chicot and Desha, in the state of Arkansas, for mutual protection in compliance with article 216 of the constitution. This provision was left in force by the amendatory act of 1888, and it therefore, considered in connection with article 216 of the constitution to which it refers, is to be treated as a limitation upon the power of the Board of Levee Commissioners in regard to constructing levees or works of public improvement in the state of Arkansas. It is not disputed that the statutes of the state of Arkansas provide for the construction of public levees in Chicot and Desha counties, by and under the authority of the levee boards of said counties; and the case shows—in fact, it is conceded—that the levee boards of those two counties have not joined with the Tensas Basin Levee Board in the building of the embankment or levee contracted to be built by the Railroad Company, nor have the same boards given permission even to build the said embankment, but, on the contrary, have refused such permission, and, as appears by the averments in the defendant's answer, have gone so far in opposition as to contribute to the expense of litigation to prevent the construction by the Railroad Company of such embankment. The statutes of the state of Arkansas providing for the organization of railroad corporations, and regulating the construction of railroads by such corporations, prohibit the building of railroads across streams or water courses in such a manner as to permanently obstruct the stream or water course or impair its usefulness (Mansf. Dig. § 5447, par. 5), from which it follows that, although the Railroad Company may have the right to construct its roadbed in the state of Arkansas, it can neither build a roadbed under its railway charter, nor, without the consent of the authorities of Chicot and Desha counties, build an embankment, either of which will permanently interrupt the free flow of the water through all natural channels.

From these conclusions it would seem that the contract between the Tensas Basin Levee Board and the Railroad Company is not only ultra vires the power of the Levee Board, but otherwise, in its objects and purposes, is a contract impossible to perform.

Section 2 of Act No. 77 of 1888, which amends section 9 of Act No. 59 of 1886, provides as follows:

"That in order to provide additional means to carry out the purposes of this act, and to furnish resources to enable said board to assist in developing, establishing and completing, either within or without the state, a system of levees and other works of public improvement, designed to aid in protecting property in the Tensas Basin Levee District from disastrous floods, all lands now belonging, or that may hereafter belong to the state of Louisiana, and embraced within the limits of the Tensas Basin Levee District as herein constituted, shall be, and the same hereby are given, granted, bargained, donated, conveyed and delivered unto said Board of Levee Commissioners of the Tensas Basin Levee District. \* \* \* Said Board of Levee Commissioners shall have the power and authority to sell, mortgage, pledge or otherwise dispose of said lands in such manner and at such times and for such prices as to said board shall seem proper, but all proceeds derived therefrom shall be deposited in the state treasury to the credit of the Tensas Basin Levee District, and shall be drawn out only upon the warrants of the president of said board, properly attested as provided in this act."

The above is the legislative authority for the Board of Levee Commissioners to make the conveyance of the lands in question to the Railroad Company. By the first contract entered into between the parties, the Railroad Company, for the consideration named,

—"Agrees and binds itself to construct and complete above overflow, in a thorough and workmanlike manner, under the supervision and direction of the Board of State Engineers of the State of Louisiana, and thereafter to maintain, all that certain embankment or portion of its roadbed proposed by said Railroad Company to be located in the state of Arkansas, between a point where the line of railroad projected by said company shall cross Crooked Bayou, in section —, township — south, range — west, and a point on the northern terminus of what is known as the 'Bayou Macon Ridge,' in section —, township — south, —, range — west. Said embankment or roadbed, when constructed, may be forever afterwards used as its roadbed by the said Louisiana, Arkansas and Missouri Railroad Company, its successors, and assigns. The course of said embankment is to be a general northerly and southerly direction on the west of Bayou Macon."

The second contract further described the railroad and embankment to be constructed as follows:

"And to continue actively and earnestly at work until a railroad is completed and in operation, northward from Delhi, to and as far as the northern terminus of the Bayou Macon Hills, at the Boeuff Cut-Off, in Chicot county, Arkansas. And said Railroad Company further covenants, promises, and agrees so [to] complete said embankment in said contract agreed to be constructed, and entire line of railroad from Helleys, Arkansas, to Delhi, Louisiana. \* \* \* Fourth. The Louisiana, Arkansas and Missouri Railroad Company further covenants, promises, and agrees, not only to keep said embankment across said Boeuff Cut-Off, in Chicot county, Arkansas, in repair, but also to place thereon a standard-gauge railroad, and to maintain and operate the said railroad after it is completed."

The consideration for the conveyance of the land as stated in the contract is "the completion on the part of said Railroad Company of the embankment in the state of Arkansas, agreed to be constructed by said Railroad Company in and by a certain contract dated May 3rd, 1889."

From what we have quoted, it will be seen that the object of the contracts between the parties was the construction of an embankment across Boeuff Cut-Off, lowlands in the state of Arkansas, and the building and operation of a railroad from Helleys, Ark., to Delhi, La. The authority given to the Levee Board was to assist in developing, establishing, and completing, either within or without the state, a system of levees and other works of public improvement designed to aid in protecting the property in the Tensas Basin Levee District, etc.; and this naturally brings us to the question whether the railroad and embankment, the object of the contract between the parties, were public improvements, within the terms and meaning of the law in question.

Counsel for appellee, relying upon article 56 of the constitution of Louisiana of 1879, as follows:

"The funds, credit, property or things of value of the state, or of any political corporation thereof, shall not be loaned, pledged or granted to or for any person or persons, association, or corporation, public or private; nor shall the state, or any political corporation, purchase or subscribe to the capital stock of any corporation or association whatever, or for any private enterprise. Nor shall the state, nor any political corporation thereof, assume

the liabilities of any political, municipal, parochial, private, or other corporation or association whatsoever; nor shall the state undertake to carry on the business of any such corporation or association, or become a part owner therein: provided, the state, through the general assembly, shall have power to grant the right of way through its public lands to any railroad or canal."

—contends: First, that it was beyond the power of the legislature to confer upon the Tensas Levee Board authority to contract for any work or any levees or public improvements designed to prevent the overflow of the Tensas Basin, unless the work, when completed, should be owned and controlled by the public, and not by any private party; second, that a railroad, although upon a solid embankment, is not a work of public improvement; and, third, that such railroad, although it may be in some sense a work of public improvement, is not a work of public improvement designed in fact to aid in protecting property in the Tensas Basin Levee District from overflow.

In *McKenzie v. Wooley*, 39 La. Ann. 944, 3 South. 128, a case much relied upon by the counsel for appellant, it was declared incidentally that a railway is a public improvement; and in many aspects this is, no doubt, true. It can hardly be denied that an embankment or levee designed to prevent the overflow of the surplus waters of the Mississippi river is a work of public improvement. The record shows with regard to the railway embankment in question that the Louisiana State Board of Engineers reported to the governor of the state as follows:

"The Tensas Basin Levee District has recently entered into an agreement with the Louisiana, Arkansas and Missouri R. R. Company to construct an embankment on the west side of Bayou Macon, and across the stream and lowlands known as 'Boeuff Cut-Off.' Such an embankment, of sufficient length and strength to confine the flood waters of its eastern side in case of breaks in the front levee along the Mississippi river, will give additional security against overflow, and protect the major part of the district, independently of the levee system along the front."

The contention that the public improvements, assisted by the Tensas Basin Levee Board, and designed to aid in protecting property in the Tensas Basin Levee District from overflow, should be owned and controlled entirely by the public as public property, is not well founded. The language of the statute forbids such a narrow construction.

There has been much argument with regard to the effect to be given to the provision of the third contract, which stipulates that:

"The Railroad Company agrees to complete the work in question on or before December 31st, 1893, unless it, its successors or assigns are, by reason of the elements, litigations, strikes, financial panics, epidemics, or any other cause unforeseen or beyond the control of said Railroad Company, hindered or delayed or otherwise prevented from properly prosecuting said work, in which case, time not being of the essence of this contract, it is understood and agreed that the dates mentioned shall be extended, and the time lost shall not be counted."

The appellant contends that, under this provision, the Railroad Company could not be put in default, at the commencement of this suit, nor since, because the case shows that there have been financial panics and litigations which have hindered and delayed the Railroad

Company in prosecuting the work, for which reasons, and because it is expressly stipulated that time was not of the essence of the contract, the Railroad Company is entitled to further delay and opportunity to prosecute and complete the work before the contracts providing for the same can be avoided and the reconveyance of the lands can be demanded. The extraordinary unilateral contract made between the Levee Board and the Railroad Company furnishes strong support to the appellant's contention; and, if the contracts can only be declared at an end because of the default of the Railroad Company, we are inclined to think that the appellee can never put the Railroad Company in default, no matter what may be the delay resulting. The laws controlling the whole matter, however, are the Louisiana laws; and under well-recognized Louisiana law, the principles of which are declared in article 2765, Rev. Civ. Code La., to wit, "The proprietor has a right to cancel at pleasure the bargain he has made, even in case the work has already been commenced, by paying the undertaker for the expense and labor already incurred, and such damages as the nature of the case may require," the Tensas Basin Levee Board had the right to cancel the contract and demand the reconveyance of the lands in question at any time on paying the Railroad Company for the expense and labor already incurred in executing the contract, and such damages as the nature of the case required. The institution of the present suit may be taken as a cancellation of the contract on the part of the Tensas Basin Levee Board. If the contracts are held void because *ultra vires*, equity makes it the duty of the Tensas Basin Levee Board to restore all the consideration received from the Railroad Company before it can demand the reconveyance of the lands. The Railroad Company, in its answer, avers that it has expended in good faith, in procuring the right of way on which to build said embankment, in the building of the same, in the prosecution and defense of litigation, in making surveys, and in other necessary expenses in and about the performance of said contract, a sum in excess of \$100,000; but we do not find that this averment is established by the evidence, nor do we find that any specific sum, nor any sum worthy of consideration, has been expended by the Railroad Company otherwise than for and on account of and for the actual benefit of the Railroad Company itself in the preservation of its charter and franchises, and in the construction of its own roadbed in the main distinct and apart from the embankment which was to aid in preventing overflow. Certain it is that the case does not show that the Railroad Company has done anything from the date of the first contract to the commencement of this suit which was beneficial to, or in any wise to the advantage of, the Tensas Basin Levee District, nor that the Levee Board has in possession any consideration received from the Railroad Company which equity requires to be restored.

On the whole case, we are of opinion that the contracts between the Railroad Company and the Tensas Basin Levee Board for the construction of the specific railway and embankment in the state of Arkansas, without the consent and co-operation of the Arkansas authorities, was *ultra vires* of the Tensas Basin Levee Board; that, because of the existing provisions in the laws of the state of

Arkansas and the opposition of the levee boards of Desha and Chicot counties of the state of Arkansas, the contracts in question, in their objects and purposes, were impossible of performance; that the Tensas Basin Levee Board had a right to, and did, cancel the said contracts; that in no aspect of the case is the Railroad Company entitled to compensation for work done and expenses incurred in carrying out the said contracts, nor for advantages which might have resulted from the performance of the same as a prerequisite to the conveyance of the lands in question; and that in all respects the decree of the circuit court appealed from should be affirmed; and it is so ordered.

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**STORROW et al. v. TEXAS CONSOLIDATED COMPRESS & MANUFACTURING ASS'N.**

(Circuit Court of Appeals, Fifth Circuit. May 17, 1898.)

No. 681.

**1. CORPORATIONS—DIVIDENDS ON STOCK—POWERS OF DIRECTORS.**

While it is largely a matter of discretion with the directors whether to declare a dividend out of the profits, or use them in the business of the company, there is a limit to this discretion; and the courts will not allow them to oppress the holders of preferred stock by refusing to declare dividends when the net profits and character of the business clearly warrant dividends.

**2. SAME—PREFERRED STOCK.**

The face value of preferred stock is in the nature of a debt against the corporation, and the interest thereon becomes a debt as soon as it can be shown there are profits wherewith to pay it.

**3. EQUITY JURISDICTION.**

A bill by a holder of preferred stock against a corporation alleging that it has refused to pay its guaranteed dividends on its preferred stock, and refused the holders thereof their rights; that judgments are being taken against it; that it is insolvent, and cannot be operated as a going concern with profit, and ought to be disintegrated, and the assets divided; that part of its property has been sold without authority; and asking for a lien, the foreclosure thereof, the marshaling of the assets, and the appointment of a receiver,—presents a case for a court of equity.

**Appeal from the Circuit Court of the United States for the Eastern District of Texas.**

The original bill filed in this case November 18, 1896, alleges that the complainant Charles Storrow is a resident and citizen of Brookline, in the state of Massachusetts; that he brings this suit for himself and all others similarly situated and interested, to make themselves parties thereto, and complains of the Texas Compress & Manufacturing Association, a corporation, with its principal place of business in the county of Smith, state of Texas. It alleges that it was chartered on the 18th day of March, 1891, with an authorized capital of \$1,000,000, divided into 10,000 shares; its purpose was the manufacture of cotton, cotton-seed oil, cotton ties, and pressing cotton; that in accordance with a vote at a meeting of its stockholders held at Ft. Worth, Tex., on the 11th day of May, 1891, and in accordance with section 2, art. 7, of the by-laws approved by said association, seven compresses were purchased; \$700,000 of common stock, and \$350,000 of preferred stock, were issued. Subsequently, four other bills were filed, called "aid bills." Said complainants claim to be owners and holders for value of some 400 shares of said preferred stock. The exact terms of the contract made by the company with the holders of the preferred stock are set out in the following certificate:

"No. 186.

100 Shares.

"Texas Consolidated Compress & Manufacturing Association.

"This is to certify that Charles Storrow is the owner of one hundred shares preferred stock, of the par value of one hundred dollars each, in the capital stock in the Texas Consolidated Compress & Manufacturing Association, transferable only on the books of the association in person, or by attorney on surrender of this certificate.

"This certificate is entitled to a guarantied dividend of six per centum per annum on the number of shares hereby represented, to be paid only out of the net earnings of said association, payable annually on the first day of June of each year; and until such dividends, if any, are paid, no dividend shall be declared on the common stock of this association; but this certificate is not entitled to, nor shall it, participate in any dividends over and above said guarantied dividends as above stated, nor is it entitled to vote at any stockholders' meeting. The directors of this association shall, at their annual meeting in each year, ascertain the net profits from the business of said association, and shall then and there declare such guarantied dividend of six per cent.

"All insurance policies upon property belonging to this association shall be held in trust by said association for the benefit of the holders of these certificates; and in the event of the dissolution of said association, either by limitation or otherwise, the holders of preferred shares shall be entitled to be paid in full prior to any participation in the assets of this association by other stockholders. The company reserves the right to issue, in lieu thereof, first mortgage bonds, bearing interest at the rate of six per centum per annum, and secured by mortgage upon all the compresses of this association.

"Tyler, Texas, June 24, 1893.

Jno. M. Duncan, President.

"[Seal.]

J. D. Moody, Secretary."

Article 7, §§ 2 and 3, above referred to, are as follows:

"Sec. 2. Not exceeding \$50,000 in six per cent. bonds or preferred stock, bearing six per cent. interest, or entitled to six per. cent. dividend, and \$100,000 in common stock, shall be issued on each compress that may be owned and brought into this association. Such preferred stock shall be entitled to six per cent. dividend or interest, and shall not be entitled to vote.

"Sec. 3. On the issuance of any bonds by this association, the association shall put aside, of the earnings of the association, 2 per cent. annually, as a sinking fund to liquidate the bonds thus issued, before any dividend is declared on the common stock."

Complainant further alleges, upon information and belief, and so charges the fact to be, that it was the intention of the parties who originally organized said defendant corporation, and all of the stockholders and directors of said corporation at the time of the issuance of said preferred stock, that, in a reasonably short time after the issuance thereof, said preferred stock should be converted into and substituted by first mortgage bonds of the same amount as the said stock, and bearing the same rate of interest per annum as is provided that the said stock shall bear, and that the first mortgage bonds should be secured by a mortgage upon all of said seven compresses then and there owned by the defendant association, as aforesaid; that, at the time complainant and others acquired said stock, it was known and generally understood, and complainant verily believed it to be the plan and purpose of said defendant association, and of all its officers, directors, and stockholders, to substitute said stock with first mortgage bonds of said association, as aforesaid, and that said preferred stock should be considered as, and be in effect, the same as first mortgage bonds of said association, and the holders thereof considered as creditors of said association to the extent of such preferred stock as should be held and owned by them; that the complainant was induced to acquire said preferred stock upon the statement and representation of J. H. Brown, who was the president, and John A. Brown, who was the secretary, of said association, that said stock was in effect a first mortgage bond, and would be converted into the form of a first mortgage bond at an early date. Complainants claim a lien upon the net profits of the said association which may have been received upon any of its property,

and upon any property or betterments that may have been acquired by the net profits from the business. They further allege that sufficient net profit to pay the dividends due them on the preferred stock was earned during the years of 1892, 1893, 1894, 1895, and 1896, but that no such dividend was declared during said years, and that said association has wrongfully and willfully diverted the said net profits in divers ways, for the purpose of depriving complainants of their dividends, and for the purpose of depreciating and destroying the value of the preferred stock, so the owners of the majority of the common stock might purchase it at a nominal price. They allege a scheme on the part of the holders of the majority of the common stock to wreck the corporation; that judgments for large amounts were being obtained against the company, and large losses had occurred by the deposit in First National Bank of Tyler, which subsequently failed; that the attorney for the bank was the president of the defendant; and that the president of the bank was the general manager of the company, and that they so kept the funds of the company knowing the condition of the bank; that on May 4, 1897, a committee was appointed to prepare a plan for liquidating and winding up the affairs of the association, which reported the debts of the association to be \$50,000, preferred stock outstanding \$310,000, and the entire compresses owned by the association were worth \$240,000. A committee was appointed to sell the property. The facts disclosed in said meeting were that the assets were of far less value than when the association commenced business, and that it is deeply in debt, and cannot pay its debts in due course of business; that the corporation cannot be operated as a going concern with any profit, and ought to be disintegrated, and the assets divided; that the association loaned its credit to the First National Bank of Tyler for \$15,000, and sold the compress at Gatesville for \$15,000, without authority; that the association has refused to take any action for the protection of the preferred stockholders, and its directors deny that said stockholders are entitled to any relief; that the complainant has demanded of the defendant that the dividends to which he is entitled be declared and paid, which demand has been refused.

The bill concludes with a prayer for a receiver, and an accounting and marshaling of the assets; that the rights of all creditors be ascertained, and the rank in which they are to be paid adjudged; for a decree compelling the directors to declare a dividend; that the preferred stockholders be declared to have a lien upon the net earnings which should have been paid to them, or upon the plant and properties purchased therewith prior to the lien of all others; that the stock be adjudged to be a first mortgage bond in effect, etc.; for an injunction prohibiting the defendant from taking any step or doing any act or thing that may affect the right of the complainant pending the litigation, or which may interfere with the enforcement of such decree as may be rendered; that complainant's lien be foreclosed, the property sold, cost paid, and the balance of proceeds applied to the indebtedness of the defendant according to its rank, as adjudged by the court.

Defendant's demurrers to the "aid bills" and amended bill are as follows: "This defendant, by protestation, not confessing nor acknowledging any of the matters or things in said bills of complaint contained to be true in such manner and form as the same therein set forth and alleged, doth demur to the said bills, and, for causes of demurrer, sheweth: (1) That it appeareth by each complainant's own showing by each of said bills that he is not entitled to the relief prayed for by the bills against the defendant. (2) That there is no equity in the bills, and that it appears from the face thereof that, if the complainant be entitled to any relief, they have a full and adequate remedy at law. (3) That it appears by the bill that the complainants are not, nor either of them, creditors of the defendant, and have no lien upon the property of defendant. (4) That plaintiff's suits are, in effect, to dissolve defendant corporation, and to distribute its assets, of which proceeding a court of equity hath no jurisdiction. (5) That there are in the bills no facts set forth showing insolvency of defendant, but merely a naked averment of insolvency. (6) That it is not shown by said bills, nor either of them, that the defendant corporation is dissolved, nor that there exists any cause for its dissolution. (7) That complainants do not show that they have no remedy, through the corporation itself, for the alleged injuries com-

plained of. (8) That complainants do not allege demand on the corporation or its officers for the declaration of a dividend, nor demand for the payment of the dividends alleged to be due. (9) That the complainants do not show that they are those for whose benefit they sue, did not assent to, or that they protested against, any of the acts or omissions of which they complain. (10) That the bill shows that, if complainants ever had any cause for action against the defendant, the same is barred by their own laches. (11) That while the bills charge, in terms, fraud and bad faith, they set out no facts or circumstances showing the same, but and only warranted transactions, innocent in themselves, and arising from the exercise of that discretion and judgment committed to the directory by defendant's charter, by-laws, and by the laws of the land. (12) That while said bills charge a combination or conspiracy between H. H. Rowland and J. D. Moody, two of defendant's stockholders, to depress the value of its stock, the same does not show how, in any way, the corporation is responsible for their motives or actions, or how said Moody and Rowland 'dictated' and 'controlled' the action of the defendant corporation, in any other way than by voting stock which they were legally entitled to vote. (13) That paragraph 14 of said original bill insufficiently charges a scheme by said Rowland and Moody to acquire a majority of the common stock of defendant corporation, without alleging any of the facts or circumstances constituting said scheme, or that they acquired a majority of said stock in any other way than fairly and legally. (14) That such of the allegations of paragraph 14 of the original bill as are introduced by the words 'alleges upon information and belief,' and by the words 'is informed,' without charging such allegations to be true, are insufficient. (15) That the said bills undertake to vary or rather to substitute by parol the terms of a written instrument, the foundation of the action set out in the bills, to wit, the certificates of preferred stock in defendant corporation, upon which this suit is brought. (16) That neither of said bills contains allegations that the plaintiff was a shareholder in the defendant corporation at the time of the transaction of which he complains, or that his shares had devolved on him since, by operation of law, nor that the suit is not a collusive one to confer upon a court of the United States jurisdiction of a case of which it would not otherwise have cognizance; nor do said bills set forth any effort of either of the plaintiffs to secure such action as they desire on the part of the managing directors or shareholders of defendant. Wherefore, and for divers other good causes of demurrer appearing on said bill, the defendant doth demur thereto. It prays the judgment of this honorable court whether it shall be compelled to make any answer to said bills, and it humbly prays to be hence dismissed, with its reasonable costs in this behalf sustained."

W. S. Herndon and Ben B. Cain, for appellant.

John M. Duncan, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

SWAYNE, District Judge (after stating the facts). Much of the difficulty arises in this case from the want of a proper understanding of the difference between the common stock and preferred stock, and the respective rights of the holders thereof. Among the rights of the holders of common stock are those of attending and voting at the meetings of the corporation, participation in the election of officers, the formation of by-laws, the participation in the profits and losses, and in the final division of the property upon dissolution. A share of stock has been defined to be a right which its owner has in the management, profits, and ultimate assets of the corporation; but he has no legal title to the profits or property of the corporation until a dividend is declared, and a division made on the dissolution of the cor-

poration. Common stock differs in many ways from what is termed "preferred stock." The owner of the former is entitled to an equal pro rata division of the profits, if there be any, but has no advantage of any other shareholder or class of shareholders of common stock. Preferred stock, on the other hand, generally entitles its owner to dividends out of the net profits before and in preference of the holders of the common stock. Generally, the rights, powers, and privileges of preferred stockholders depend upon the terms upon which it is issued; preferred stock making a multiplicity of forms, according to the desire or ingenuity of the stockholders, and the necessity of the corporation itself. The percentage of preferred stock dividends is always fixed before it is issued. It is a matter of contract, and may be made cumulative, as it was in this case. Every holder of preferred stock, by its terms, was guaranteed a dividend of 6 per cent. per annum thereon to be paid out of the net earnings of the association, which are properly the gross receipts, less the expenses of operation, interest on debts, and other liabilities payable first. The rest is the net profits out of which the shareholders of preferred stock should be paid the 6 per cent. dividend. While it was largely a matter of discretion with the board of directors as to what use they would put the profits to, whether to declare a dividend or use them in the business of the company, there is a limit to this discretion; and the courts will not allow the directors to use their powers oppressively by refusing to declare a dividend while the net profits and character of the business clearly warrant it. This rule is applicable not only to the holders of the common stock, but also to the preferred stock, which is entitled, as a matter of right, to have a dividend declared out of the net profits, if it can be shown that the directors did not exercise reasonable discretion in withholding the same. By the final dissolution of the corporation, the holders of the preferred stock would be entitled to receive only the full face value thereof, after which the balance of the property would be equally divided among the common stockholders.

The bill alleges, and the demurrer admits, that, during the time in question, the association had earned sufficient net profits from the operation of the compresses to pay the 6 per cent. dividend on its preferred stock. It also states that the said association wrongfully and willfully diverted the net profits earned by it, and has used and appropriated the same in divers and sundry ways for the purpose of depriving the complainants of their dividends, and of destroying the value of the preferred stock; and this was done by the majority of holders of the common stock, in fraud of the rights of complainants. While it has been determined that the claim of the holders of the preferred stock against the corporation is not strictly a debt, but is contingent upon the existence of sufficient net profits to pay it, it is evident that preferred stock is only a security for a loan, upon which a certain and definite interest was to be paid while the corporation existed, and the full amount thereof returned to the lender when it was dissolved, before the holders of the common stock should receive anything. The preferred stockholder has no vote or voice in the management of the corporation. He possessed none of the rights of a common stockholder as such, and

about the only difference between him and the ordinary lender of money was that he was not to receive his interest unless there were sufficient net profits to pay the same. Therefore, so far as the face value of the preferred stock is concerned, it is in the nature of a debt against the corporation, and the interest thereon becomes a debt as soon as it can be shown that there were profits wherewith to pay it, and becomes a lien prior to the rights of the holders of common stock upon the net earnings, if there were such, for the amount of the dividend, and can be followed wherever invested by the company. This contention is further maintained by the fact that the company reserved the right to issue, in lieu of the preferred stock, first mortgage bonds, bearing interest at the rate of 6 per cent. per annum, secured by a mortgage upon all the compresses of the association; thus making this loan represented by the preferred stock payable at any time upon the will of the corporation.

The other allegations in complainants' bill in regard to judgments; the insolvency of the corporation; that it could not be operated as a going concern with profit, and ought to be disintegrated, and the assets divided, and that part of the property had been sold without authority; that their right to have a dividend declared on their stock had been neglected and refused; that their right to receive the full face value thereof had been denied by the corporation,—are matters that can only be investigated and determined by a court of equity. The investigations of the amount of the net income, and the proper disposition thereof, the marshaling of assets, the priority of liens, and the foreclosure of same, as well as the prayer for injunction and receiver pendente lite, are proper matters for the consideration of the chancellor, and cannot be proceeded with in a court of law. The case made by the bill, if sustained by proof, would undoubtedly entitle complainants to relief. Therefore the decree dismissing the bill is reversed, and the case remanded, with instructions to grant a rehearing in the case, and proceed as equity may require.

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VANVALKENBERG et al. v. AMERICAN FREEHOLD LAND MORTGAGE CO. OF LONDON, Limited.

(Circuit Court of Appeals, Fifth Circuit. May 10, 1898.)

No. 641.

**1. MORTGAGES—UNCERTAINTY—PAROL EVIDENCE.**

Where the only property owned by a mortgagor in a certain quarter section is the portion lying south of a creek, which portion contains about 30 acres, a mortgage describing land as "thirty acres in" said quarter section is not so vague and indefinite as to be incapable of being aided by parol proof.

**2. MORTGAGES—UNCERTAINTY—POSSESSION.**

Where land is conveyed by a mortgage, by uncertain terms of description, it is not indispensable to the identification of the land that the mortgagee should have been placed in actual possession.

**3. MORTGAGES—UNCERTAINTY—NOTICE.**

Where a mortgage describes land as "thirty acres in" a certain quarter section, it is not necessary that such land should be laid off in the form

of a square, one angle of which conforms to the southwest angle of the quarter section; and, where the only land in such quarter section belonging to the mortgagor is 30 acres lying south of a certain creek, the judgment creditors of the mortgagor will be charged, by the record of the mortgage, with notice of the mortgagee's interest in such land.

Appeal from the Circuit Court of the United States for the Northern District of Alabama.

R. W. Walker, for appellants.

Milton Holmes, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

McCORMICK, Circuit Judge. On and prior to April 9, 1886, Daniel H. Turner owned a plantation in Madison county, Ala., containing 2,405 acres, embracing certain half sections, quarter sections, and smaller parts of sections, contiguous to each other, aggregating 365 acres. The latter portion embraced what is described as W.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$  of section 33, township 1, range 2 W., 80 acres; S. W. part of the N. W.  $\frac{1}{4}$  of section 33, township 1, range 2 W., 30 acres; 14 acres in N. W.  $\frac{1}{4}$  of section 33, township 1, range 2 W.,—which 124 acres, together with the N. W.  $\frac{1}{4}$  of section 32, township 1, range 2 W., 160 acres, and the E.  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$  of section 32, township 1, range 2 W., 80 acres, and 1 acre in the S. E. part of section 29, township 1, range 2 W., made up the 365 acres, and constituted the tract described as the Mill tract in the plat marked "Exhibit 4," attached to the deposition of Joseph H. Sloss in the record in this case. On the tract thus described as the Mill tract, and on the south bank of Limestone creek, there stood one grist mill and flouring mill, run by water power, in a frame building four stories high, new, and in complete order. On this 2,405 acres the owner, Daniel H. Turner, applied for and obtained a loan of \$16,000 from the American Freehold Land Mortgage Company of London, Limited, the appellee. He executed to the appellee his mortgage, bearing date April 9, 1886, on all of the land above referred to, describing a part of the land as "thirty (30) acres in the southwest part of the northwest quarter of section thirty-three (33)." This mortgage was duly recorded on April 17, 1886. On July 6, 1891, the land embraced in this mortgage was put to sale according to its terms, and duly purchased by the appellee at and for the sum of \$17,600; that being the highest, best, and last bid therefor at the sale. On August 27, 1891, J. Vanvalkenberg & Sons, the appellants, recovered a judgment in the state court of Madison county, Ala., in the sum of \$997.85 and costs of suit, which judgment they caused to be duly recorded on the next day, August 28, 1891, in the proper office in Madison county, Ala. They had duly issued executions on their judgment, which were levied from time to time on different property as the property of the defendant in the judgment, but without any sale thereunder until the issuance of an alias execution on the 2d day of August, 1893, which was levied on all of the N. W.  $\frac{1}{4}$  of section 33, township 1, range 2 W., which lies on the south or west side of Limestone creek, all in Madison county, state of Alabama, and levied upon as the property of Daniel H. Turner,

under which levy and execution the sheriff did on the 4th day of September, 1893, sell the property last above described to J. Vanvalkenberg & Sons, and executed to them a deed therefor. On April 8, 1895, the appellants brought a suit of ejectment against the appellee in the state court, which was duly removed into the circuit court; and to enjoin the prosecution of which action, and cancel the sheriff's deed as a cloud upon appellee's title, this bill was exhibited. It is shown that by due proceedings in the chancery court of Madison county, Ala., the appellee had procured to be reformed and corrected the description of the land referred to in the mortgage as "thirty (30) acres in the southwest part of the northwest quarter of section thirty-three (33)," so that the description thereof shall read: "All of the northwest quarter of section 33, on the south side of Limestone creek, containing 30 acres, more or less, township 1, range 2 west, being part of the Bayless Mill property; including the mill and appurtenances thereto. \* \* \*" The appellants were not made parties to the equity proceeding for the reformation and correction of the description of this land in the mortgage. They claim that the land in controversy is not embraced in the description, as originally written in the mortgage, and that by the record of their judgment against the mortgagor they obtained a lien upon the land equivalent to the right that would have been acquired by a purchaser for value without notice of the appellee's equity. They also claim that they had a lien by reason of the issuance from term to term and levy of executions under their judgment previous to and up to the time of the sale. They refer to and rely upon section 2894 of the Code of Alabama (1886), as construed by the supreme court of the state in several recent cases, but especially in *Winston v. Hodges*, 102 Ala. 304-310, 15 South. 528, and the cases therein cited. The view that we have taken of the facts of this case makes it unnecessary for us to review the Alabama decisions, and the various provisions of the Alabama Code, or the other authorities cited by either of the parties.

The appellants assume, and it appears that the appellee impliedly concedes, that the land described as 30 acres in the S. W. part of the N. W.  $\frac{1}{4}$  of section 33 embraces only the land contained within a survey beginning at the S. W. corner of the N. W.  $\frac{1}{4}$ , and laid off in a square form. Counsel for the appellants insisted in his oral argument that the law so required. He was asked by one of the members of this court: "What law? The statute law of Alabama, or the common law, or any generally recognized law?" He did not refer us to any authority, either in the statutes of Alabama, or other statutes, or course of judicial decision, demanding recognition of his proposition as settled law. With as much care as our limited time permits, we have examined the Alabama Code, and can find no provision therein that supports the proposition so confidently advanced by the appellants' counsel, that the description in the mortgage cannot embrace any land in the S. W. part of the N. W.  $\frac{1}{4}$  of section 33 that does not fall within a square of that area, beginning at the S. W. corner of the N. W.  $\frac{1}{4}$ , and having for two of its lines the lines of the quarter section. If there is any general law to that effect, of which we are charged with judicial notice, the members of this court have not actual knowl-

edge of it. We are aware that in some of the states provisions are made for tax sales, which require the offering, when necessary, of land to the bidder who will take the smallest number of acres of the land, and pay the tax and charges due on the whole tract out of which such number of acres is to be taken; and as a necessary part of such regulation the statute in such cases provides how a small number of acres shall be taken out of the larger tract, giving a beginning corner, and the form in which the survey shall be made so as to include the number of acres. We do not find this provision, however, in the Alabama Code. On the contrary, it appears that even in tax sales a special designation of the land to be sold, as far as it is practicable to make it, shall be made by the public officer, and only so much offered for sale as will meet the delinquent taxes, penalties, and charges.

Daniel H. Turner acquired this property from Mary A. Bayless, Arthur H. Bayless, Leona V. Bayless, and Beatrice A. Pearson, joined by her husband, William J. Pearson; she (Beatrice A.) being a daughter of Reuben W. Bayless. The deeds from these grantors to Daniel H. Turner were duly recorded in 1882. They describe the property, so far as it affects this contest, thus: "All of N. W.  $\frac{1}{4}$  south of Limestone creek, S. 33, T. 1, R. 2 west; 30 acres S. part N. W.  $\frac{1}{4}$ , S. 33, T. 1, R. 2 west." It clearly appears from the record in this case that there are only about 30 acres of the N. W.  $\frac{1}{4}$  of section 33 on the south side of Limestone creek, and that, therefore, the description in the deed to Daniel H. Turner from the Bayless grantors is not susceptible of any other reasonable construction than that which conveys all of the N. W.  $\frac{1}{4}$  of section 33 on the south side of Limestone creek, containing 30 acres, more or less, in township 1, range 2 W. It is not shown by the record that Daniel H. Turner owned any land in the N. W.  $\frac{1}{4}$  of section 33, except this 30 acres acquired from his Bayless grantors. On the contrary, it affirmatively appears in the exhibits to the depositions that the records of Madison county do not show such ownership of any other portion of this quarter section to have been in Daniel H. Turner at any time. "The description of the land involved in this controversy, as given in the mortgage to the appellee, is not so vague and indefinite as to be incapable of being aided by parol evidence of identification, when read in the light of the circumstances surrounding the contracting parties at the time the conveyance was made. Nor would it be necessary that the mortgagee should have been placed in actual possession of the premises; that being only one of the usual, but not indispensable, modes of identifying lands conveyed by uncertain terms of description." This language is taken from the opinion of the court in *O'Neal v. Seixas*, 85 Ala. 80, 4 South. 745. The description in the mortgage in that case reads, "A lot of land near Florence, north of the fair grounds, containing 35 acres, more or less,"—a description not only very like, but certainly as vague as, the description of the land in question in the appellee's mortgage.

Without considering the question of notice to the appellants, as *lis pendens* purchasers after the institution of the equity proceeding to reform the mortgage, or the question of notice to them by reason

of their attorneys' former connection with the appellee and its litigation in connection with this land, it seems clear to us that the appellants are chargeable with notice of the appellee's right in this land by reason of the record of the mortgage itself. The mortgagor thought he was conveying in mortgage the land on which the grist mill and flouring mill stood. It was his intention to do so. The appellee thought it was receiving a conveyance in mortgage to the land upon which the mill plant stood. The court of chancery has decreed that this property was embraced in the mortgage. The claim of the appellants rests solely, as far as we can discover, upon the assumption that by some fixed law—whose origin, or the evidence of its existence, we have failed to discover—30 acres out of the S. W. part of the N. W.  $\frac{1}{4}$  of section 33 could only be laid off in the form of a square, one angle of which conforms to the S. W. angle of the quarter section. We think the appellants' claim has no support either in law or equity, and therefore the judgment of the circuit court is affirmed.

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MILLER v. MORLEY FINISHING MACH. CO.

(Circuit Court of Appeals, First Circuit. April 15, 1898.)

No. 241.

**SPECIFIC PERFORMANCE—PRELIMINARY INJUNCTION.**

In a suit for specific performance of an alleged contract for the assignment of a large number of patents belonging to defendant, a preliminary injunction, involving the defendant in much inconvenience and possible loss, should not be granted, restraining him from selling or otherwise disposing of a list of patents enumerated as coming within the agreement, where one of the terms of the contract is so indefinite as to make it doubtful whether the court could enforce it, and where it is also doubtful whether some of the patents for which the injunction is sought are embraced within the terms of the contract.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a bill by the Morley Finishing Machine Company, a corporation organized under the laws of Maine, against Oliver A. Miller, a citizen of Massachusetts, for specific performance of a contract. In the circuit court a preliminary injunction was granted, restraining the defendant from selling, assigning, or transferring certain patents owned by him, and which were alleged to be subject to the agreement sought to be enforced. From this order the defendant has appealed.

The bill contains the following allegation, among others:

(1) The plaintiff company is the owner of a number of United States letters patent covering inventions and improvements in tree feet or boot trees and boot-treating machines, used by boot and shoe manufacturers in the finishing of boots and shoes, and was organized for the purpose of manufacturing tree feet or boot trees and boot-treating machines embodying the inventions and improvements covered by said patents or such other patents as it might acquire, and selling or leasing the machines and appliances so manufactured. The defendant, Miller, is the owner of a large number of patents and rights in patents covering other inventions and improvements in the same line as those covered by the plaintiff's patents,—that is to say, in boot and shoe trees or tree feet and boot-treating machines and devices, to be used in con-

nection therewith, and machinery to be used in the finishing of boots and shoes, and accomplishing the same or similar results as the boot trees and boot-treeing machines covered by the plaintiff's patents,—and for some years past has been, and is now, engaged in manufacturing, in a shop or factory owned by him in said Brockton, boot trees and boot-treeing machines and devices, to be used in connection therewith under his said patents, and in selling or leasing the same; and such boot trees, boot-treeing machines, and devices manufactured by the defendant, Miller, are widely distributed in boot and shoe factories throughout the United States.

The bill then enumerates certain patents as being among those owned by the defendant, Miller. The contract which the bill seeks to enforce related to these patents. It was negotiated in behalf of the complainant by Charles A. Sinclair, one of its directors, and was dated October 9, 1897; being in full as follows:

Memorandum of an agreement made this day, between Mr. O. A. Miller, of Brockton, Mass., and the Morley Finishing Machine Company, by Wm. B. Lewis, of Boston, president of said company, witnesseth as follows: In consideration of one dollar, and other valuable consideration, receipt of which is hereby acknowledged each to the other, the said Miller agrees to turn over and transfer his business in tree feet, tree-foot machinery, all patents, all machines, tools, and fixtures, and everything pertaining to the manufacturing of said machines and said tree feet, to the said Morley Finishing Machine Company or its representatives, and further agrees that he will not engage in any business, during the life of the said Morley Finishing Machine Company's patent, that shall in any way interfere or injure said tree-foot business. In consideration and upon the promise of the said Morley Finishing Machine Company to take the necessary steps immediately to increase the capital stock of their company to three hundred and fifty thousand dollars, the said Miller to receive outright one hundred thousand dollars of this stock, and fifty thousand dollars to be put into the treasury of said Morley Finishing Machine Company. It is understood and agreed that the said Miller, in consideration of his turning over the above-mentioned business, patents, machinery, tools, and fixtures, and everything that pertains to the business excepting his real estate, shall be elected manager of said business for the term of one year, receiving as compensation for his services five thousand dollars, payable in equal quarterly payments. It is further understood and agreed that the Morley Finishing Machine Company shall have the use, for one year from the date of this transfer, of the said real estate, power, and plant, and everything that pertains to the manufacturing of tree feet now used by the said Miller, free of expense to the said Morley Finishing Machine Company during that time, or for such less time as said Morley Finishing Machine Company may occupy it. It is agreed by both parties to this agreement that this agreement shall be submitted to Messrs. Fish, Richardson & Storow, who shall draw up an agreement, which shall be signed by both parties to this agreement, which shall insure the faithful performance of everything outlined in this agreement; and it is further agreed that the agreement and transfer shall go into effect as of November first, eighteen hundred and ninety-seven. Witness our hands and seals, this ninth day of October, eighteen hundred and ninety-seven.

William B. Lewis, President. [Seal.]  
Morley Finishing Machine Co.  
Oliver A. Miller.

Witnesses:

J. F. Springfield.  
Edw. C. Storow.

On October 11, 1897, Mr. Sinclair addressed the following letter to Mr. Lewis:

Manchester and Lawrence Railroad, Boston, Mass., October 11, 1897.

William Lewis, Esq., President Morley Finishing Machine Company—Dear Sir: Mr. Miller has just been in to see me, and has called my attention to the

fact that, in the agreement which we signed for the consolidation of our businesses, we omitted to state the fact that he was to receive cash for his merchandise. This was my understanding, and was what we agreed to do with Mr. Miller. Leaving it out of the signed agreement was an oversight, and it is entirely proper he should have something to show what the understanding is. If you agree with me as to the intention, I will ask you to please indorse on the back of this your approval. I think this will cover the necessity, as Mr. Fish is to draw up an agreement, and can embody this part of the transaction in the agreement which we will all finally sign.

Yours, truly,

[Signed] Chas. A. Sinclair.

#### Indorsed as follows:

My understanding is the same as outlined within, and we will, in the agreement to be drawn by Messrs. Fish, Richardson & Storow, have it fully set forth.

[Signed]

William B. Lewis, President,

Boston, Oct. 11/97.

Morley Finishing Machine Company.

The bill, after setting out the agreement of October 9, 1897, and alleging various steps taken on its part by way of performance, proceeded as follows:

And the plaintiff company further avers that the said agreement of October 9, 1897, was submitted, as provided by its terms, to Messrs. Fish, Richardson & Storow, counsel for the plaintiff company, who have drawn up an agreement, a copy of which is hereto annexed, marked "Exhibit B," which has been duly executed by the plaintiff company, and which by its terms secures the faithful performance by both parties of everything outlined in said agreement of October 9, 1897; and the plaintiff company has tendered said agreement so prepared and so executed by it to the defendant for his signature; and that the defendant has refused to execute the same, or to execute any other proper instrument turning over and transferring his said business, patents, and other property to the plaintiff, as provided in the said agreement of October 9, 1897, and has refused and still refuses to perform or carry out his said agreement in any respect, and has retained said business, patents, and other property for his own use, and has, by the use of said business, patents, and other property, carried on a business of manufacturing, selling, and leasing boot trees and other boot-treeing machinery in competition with the plaintiff with great profit to him, but to what amount the plaintiff is ignorant and cannot learn save by the discovery herein prayed for, and to the great and irreparable damage of the plaintiff, and proposes to continue said wrongful acts. And your orator is informed and believes that the said defendant, contriving to injure the plaintiff, and to place it forever out of the power of this plaintiff to secure the performance of said contract, and wholly regardless of his agreement with the plaintiff, is secretly planning to sell the most valuable parts of said business, property, and patents to some person or persons to the plaintiff unknown; and, unless restrained by the order of this honorable court, the said defendant will actually make said sale and transfer, whereby the rights secured to the plaintiff by said agreement will be rendered worthless.

The Exhibit B mentioned in the bill as having been prepared by complainant's counsel for the purpose of carrying the agreement of October 9, 1897, into effect, is here set out in full:

#### Exhibit B.

This agreement and assignment, made this — day of —, A. D. 1897, by and between Oliver A. Miller, of Brockton, Massachusetts, and the Morley Finishing Machine Company, a corporation duly organized under the laws of the state of Maine, hereinafter called the "Morley Company," witnesseth:

That whereas said Miller, by the terms of a certain agreement dated October 9th, 1897, agreed to turn over and transfer to the Morley Company his business in tree feet, tree-feet machinery, all patents, all machines, tools,

and fixtures, and everything pertaining to the manufacturing of said machines and said tree feet, excepting his real estate, for the consideration set out in said agreement; and whereas the capital stock of the Morley Company has been increased as provided in said agreement, except that by the agreement of the parties said increase was to five hundred thousand dollars instead of to three hundred and fifty thousand dollars, and the Morley Company has issued and delivers to said Miller simultaneously herewith a certificate for ten thousand shares of its capital stock, of the par value of one hundred thousand dollars, and has in its treasury twenty thousand shares of its capital stock, of the par value of two hundred thousand dollars: Now, therefore, be it known:

(1) That in consideration of the issue and delivery of the said stock to said Miller, and of the covenants and agreements of said Morley Company herein contained, and in further consideration of the sum of one dollar to him paid by the said Morley Company, the receipt whereof is hereby acknowledged, the said Miller does hereby grant, sell, assign, transfer, and deliver unto the said Morley Company his business in tree feet and tree-feet machinery, all machines, tools, and fixtures, and everything pertaining to the manufacture of tree feet and tree-feet machines and to his tree-feet business, except real estate owned by him.

(2) For the consideration aforesaid, said Miller does further sell, assign, transfer, and set over unto the Morley Company the following letters patent of the United States, together with the inventions therein shown and described, viz.: No. 317,476, granted to Abel D. Tyler, Jr., for boot tree, May 5, 1885; No. 319,354, granted to Abel D. Tyler, Jr., assignor to Oliver A. Miller, for boot tree, June 2, 1885; No. 319,355, granted to Abel D. Tyler, Jr., assignor to Oliver A. Miller, for boot tree, June 2, 1885; No. 319,356, granted to Abel D. Tyler, Jr., assignor to Oliver A. Miller, for boot tree, June 2, 1885; No. 347,309, granted to A. R. Wellman, assignor to Oliver A. Miller, for boot tree, August 10, 1886; No. 348,937, granted to Abel D. Tyler, Jr., assignor to Oliver A. Miller, for boot or shoe tree, September 7, 1886; No. 393,003, granted to Alfred B. Fowler, assignor to Oliver A. Miller, for boot-treeing machine, November 20, 1888; No. 395,668, granted to George E. Smith, assignor to one-half to William A. Knipe, for last, January 1, 1889; No. 427,698, granted to Howard G. Locke, assignor of one-half to Brockton Last Co., for boot or shoe tree, May 13, 1890; No. 440,788, granted to Jothan H. Burbank, Lovina J. Burbank, administratrix, assignor to Oliver A. Miller, for boot tree, November 18, 1890; No. 441,115, granted to F. L. Stone and A. R. Wellman, assignors to Oliver A. Miller, for boot or shoe tree, November 18, 1890; No. 441,116, granted to A. R. Wellman, assignor to Oliver A. Miller, for boot tree, November 18, 1890; No. 441,117, granted to A. R. Wellman, assignor to Oliver A. Miller, for boot tree, November 18, 1890; No. 442,033, granted to Alfred B. Fowler, assignor to Oliver A. Miller, for boot-treeing machine, December 2, 1890; No. 442,034, granted to Alfred B. Fowler, assignor to Oliver A. Miller, for boot-treeing machine, December 2, 1890; No. 449,877, granted to W. Gordon, assignor of one-half to Oliver A. Miller, for last, April 7, 1891; No. 452,142, granted to Howard G. Locke, William H. Cary, and Joseph E. Kimball, said Locke assignor to Brockton Last Co., for shoe tree, May 12, 1891; No. 500,711, granted to W. Gordon, assignor to O. A. Miller, for last, July 4, 1893; No. 556,096, granted to W. Gordon and C. E. Gordon, for last, March 10, 1896; design No. 26,040, granted to Oliver A. Miller, for ironing tool, September 15, 1896; No. 557,210, granted to H. G. Locke, assignor to O. A. Miller, for last, March 31, 1896; No. 559,492, granted to H. G. Locke, assignor to Brockton Last Co., for last, May 5, 1896; No. 568,326, granted to J. W. Barlow, assignor to O. A. Miller, for last, September 29, 1895.

Said Miller does also, for the consideration aforesaid, hereby sell, assign, transfer, and set over unto the Morley Company all his right, title, and interest in, to, and under any and all other letters patent (and the inventions therein shown and described), whether of the United States or of any foreign country, which pertain to tree feet and tree-feet machinery, especially including the following letters patent of the United States, viz.: No. 342,298, granted to Oliver I. Howe, for boot or shoe tree foot, May 18, 1886; No.

420,501, granted to Clarence A. Sumner, assignor of one-half to Oliver A. Miller, for boot or shoe treeing machine, February 4, 1890. And also the following foreign letters patent, viz.: English letters patent No. 6,709, dated June 2, 1885, to William R. Lake, on communication from O. A. Miller; English letters patent No. 6,710, dated June 2, 1885, to William R. Lake, on communication from O. A. Miller; English letters patent No. 7,974, dated May 22, 1890, to Alfred B. Fowler; English letters patent No. 18,629, dated November 18, 1890, to Henry H. Lake, on communication from O. A. Miller; French letters patent No. 169,302, dated June 2, 1885, to Oliver A. Miller; French letters patent No. 209,964, dated December 3, 1890, to Alfred B. Fowler; German letters patent No. 34,593, dated June 2, 1885, to Oliver A. Miller; German letters patent No. 34,687, dated June 2, 1885, to Oliver A. Miller; German letters patent No. 58,742, dated December 3, 1890, to Alfred B. Fowler; German letters patent No. 59,978, dated November 18, 1890, to Oliver A. Miller.

And said Miller does also, for the consideration aforesaid, hereby sell, assign, transfer, and set over unto the Morley Company all his right, title, and interest in and to any and all applications for letters patent the inventions of which pertain to tree feet and tree-feet machinery, especially including the following applications for letters patent of the United States, viz.: Ser. No. 364,688, filed September 11, 1880, by Howard G. Locke; Ser. No. 453,749, filed December 1, 1892, by Howard G. Locke; application filed by George E. Smith for lasts, assigned to O. A. Miller, July 22, 1895, recorded in United States patent office, Liber T<sup>51</sup>, page 416; application filed by George E. Smith, for lasts, assigned to O. A. Miller, October 5, 1896, recorded in United States patent office, Liber O<sup>54</sup>, page 269; application filed by Charles H. Saunders, for hinged last, assigned to O. A. Miller, August 14, 1896, recorded in United States patent office, Liber K<sup>54</sup>, page 168; application filed by Charles H. Saunders, for lasts, assigned to O. A. Miller, October 7, 1896, recorded in United States patent office, Liber W<sup>54</sup>, page 111; application filed by Oliver A. Miller and Don C. Luce, for lasts, said Luce's interest having been assigned to said O. A. Miller, July 3, 1897, recorded in United States patent office, Liber F<sup>56</sup>, page 199; application filed by John W. Barlow, for lasts, assigned to O. A. Miller, February 17, 1897, recorded in United States patent office, Liber P<sup>56</sup>, page 4; application filed by John W. Barlow, for lasts, assigned to O. A. Miller, February 17, 1897, recorded in United States patent office, Liber P<sup>56</sup>, page 4.

Said Miller does hereby authorize and request the commissioner of patents to issue the several letters patent that may be granted on such applications, or any of them, to the said Morley Finishing Machine Company, its successors and assigns. To have and to hold the said goods and chattels, letters patent, applications, and other property to the said Morley Finishing Machine Company and its successors and assigns, to its and their own use and behoof forever.

(3) For the consideration aforesaid, said Oliver A. Miller does hereby covenant and agree that he will permit the Morley Company to use and occupy, free of expense to the Morley Company, for one year from November 1, 1897, his factory, power, plant, and everything that pertains to the manufacture of tree feet used by the said Miller on the ninth day of October, A. D. 1897.

(4) For the consideration aforesaid, the said Miller does hereby covenant and agree that he will not engage in any business that shall in any way injure the said tree-feet business assigned and sold by these presents to the Morley Company, until the expiration of the Morley Company's letters patent No. 589,696, dated September 7, 1897.

(5) In consideration of the foregoing transfers and assignments from and agreement of the said Miller, the Morley Company does hereby covenant and agree that said Miller shall be elected manager of its business for the term of one year from the first day of November, 1897, and that it will pay to said Miller for said period of one year a salary of five thousand dollars in equal quarterly payments, the first payment to be made February 1, 1898.

(6) This instrument shall take effect as of the close of business on the thirty-first day of October, A. D. 1897.

In witness whereof, the said Oliver A. Miller has hereunto set his hand  
87 F.—40

and affixed his seal, and the said Morley Finishing Machine Company has caused this instrument to be signed and its corporate seal to be hereunto affixed by Wm. B. Lewis, its president, and John F. Springfield, its treasurer, thereunto duly authorized, in duplicate, the day and year first above written.

[Corporate Seal.]

Morley Finishing Machine Company,  
By William B. Lewis, President,  
John F. Springfield, Treasurer.

The restraining order (which by a subsequent order of the court became a preliminary injunction) was in part as follows:

We therefore, in consideration thereof, enjoin and command you, each and every of you, that from and immediately after the receipt and notice of this, our writ, by you, or any of you, you shall not sell, assign, transfer, or incur, or otherwise intermeddle with the title to any of the business and property used therein, and patents and patent rights subject of the contract between you and the said Morley Finishing Machine Company of October 9, 1897, and particularly shall not withdraw any money from said business, nor sell, assign, transfer, incur, or otherwise intermeddle with the title to any of the following described patents and inventions, or the rights therein: [Then followed a long list of patents and pending applications for patents.]

William Quinby, for appellant.

Frederick P. Fish and Robert F. Herrick, for appellee.

Before PUTNAM, Circuit Judge, and BROWN and LOWELL, District Judges.

PER CURIAM. With reference to the letter of Mr. Sinclair, which it is admitted must be read into the alleged agreement which the plaintiff seeks to enforce, it appears to the court that the expression "cash for his merchandise" is so indefinite as to leave the alleged agreement so vague that it is doubtful whether an equity court can compel its enforcement; and, moreover, it is doubtful whether the instrument of conveyance submitted to the defendant for execution by him contained a proper offer to carry out the draft contract as it was supplemented by that letter; and, further, it appears very doubtful whether the alleged agreement covers the patents relating to hinged lasts, in reference to which an apparently fair controversy has arisen between the parties. On the whole, the court is of the opinion that the case, as presented, is so doubtful on the merits that an injunction of the broad character granted below, involving the defendant in so much inconvenience and possible loss, ought not, in this case, to be affirmed. The order appealed from is reversed, and the costs of this court are awarded to the appellant.

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RICE et al. v. P. J. WILLIS & BRO.<sup>1</sup>

P. J. WILLIS & BRO. v. OAKES et al.

(Circuit Court of Appeals, Fifth Circuit. May 10, 1903.)

No. 671.

1. ADVERSE POSSESSION—COLOR OF TITLE.

"Title," as used in the Texas statute prescribing the three-years limitation, means a regular chain of transfer from or under the sovereignty of the soil; and "color of title" means a consecutive chain transfer down to the person in possession, without, however, being regular; as where one

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<sup>1</sup> Petition for rehearing filed May 23d, and denied June 2d, without opinion.

of the memorials or muniments is not registered or duly registered, or is only in writing, or such like defects as do not include a want of intrinsic fairness and honesty.

2. VENDOR AND VENDEE—BONA FIDE PURCHASER—DESTROYED RECORDS.

A bona fide purchaser for value, without notice, of a tract of land, part of which has been conveyed to another by a deed the record whereof has been destroyed, and not replaced as provided by the statute, acquires a good title; but where, on subsequently receiving notice of the prior deed, he sells the land, and conveys it by a deed of special warranty, containing a reservation of the part conveyed by such previous deed, thus showing his waiver of previous notice, this protects the title of the grantees under the previous deed, so that his executors would have no power over the part conveyed by it.

Error and Cross Error to the Circuit Court of the United States for the Northern District of Texas.

John C. Winter, Pressley K. Ewing, and H. F. Ring, for plaintiffs in error Rice, House, and Oliver.

Eugene Williams, for P. J. Willis & Bro.

D. A. Kelley, for defendant in error R. A. Oakes.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

McCORMICK, Circuit Judge. This is a Texas real action to try the title to a tract of land described in the pleadings. The parties, by stipulation in writing, waived a jury, and submitted the case, on law and fact, to the decision of the judge. Reducing the finding of facts to working form, it shows that one Louis Moore was the common source of title through and under whom all the parties claim; that on February 1, 1875, Louis Moore conveyed to one E. H. Graham, trustee, the north half of the Morgan league, including the land in controversy, to secure a debt specified in the conveyance; that this trust deed was duly foreclosed, and the land sold according to the terms of the deed, at which sale, on September 8, 1881, one R. S. Willis became the purchaser; that, prior to the making of the trust deed, Louis Moore had deeded the land in controversy to A. Groesbeck, W. J. Hutchins, and W. R. Walker, trustees, by deed dated August 24, 1872, and duly recorded September 6, 1872; that the trustees named took for the benefit of the Houston & Texas Central Railway Company, and the trustees, parties to this suit, are the successors to the grantees in this deed; that the book in which the record was made was destroyed by fire on October 12, 1872, and the deed was re-recorded on June 13, 1893; that Willis had no notice of this conveyance at the time he purchased the north half of the Morgan league; that he was a purchaser for value, in good faith, and his purchase vested in him the title to the land in controversy; that on February 9, 1884, Willis executed and delivered to R. A. Oakes, for an adequate consideration, a deed to a part of the Morgan league, reciting in the deed that "this conveyance includes the north half of said league, less a certain portion sold to the Central Railway Company, lying at or near Perry Station"; that the land mentioned in and reserved out of this conveyance by R. S. Willis to R. A. Oakes, under which conveyance Oakes claims title to the

land in controversy, is the land that was conveyed by Louis Moore to Baker, Rice, Hutchins, and Groesbeck, trustees (whose title the defendants House, Rice, and Oliver hold), by deed of date August 24, 1872; that this last-named deed was duly recorded in Book K of the Records of Deeds of Falls County, in which county the land is situated, on September 6, 1872; that the land so conveyed by the deed last named was surveyed and marked by a civil engineer for the railway company and said trustees in the year 1872, together with one Gill, agent for Moore; that, when Oakes was about to purchase the land from Willis, he demanded a general warranty deed from Willis, which demand was refused, and Willis conveyed to Oakes by deed with special warranty against claims thereto arising by, under, or through him; that the deed of Willis to Oakes conveyed the north half of the Morgan league, less a certain portion sold to the Central Railway Company, lying at or near Perry Station, and was so expressed on the face of the deed; "that the tract so excepted is the land conveyed by Louis Moore, but it is not found that Willis meant this tract in making the reservation in his said deed." The last clause of the finding just quoted, to the effect that it is not found that Willis meant this tract in making the reservation in his said deed, would be somewhat confusing if the fact had not been so distinctly found that the land in controversy conveyed by Louis Moore to the trustees Baker, Rice, Hutchins, and Groesbeck is the land so excepted out of Willis' deed for the north half of the Morgan league to Oakes. That being the fact clearly found, the deed itself best shows what Willis meant in making the reservation. R. S. Willis died in 1892, leaving a will, which was duly probated, and in which he named executors, and clothed them with ample powers for independent action; and the executors named, having accepted the trust, and having duly qualified as such executors, conveyed the land in controversy to P. J. Willis & Bro. (incorporated), the plaintiff below, and plaintiff in error here.

The trial judge states as conclusion of law:

"(1) The plaintiff is not entitled to recover against either of the defendants, trustees, or the defendant Oakes. If, upon any conceivable theory, the plaintiff has any claim whatever to the land in controversy, such claim is barred as to the defendant Oakes by the three and five years' statutes of limitation.

"(2) As between the defendants, trustees, F. A. Rice, T. W. House, and W. C. Oliver, on the one hand, and the defendant Oakes on the other, the trustees are not entitled to recover against Oakes. Oakes is not an innocent purchaser for value, without notice as to the trustees, if such defense be available in an action at law. But, in the judgment of the court, the proof plainly shows that as to Oakes the claim of said trustees, defendants, is barred by the three and five years' statutes of limitation.

"(3) Judgment will be rendered that the plaintiff take nothing by its suit as against the said trustees, defendants, and the said defendant Oakes, and that, as to such defendants, the costs be adjudged against the plaintiff."

By the term "title," as used in the statutes of Texas prescribing what is called the "three-years limitation," is meant a regular chain of transfer from or under the sovereignty of the soil; and by "color of title" is meant a consecutive chain of such transfer down to such person in possession, without being regular, as if one of the me-

monials or muniments be not registered or not duly registered, or be only in writing or such like defect as may not extend to or include the want of intrinsic fairness and honesty. To support the five-years limitation, the party setting it up is required to show that he is claiming under a deed or deeds duly registered. Rev. St. Tex. 1895, arts. 3341, 3342.

As the land in controversy was excepted out of Willis' conveyance, covering all the other part of the north half of the Morgan league to Oakes, he was not able to show, and did not show, either title or color of title or deed of any kind to the land in controversy, and therefore did not make out either his plea of three years' or of five years' limitation. We concur with the judge of the circuit court in holding that the corporation, P. J. Willis & Bro., claiming under and through the executors of R. S. Willis, cannot recover the land in controversy, because, while it appears from the findings of fact that the title to it did vest in R. S. Willis at the time of his purchase, in 1881, by reason of the fact that he became a purchaser of the whole half league for value, without any actual or constructive notice of the prior conveyance, his recitation in the deed to Oakes shows that, having subsequently received such notice, he put on the face of his special warranty deed to his vendee a reservation which protected the title of the trustees F. A. Rice, T. W. House, and W. C. Oliver, and put it beyond the power of his executors to convey any title thereto to the plaintiff below, the plaintiff in error herein. There being, therefore, no title remaining in the estate of R. S. Willis which his executors could convey to the corporation, P. J. Willis & Bro., and hence no title in that corporation, and there being no right, legal or equitable, in Oakes to the land in controversy, and no support whatever to his plea of three and five years' statute of limitation, by reason of this lack of any deed thereto, and the land having been, in good faith and for an adequate consideration, conveyed by Louis Moore, the common source of title, to the predecessors in the trust of the trustees F. A. Rice, T. W. House, and W. C. Oliver, the title has continued to be in the trustees for the benefit of the Houston & Texas Central Railway Company, and remains theirs in law and in equity.

We conclude, therefore, that the judgment of the circuit court is not supported by the findings, and that the findings require that the judgment should be rendered in favor of the trustees F. A. Rice, T. W. House, and W. C. Oliver. It is therefore ordered that the judgment of the circuit court is reversed, and is now here reformed and rendered so as to vest the title to the land in controversy in the defendants, trustees, F. A. Rice, T. W. House, and W. C. Oliver.

## ERSKINE et al. v. STEELE COUNTY.

(Circuit Court, D. North Dakota, S. E. D. May 28, 1898.)

## 1. CONSTITUTIONAL LAW—STATUTE VALIDATING FORMER INVALID CONTRACT.

Plaintiff sued on a county warrant, and was defeated on the ground that the county commissioners had no authority to contract for the services the warrant was given for. The state legislature afterwards passed an act authorizing contracts of a like nature, and validating those theretofore made. *Held*, that the act was not unconstitutional, either as an exercise of judicial power or a deprivation of the county of its property without due process of law, nor was it in violation of the provision forbidding donations to individuals.

## 2. RES JUDICATA.

In such case, the prior judgment was no bar to the subsequent action on the validated contract.

This was an action by the administrators of Massena B. Erskine against Steele county, N. D., to recover on a county warrant.

Newman & Spaulding, for plaintiffs.

F. W. Ames and George Murray, for defendant.

AMIDON, District Judge. This action is submitted to the court without a jury upon an agreed statement of facts, which may be summarized as follows: The defendant, Steele county, was organized on the 23d day of June, 1883, out of territory which had been previously embraced in the counties of Traill and Griggs. Thereafter its board of commissioners employed one E. J. McMahon to transcribe the records in the offices of the registers of deeds of the old counties affecting the title to real property situated in the new. The work was prepared by him pursuant to the contract, and on the 19th day of November, 1883, the defendant's board of commissioners audited and allowed his claim at the sum of \$2,010, and caused a county warrant to be issued to him for the amount of \$2,680; the excess over the amount of the claim being for the purpose of making good the discount at which the warrants of the county were selling at that time. McMahon transferred the warrant to Massena B. Erskine, who thereafter brought an action upon it against the county, in which he recovered a judgment in the trial court, but the supreme court of the state, on appeal, reversed this judgment, and directed the lower court to dismiss the complaint, with costs. Judgment was entered accordingly in the trial court, and that portion of it relating to costs was paid by the plaintiffs, who had been substituted in the action upon the death of the original plaintiff. The decision of the supreme court was based wholly upon the following grounds: First, that, at the time the contract was made with McMahon, the county commissioners had no power or authority, under the law, to make the same; and, second, that they had no power or authority to issue any warrant for a greater sum than the amount that was agreed to be paid for the services rendered. This decision will be found in 4 N. D. 339, 60 N. W. 1052. In the course of the opinion the court uses the following language:

"Whether the transcription made by McMahon would or would not possess any legal validity as notice or otherwise is unnecessary to decide in this case;

but, to say the least, there is grave reason to doubt the legal value of such transcribed records."

This decision was rendered in November, 1894. For the apparent purpose of meeting the objections thus raised, at the next session of the legislature of the state, which convened in January, 1895, an act was passed which provided as follows:

"When a new county is organized in whole or in part from an organized county, or from territory attached to such organized county for judicial purposes, it shall be the duty of the commissioners of such new county to cause to be transcribed in the proper books all the records of deeds, or other instruments relating to real estate in such new county, and all the contracts heretofore made by any board of county commissioners for the transcribing of any such records are hereby made valid; and all records transcribed thereunder, or under the provisions of this act, shall have the same effect in all respects as original records, and any person authorized by such boards of county commissioners to transcribe such records shall have free access at all reasonable times to such original records for the purpose of transcribing the same." Acts 1895, p. 43.

Thereafter the plaintiffs obtained an assignment from McMahon of his claim against the county for transcribing the records, and this action is brought to enforce its payment. Several objections to plaintiffs' right of recovery are urged in the brief of defendant, but it seems necessary to consider only the following in this opinion: (1) That the act of 1895 is unconstitutional for the reason that it is an exercise of judicial power; (2) that it is unconstitutional because it deprives the county of its property without due process of law; (3) that it violates section 185 of the constitution of North Dakota, which forbids the state or any county \* \* \* to make donations to, or in aid of, any individual, association, or corporation; (4) that this action is barred by the judgment in the former action.

An examination of the statutes of the territory of Dakota shows that newly-organized counties were usually empowered to have the records affecting real property embraced within their limits transcribed. Steele county is the only exception found. The maintenance of such a system of records is certainly one of the usual duties of this class of corporations, and is a public, as distinguished from what is sometimes spoken of as a private, function. From this it follows that the legislature could retroactively legalize the contract, unless such action would be an infringement of the constitution. The act of a municipality, done without authority previously conferred, may be confirmed and legalized by subsequent legislative enactment, when legislation of that character is not prohibited by the constitution, and when that which was done would have been legal had it been done under legislative sanction previously given. *Supervisors v. Brogden*, 112 U. S. 261, 5 Sup. Ct. 125; *Bolles v. Brimfield*, 120 U. S. 760, 7 Sup. Ct. 736; *Springfield Safe-Deposit & Trust Co. v. City of Attica*, 29 C. C. A. 214, 85 Fed. 387. The objection that the act in question was judicial legislation wholly misconceives the nature of the act. The legislature did not declare the contract valid which the court had adjudged invalid, but made it valid by imparting to it the legislative sanction which the court had declared was the only element wanting to its validity. The act did not construe, but completed, the imperfect contract which the county had made. *Seiz-*

ing upon the duty that, in good conscience, rested upon the county to pay for the service which it had received, the legislature, by virtue of its authority over the municipality as a public agency of the state, ratified its act, and thereby changed its moral duty into a legal obligation. Its act was formative, not judicial. The want of power in a municipal corporation to enter into a contract is usually disclosed for the first time by an adverse decision in the courts, and, if it should be held that such a decision precludes the legislature from curing the defect, retroactive legislation would be defeated in those cases in which it has heretofore been most frequently used, and in which it has its highest justification. Such is not the law.

The leading authority upon this subject is *Town of Guilford v. Cornell*, 18 Barb. 615, 13 N. Y. 143. In that case Cornell and Clark, as commissioners of highways, prosecuted an action on behalf of the town by direction of the town meeting, and, having been defeated, were compelled to pay \$657.22 as costs of the litigation. They presented a claim for that amount to the town board, which was rejected, and thereupon they brought suit for its recovery. They succeeded before the referee, but the court set aside the judgment, and dismissed the complaint, with costs, upon the sole ground that there was no authority in law for the prosecution of the original action in which the costs accrued, and this decision was affirmed on appeal by the court for the correction of errors. The legislature thereupon passed a law legalizing the claim, and directing the levy of a tax upon the town for its payment. The case above referred to, reported in 18 Barb. 615, 13 N. Y. 143, was brought by the town to restrain the imposition of this tax, and one of the main contentions in support of the action was that the act legalizing the claim was void as judicial legislation. See 18 Barb. 623, 629, 641. The court held this position unsound, the writer of the opinion saying:

"I am unable to see in what respect this act comes in conflict with any power which the judiciary has exercised or which it deems itself authorized to exercise. The equity of the claim of Cornell and Clark was not considered by the court, and for the reason that the question presented was one of strict law, depending entirely upon whether authority to sue had been conferred upon them by statute, and the court held that it was not; and here its functions ended. The judgment of the court has not been interfered with or their jurisdiction assumed; all that has been done is to afford relief where the court, if they would, could not."

This decision is cited and approved in *Wrought-Iron Bridge Co. v. Town of Attica*, 119 N. Y. 204, 23 N. E. 542. In that case the plaintiff had constructed a bridge for the defendant. Its claim for payment of the contract price having been rejected, suit was brought. Plaintiff obtained a verdict, but, upon motion for a new trial, the judge presiding at the circuit set aside the verdict, holding "that the contract with the plaintiff for the construction of the new bridge was without authority; that all the proceedings were unauthorized and ineffectual to bind the town; and that the plaintiff could not recover." Nothing was done to review this judgment, but the plaintiff had recourse to the legislature for relief. An act was passed by which the proceedings of the town were legalized and the contract made binding upon it. After the passage of this act a new action

was brought by the plaintiff, which was resisted upon the ground "that the legislature had no power to legalize and validate a claim against the town which had already been declared invalid by the judicial tribunals." Upon a review of the authorities, the court of appeals declared this position untenable, and sustained a judgment in favor of the plaintiff.

*Pennsylvania v. Wheeling & B. Bridge Co.*, 18 How. 421, is a striking illustration of the power of the legislature to render lawful that which has been declared unlawful by the courts. In that case the supreme court adjudged a bridge which had been constructed across the Ohio river at Wheeling, under an act of the legislature of Virginia, to be an obstruction to navigation, and a common nuisance, and ordered it to be so changed as not to interfere with vessels in use upon the river. The ground upon which the decision rested was that the bridge had been constructed over a navigable stream without authority of congress, and in violation of rights secured by congressional legislation. Thereafter congress passed an act which was in direct contravention of the decree. It declared the bridge which the court had adjudged to be a nuisance to be a lawful structure, and, instead of requiring the bridge to be accommodated to the vessels, it required the vessels to be so operated as not to interfere with the bridge. This act was assailed as, in effect, annulling the judgment of the court already rendered and the rights determined thereby in favor of the plaintiff. But the act was sustained by the court, which held that the want of congressional authority was all that rendered the bridge an unlawful structure, and, the authority having been conferred, its character was changed. The act did not change the decree, but the subject-matter upon which the decree operated. So, in this case, the curative act of 1895 did not undertake to annul the judgment rendered in the first action. On the contrary, it assumed its validity, and changed, not the judgment of the court, but the contract in respect to which the judgment was rendered.

The question as to when a curative act of the legislature is an infringement upon the judicial power is ably considered in *Howell v. City of Buffalo*, 37 N. Y. 271, 273; *State v. City of Newark*, 34 N. J. Law, 236, 240; *Mills v. Carleton*, 29 Wis. 400, 416; *City of Emporia v. Bates*, 16 Kan. 495 (opinion by Brewer, J.); *Donnelly v. City of Pittsburgh* (Pa. Sup.) 23 Atl. 394. These were all cases involving the validity of acts authorizing the reassessment of special assessments which had been adjudged void and the collection thereof enjoined. The legislation was assailed upon the constitutional ground which we are now considering, and was in each case sustained by the court. It has not escaped notice that the opinions are careful to point out that the acts in question did not attempt to legalize or enforce the assessments which had been adjudged illegal by the court, but simply authorized a reassessment against the property benefited. This distinction, however, grows out of the nature of taxation. The legislature has no power to impose a specific tax upon particular property. An assessment and an opportunity to be heard are essential to a valid tax. No such limitation exists, however, when the legislature is dealing directly with a municipality

which has no right to a hearing before obligations are imposed upon it by the state.

A consideration of the nature of the defendant corporation, and the tenure by which it holds all its property and rights, will afford a complete answer to the contention that it had a vested right under the judgment in the former action of which it could not be deprived by the legislature. The defendant is a public quasi corporation, created solely for governmental purposes. It holds all its property and rights, not as a private proprietor, but for the performance of those public duties with which it is charged by law. Being a mere instrumentality of the state for the convenient administration of government, it is at all times, both as to its powers and its rights, subject to legislative control. While it is no doubt true that the legislature has not such transcendent and absolute power over these bodies that it can apply property held by them to private purposes or to public purposes wholly disconnected with the community embraced within their limits, still it is likewise true that a purely public corporation, like a county, cannot acquire any vested interest which will preclude the legislature from directing the application of all its property and rights to the performance of those governmental functions which pertain to the community embraced within the corporation, and for the performance of which the corporation was created. If it were otherwise, counties, instead of being agencies of the state for administering the government, would be petty sovereignties, to impede and defeat the state with claims of local interest and authority. *Maryland v. Baltimore & O. R. Co.*, 3 How. 534; *East Hartford v. Hartford Bridge Co.*, 10 How. 511; *Board v. Lucas*, 93 U. S. 108; *Board v. Skinkle*, 140 U. S. 334, 11 Sup. Ct. 790; *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 88, 12 Sup. Ct. 142; *Creighton v. Board*, 42 Cal. 446; *Dill, Mun. Corp.* (4th Ed.) § 61 et seq. If it be the law that these public quasi corporations cannot acquire a vested right in property or contract which can limit the power of the legislature in applying the same to the public purposes of the corporation, much less can the defendant in this case claim, as against the legislature, a vested right in a judgment simply declaring in its favor the defense of *ultra vires*. If the judgment had not been rendered, the legislature might have legalized the acts of the defendant, and commanded it to apply funds in its treasury to the payment of the plaintiff's claim. The most that can be said of the judgment is that it is property like the funds in the county treasury, and if the one could be controlled and applied by legislative act the other could also.

A further answer to this objection is found in the nature of the judgment rendered in the first action. That judgment entitled the county to recover neither money nor property, but merely declared a defense, and it is difficult to see how such a judgment can create any higher right than the antecedent right whose existence it declares. The obligations of private parties must be determined by the law in force at the time of the transactions out of which they accrue. But, as we have already seen, this principle does not apply in case of public corporations so as to preclude the passage of curative acts.

It being conceded that the defendant had no vested right as against the legislature in the defense of ultra vires, how can a judgment which simply declares the existence of that defense create a better right than the defense itself?

The contention that the act in question is in violation of section 185 of the constitution of North Dakota, which forbids the state or any county to make donations to, or in aid of, any individual, association, or corporation, is based upon *Conlin v. Board* (Cal.) 33 Pac. 753; *Id.*, 46 Pac. 279. Both these decisions involve the validity of an act whereby the legislature of the state of California attempted to impose upon the city of San Francisco the duty of paying for grading a street, a special assessment levied for that purpose having been declared invalid. The court held the act void under the constitution of California, which in its general features is similar to section 185 of the constitution of North Dakota. The gist of the decisions is contained in the following language:

"The power of the legislature to appropriate any of the public moneys in the state treasury, or to direct the appropriation of the public moneys of a municipality, in cases like the foregoing, was taken away by the present constitution; and it can now make no appropriation of public moneys for which there is no enforceable claim, or upon a claim which exists merely by reason of some moral or equitable obligation, which the mind of a generous, or even a just, individual, dealing with his own moneys, might prompt him to recognize as worthy of some reward."

Constitutional provisions similar to those of California and North Dakota have existed in most of the states of the Union for many years. They were adopted to correct the abuse by which municipalities, particularly in the West, were overwhelmed with debt through gratuitous donations to aid in the construction of railroads and other like enterprises of internal improvement. With the exception of the California case above referred to, such limitations have never been held to forbid legislation validating the acts of municipal corporations which were void for want of authority which the legislature might have originally conferred. A construction of a constitutional provision, which would compel the state to be less just than honorable men and would make the public agencies of the state repositories to keep without payment whatever could be got without authority, certainly should not be adopted, except in obedience to the most imperative and unequivocal language. The provision under consideration imposes no such necessity. The state, as the source of justice, ought itself to be just, and should have authority to compel its public agencies to do justice; and it ought not to be determined by a forced construction that a people have ordained for their government by solemn constitutional provision a standard of honesty which would be condemned by all honorable men in the transaction of private business. To discharge an obligation which rests upon full value received is neither a "gift" nor a "donation." Failure to discharge such obligations is aptly characterized by Judge Caldwell as "that vulgar type of dishonesty which consists in obtaining goods on credit and then refusing to pay for them." *American Nat. Bank v. National Wall-Paper Co.*, 23 C. C. A. 33, 77 Fed. 92. The restriction was originally directed against mere gratuities in aid of private

enterprises, and there is nothing in the language of the constitution of North Dakota to indicate a change in this original purpose. The practice of validating the acts and contracts of municipalities which were void for want of authority has existed since the establishment of the government, and has been quite as frequent since the constitutional restrictions against making donations of public money as before; and, with the exception of the case of *Conlin v. Board*, such legislation has never been held unconstitutional. *Dill. Mun. Corp.* § 75. On the contrary, it has met with general approval. *New Orleans v. Clark*, 95 U. S. 644; *Erskine v. Nelson Co.*, 4 N. D. 66, 58 N. W. 348; *Trustees v. Roome*, 93 N. Y. 313, 325; *Cole v. State*, 102 N. Y. 48, 53, 6 N. E. 277; *Wrought-Iron Bridge Co. v. Town of Attica*, 119 N. Y. 211, 23 N. E. 542; *Mayor, etc., of New York v. Tenth Nat. Bank*, 111 N. Y. 446, 459, 18 N. E. 618. Sections 10 and 11 of article 7 of the New York constitution are nearly identical in language with section 185 of the constitution of North Dakota.

The contention that the former judgment is a bar to this action is equally untenable. "The conclusive character of a judgment extends only to identical issues, and they must be such, not merely in name, but in fact and in substance. If the vital issue of the later litigation has been in truth already determined by an earlier judgment, it may not be again contested; but if it has not, if it is intrinsically and substantially an entirely different issue, even though capable of being described in similar language, or by a common form of expression, then the truth is not excluded, and the judgment no answer to the different issue." *Palmer v. Hussey*, 87 N. Y. 303, 306. The former judgment between these parties simply declared the contract unenforceable because it was made without legislative authority. How can such a judgment be a bar to an action upon the same contract after it has received the legislative sanction? Judgments declare the rights of parties at the time they are pronounced, but do not preclude the assertion of rights subsequently acquired. In reply to an objection identical with that which we are now considering, the supreme court said:

"It surely cannot be seriously urged that the legislature is stripped of its power to authorize a contract to have effect in the future by judicial interpretation of the contract, and which at the time had reference to the present and the past only. A very large proportion of the legislation in all the states is prompted by the decisions of the courts, and is intended to remedy some mischief pointed out or resulting from the utterances of the courts of the country." *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 92, 12 Sup. Ct. 142.

The present action comes within the principle of a second suit to recover real property based upon a newly-acquired title. Such an action is never barred by an adverse judgment in respect to the same property, which was rendered before the new title was acquired. *Railroad Co. v. Smith*, 16 C. C. A. 336, 69 Fed. 579. Judgment must be entered in favor of the plaintiff for the amount claimed in the complaint, and it is so ordered.

## MUTUAL LIFE INS. CO. OF NEW YORK v. LOGAN.

(Circuit Court of Appeals, Ninth Circuit. February 28, 1898.)

No. 383.

**1. ACTION ON INSURANCE POLICY—EVIDENCE—DECLARATIONS.**

In a suit by an executor to collect an insurance policy upon the life of his testator, when the issue is whether or not the contract was consummated, it is error to allow the plaintiff to testify to declarations by his testator going to show that he acknowledged liability upon his premium note, in order to show an acceptance by him of the policy. The suit being on the policy, and not on the note, such declarations cannot be considered as against interest.

**2. SAME—RES GESTÆ.**

Declarations made 10 days after the alleged delivery of an insurance policy cannot be admitted in evidence, as part of the *res gestæ*, to show such delivery.

**3. INSURANCE—PREMIUM NOTE—AUTHORITY OF AGENT TO ACCEPT.**

The agent of a life insurance company, authorized to close the contract by delivering the policy and collecting premiums, has, in general, implied authority to accept notes for the premiums.

**4. SAME—RULES OF COMPANY—VIOLATION—WAIVER.**

When the general agent of an insurance company has knowledge of frequent violations by a subagent of a rule of the company prohibiting the acceptance of notes for premiums, and makes no serious objection, the company must be deemed to have waived the application of the rule.

**5. SAME—EFFECT AS TO THIRD PARTIES.**

A person dealing with an insurance company cannot be bound by a rule of the company forbidding the taking of premium notes, which is intended for the guidance of its agents, and of which he has no knowledge.

**6. SAME—INSTRUCTIONS—PREMIUM NOTE—ALLOWANCE BY EXECUTOR.**

Where a premium note has been negotiated by the agent of the company, and, on presentation by the assignee, allowed by the maker's executor as a claim against the estate, it is error to refuse to instruct that such action by the executor cannot bind the company, the issue being whether or not the contract was ever consummated.

**7. TRIAL—WEIGHT OF EVIDENCE.**

When there is a variance between the testimony of a witness and statements made by him in letters at the time of the transaction in question, and the letters are in evidence, it is error to instruct that greater weight must be given to the testimony than to the statements in the letters. It is for the jury to say which statement they will accept.

In Error to the Circuit Court of the United States for the District of Oregon.

The action was brought by Lysander S. Logan, the defendant in error, as executor of the last will and testament of Thomas J. Logan, deceased, to recover \$10,000 and interest, alleged to be due upon a certain policy of insurance claimed to have been issued by plaintiff in error, the Mutual Life Insurance Company of New York, upon the life of Thomas J. Logan. The case was tried in the court below before a jury, which rendered a verdict for the plaintiff, the defendant in error here, in the sum of \$10,000, with interest at 6 per cent. per annum from September 28, 1894. Judgment was entered December 28, 1896, to reverse which the defendant sued out this writ of error.

The policy in question was for the sum of \$10,000, was numbered 581,368, and was issued by the company on August 28, 1893. The defense interposed in the court below was that the contract of insurance was never consummated

by Thomas J. Logan. That was the only issue in the case. Thomas J. Logan resided near Prineville, Crook county, Or., and on the 26th day of August, 1893, signed an application for insurance, and at the same time and place executed a promissory note payable to his own order for the sum of \$1,185, due on November 1st thereafter, payable at the First National Bank of Prineville. The sum of \$1,185 was the amount of the premium. The note was indorsed in blank by the maker, and delivered at the time of the signing of the application to one William Johnson, who appears to have been a solicitor of insurance. The application was accompanied with a medical examiner's report, also signed by Thomas J. Logan, and made by H. P. Belknap, medical examiner, of the same date, and was forwarded to one F. L. Stinson, an agent of the defendant company at Seattle, Wash., and was by him in turn forwarded to A. B. Forbes & Son, at San Francisco, the general agents of the plaintiff in error for the Pacific Coast, and by them in turn forwarded to the home office of the company, in New York. Thereafter a policy in the form called for by the application was issued, and forwarded to Stinson, at Seattle.

On October 18, 1893, Stinson wrote Logan, from Seattle, the following letter:

"The Mutual Life Insurance Company of New York. Richard A. McCurdy, President. F. L. Stinson, General Agent for Washington and Oregon.

"Seattle, Washington, Oct. 18th, 189-.

"Thos. J. Logan, Esq., Prineville, Or.—Dear Sir: I take pleasure in informing you that the company have accepted your risk for \$10,000, and have issued policy No. 581,368, and I have forwarded same this day, together with your note for \$1,185, to the First National Bank of Prineville, where the latter is payable. If you wish to take the note up at once, I will allow you a discount of 1 per cent. from the face value. \* \* \*

"Yours, very truly,

F. L. Stinson, General Agent."

Stinson also wrote and sent the following letter to the First National Bank of Prineville:

"The Mutual Life Insurance Company of New York. Richard A. McCurdy, President. F. L. Stinson, General Agent, Washington, Oregon.

"Seattle, Washington, Oct. 18th, 1893.

"First National Bank, Prineville, Or.—Dear Sirs: Inclosed please find policy No. 581,368, T. J. Logan, amount, \$10,000, together with his note due Nov. 1st, in amount \$1,185, which please collect and remit, less your charges, cost of exchange, etc. Kindly deliver the policy to Mr. Logan upon payment of note. If he wished to pay same at once, 1 per cent. from the face of note will be deducted.

"Yours, very truly,

F. L. Stinson, General Agent."

To this communication the bank made the following reply:

"First National Bank, Prineville, Or.

"Prineville, Oregon, 11-1, 1893.

"F. L. Stinson, Esq., Genl. Agent, Seattle—Dear Sir: \* \* \* Policy of T. J. Logan received. Mr. Logan says he is unable to pay, and desires that the policy be surrendered, and note returned to him. Please advise. \* \* \*

"Yours, respectfully,

T. M. Baldwin, Cashier."

Stinson thereupon advised the bank as follows, under date of November 6, 1893:

"First National Bank, Prineville, Oregon—Dear Sirs: I have your favor of the 1st inst. \* \* \* Regarding T. J. Logan, I note what you say. Please hold the policy subject to his call; that is, when he pays the note, deliver same to him. If the note is not paid within four days from receipt of this letter, kindly return same to me, and I will proceed to collect same. Will you kindly advise me if Mr. Logan is good for the amount of his note? If he will pay one-half of the face of the note, kindly accept and indorse same, and have promised him time to pay the balance. Thanking you in anticipation of an early reply,

"Yours, very truly,

F. L. Stinson, General Agent."

He also, on the same day, wrote to Thomas J. Logan the following letter:

"The Mutual Life Insurance Company of New York. Richard A. McCurdy, President. F. L. Stinson, General Agent, Washington, Oregon.

"Seattle, Washington, Nov. 6th, 1893.

"T. J. Logan, Esq., Prineville, Or.—Dear Sir: I am advised by the First National Bank, under date of the 1st inst., that you state that you are unable to meet your note of \$1,185, which I had sent to the above bank for collection, same being due on Nov. 1st. I had hoped that you would have met this note promptly, and trust that upon receipt of this you will take the same up immediately. If unable to pay the full amount, if you will pay half of the note I will give you time on the balance. I must insist, however, upon the payment of at least half immediately. Kindly let me hear from you by return mail, and oblige,

"Yours, very truly,

F. L. Stinson, General Agent."

The bank, on the 14th of November, 1893, sent the following communication to Stinson:

"First National Bank of Prineville.

"Prineville, Or., Nov. 14th, 1893.

"F. L. Stinson, Esq., General Agent, Seattle, Wash.—Dear Sir: I return herewith your note on T. J. Logan for \$1,185.00. Payment refused. Mr. Logan refuses to accept policy.

"Yours, very truly,

T. M. Baldwin, Cashier."

To this letter Stinson sent the following letter to the bank:

"The Mutual Life Insurance Company of New York. Richard A. McCurdy, President. F. L. Stinson, State General Agent, Washington, Oregon.

"Seattle, Washington, Nov. 20th, 1893.

"First National Bank, Prineville, Or.—Dear Sirs: I have your favor of the 14th inst., returning note of T. J. Logan, in amount \$1,185. Please hold the policy subject to Mr. Logan's call. Kindly advise me the amount of expenses for your trouble in this matter, and I will remit.

"Yours, very truly,

F. L. Stinson, General Agent."

Thereafter the policy appears to have continued in the possession of Baldwin until March 29, 1894, when he returned the same to W. S. Pond, at that time the cashier of the plaintiff in error, at Seattle, Washington, upon a request as contained in the following letter:

"The Mutual Life Insurance Company of New York. Richard A. McCurdy, President. F. L. Stinson, State General Agent, Washington, Oregon.

"Seattle, Washington, March 24, 1894.

"First National Bank, Prineville, Or.—Dear Sirs: Kindly send the Logan policy here, No. 581,368, as per inclosed order from Mr. F. L. Stinson, and oblige,

"Yours, very truly,

Wm. S. Pond, Cashier."

It was subsequently sent on to the company's home office for cancellation. The note was returned to Stinson, as per his request, on or about November 20, 1893. It was by him given to the National Bank of Commerce, at Seattle, Wash., to secure the payment of advances made to him by the bank prior to November 25, 1893, and for further advances to be thereafter made. On November 25, 1893, the note was mailed by the bank to one J. Park Henderson, an attorney at law, at Portland, Or., to endeavor to collect for the bank. Suit was thereupon brought on the note on November 29, 1893, by Henderson. A demurrer, answer, and reply were successively filed, and it appears that on May 7, 1894, following, the suit was dismissed without prejudice by order of court, on motion of counsel for defendant, Thomas J. Logan. Nothing appears to have been done in regard to collection of the note, beyond its being held by the National Bank of Commerce as collateral for moneys theretofore and thereafter advanced to Stinson, until August 31, 1894, when it was sent by the National Bank of Commerce to the First National Bank of Prineville, Or., in a letter

dated July 31, 1894. It was returned to the National Bank of Commerce by a letter dated August 29, 1894, which reads as follows:

"First National Bank of Prineville.

"Prineville, Or., Aug. 29th, 1894.

"The National Bank of Commerce, Seattle, Wash.—Dear Sirs: We return herewith your collection, No. 8,553, T. J. Logan, for \$1,185 and interest. T. J. Logan, the maker, is now dead, and his son, L. S. Logan, is the executor of his will. He informs me that the note will have to take the regular course of such matters in this state. A copy of the note, duly sworn to, must be filed with the executor, and paid by order of the probate judge.

"Yours, very truly,

[Signed] T. M. Baldwin, Cashier."

It further appears that the note was thereafter filed and proved up against the estate of Thomas J. Logan, deceased, by the National Bank of Commerce. The latter died at Prineville, Or., July 10, 1894.

The deposition of Baldwin, the cashier of the First National Bank of Prineville, was introduced in evidence, from which it appears that he testified as follows in regard to his possession of the policy and his conversations with Logan in regard to it: That he knew Thomas J. Logan; that he (the witness) was cashier of the First National Bank at Prineville, Or., and had been such for nine years past continuously; that he was cashier in November, 1893, and remembered receiving a promissory note signed by Thomas J. Logan, dated at or near Prineville, Or., August 26, 1893, whereby said Logan promised to pay to the order of himself, on November 1, 1893, the sum of \$1,185, with interest; that he received the letter of October 18, 1893, from F. L. Stinson, containing policy of insurance No. 581,368, with the note above referred to. The deposition showed that the witness was asked the following question, among others, upon examination in chief: "Q. What did you do with the policy after receiving this letter?" After objection and exception, he replied: "I filed it in Mr. Logan's name in the bank." That the policy was placed in a case kept for that purpose, alphabetically arranged, under Mr. Logan's initials; that the case was kept for the purpose of holding the papers of customers of the bank; the bank habitually had papers there belonging to Mr. Logan, but could not say that any were there at that particular time; the papers were kept for safe-keeping; that it was customary for the bank to receive and safely keep papers for its customers and patrons; that Mr. Logan was a patron of the bank, and that there was a definite understanding between the bank and Mr. Logan that the bank should keep his papers for safe-keeping, they being left there and received by the bank as an accommodation to him; that the custom alluded to had existed ever since the bank was organized, which was about six years prior to the date last referred to; that upon the receipt of the letter from Stinson of October 18, 1893, he gave the policy and note to Logan; that he thinks Logan took the policy in his hands, and then handed it back; that Logan did not refuse absolutely to accept the policy; that Logan did not instruct him to return the policy, but that he did not remember that Logan instructed him to keep the policy for him; that Logan told him that, if he could not raise the money, he would like to return the policy; that he received no instructions or directions with relation to this policy from Logan after November 14, 1893; that he did not remember having any communication with him or any one acting for him after that time; that he might not remember, as it was a good while ago; that he did not remember that Logan instructed him to keep the policy for him; that he (Logan) did not instruct him to return the policy; that subsequent to November 20th, when Stinson wrote to the First National Bank telling them to "hold the policy subject to Mr. Logan's call," he held the policy subject to Mr. Logan's call; that, had Logan called for the policy while it was in the bank subsequent to that date (November 20, 1893), he would have delivered it to him; that Logan made no objection to receiving the policy subsequent to the date witness received instructions from Stinson to hold the policy subject to his call; that, when he said that Logan desired to have the policy returned and his note delivered to him, he (witness) was referring to a time prior to November 20, 1893; that he thought he must have informed Logan that the policy was in his box after November 20, 1893, but that he had no dis-

inct recollection as to the time, and thought so because it would have been their custom to do so. He further deposed as follows: "Q. Have you any distinct recollection that you are willing to say certainly that you notified him that you had placed the policy with his papers? A. I don't remember distinctly of notifying him at that time. Q. You can't say whether you did or not? A. Only it being in the line of my duty to do so. Q. It was your custom to do so? A. Yes, sir. Q. But you knew there had been a refusal on Mr. Logan's part to accept this policy before that because he could not pay this note? A. That was the only reason he ever gave. Q. You knew the fact that he refused to take the policy, didn't you? A. I knew that he could not take it under the circumstances. Q. Well, you knew that he had declined to accept the policy, and wanted you to return it? A. On the ground I have stated. Q. You knew that. Now, knowing that fact, did he ever change his mind or instructions to you in reference to that policy to your knowledge? A. No." The witness further testified, substantially as follows: That before writing the letter of November 1, 1893, he conferred with Logan in reference to the payment of the note and the delivery of the policy, and that said letter was written from what Logan told him; that before writing the letter of November 14, 1893, he also conferred with Logan in reference to the note and policy, and that said letter was also written from what Logan told him; that he had only one conversation with Logan up to that time; that the letter of November 1, 1893, was written shortly after said conversation, and that of November 14, 1893, was also based on said conversation; that no person was present at the conversation; that he thought that after receiving the letter of date November 6, 1893, he must have communicated to Logan the offer of Stinson that, if he could pay half of the face of the note, he might have time on the balance; that Logan did nothing in relation thereto; that he does not remember what Logan said in reference thereto; that Logan did not show him a letter he had received from Stinson bearing the same date, with reference to this matter; that he (witness) never saw such letter. The witness further testified that about March 29, 1894, he received a letter of date March 24, 1894, from W. S. Pond, inclosing an order from F. L. Stinson, dated March 14, 1894, both addressed to the First National Bank of Prineville, Or., and that he acted upon the said order and letter, by returning, on March 29, 1894, the policy to W. S. Pond, Seattle, Wash.; that he did not remember notifying Logan that the policy was to be returned; Logan never told him to return the policy; was an intimate friend and intimate business acquaintance of Logan for many years; does not remember that he notified Logan that the parties had requested a return of the policy; Logan had not called for the policy, and he (witness) wanted to see him get his note back; that he took the liberty to return the policy; that he felt authorized to return the policy from what he knew of Logan's wishes in the matter; that he does not remember that he communicated with Logan after returning the policy as to his having done so; does not remember having told him that he returned it. He further testified that he did not notify Stinson that he had placed the policy among or with Logan's papers, and that Stinson did not know the fact, nor did Logan; that he put the policy in the note case for the first time after he received the letter advising him to hold it subject to Logan's call.

F. L. Stinson testified that he was the state general agent of the Mutual Life Insurance Company of New York for Washington and Oregon; that his head office was at Seattle; that the company knew of this designation; that his letter heads sent to him by the company indicated that he was general agent for the states of Washington and Oregon; that his duties were to solicit applications for insurance, to collect premiums, and to deliver policies, remitting the premiums to the company; that, as such agent, it had been his custom to receive notes in payment of policies in lieu of money; that he had upon one or two different occasions told a Mr. Forbes, the general agent of the company for the Pacific Coast, that he had taken a great many notes in payment of premiums; that Mr. Forbes advised him not to take too many notes; that he should be careful in taking notes; that it had been his custom to deliver policies prior to the payment of the notes in many cases. The witness further stated that he remembered receiving an application for a policy in this company from Logan, and that he received the same from William Johnson, the

agent; that he received at the same time the promissory note; that, after receiving the application and the note, he took a copy of the application, and sent the original to A. B. Forbes & Son; that the application was accepted by the company; that he received from the company a policy in accordance with the requirements of the application; that he sent the policy and note to the First National at Prineville, Or.; that the National Bank of Commerce of Seattle got the note from him, he having sold it to that bank for certain indebtedness due by him to the bank; that the note was taken as collateral security; that he had told Mr. Forbes, upon one occasion, of the fact that he had sold this note to the National Bank of Commerce; that, when he took the note from Logan, he took it as payment for the premium; that he never advised Mr. Logan or consented to return to Mr. Logan his note in accordance with the wishes purported to have been expressed by the latter as contained in the letter of Mr. Baldwin of November 1, 1893; that he told Mr. Forbes, upon the occasion of the latter's visit to Seattle about the last of November, 1893, that he had sold the note to the National Bank of Commerce; that Mr. Forbes asked him regarding the payment on the Logan policy, and that he told about the note, and where it was, and that he told him, further, that he (the witness) could not get the note without paying for it; that it was in the bank, and he (witness) could not get it without paying at least one-half of the note; that Mr. Forbes said he would look into the matter, and see what could be done; that he (witness) thought this conversation occurred in November, 1893, but he would not be positive; that, before writing the letter to the Prineville Bank wherein he told Mr. Baldwin to hold the policy subject to Mr. Logan's call, he had investigated the personal responsibility of Thomas J. Logan, the maker of the note, and had found it good; that, at the time he took the note, it was received by him in payment of the premium; that the policy had not then been received; that the note was to mature November, 1893, and he intended that the policy should be tendered at the time the note matured; that he did not intend that the policy should be delivered to Mr. Logan before the payment of the note; that he could not say that he did not intend at any time to deliver the policy until after he had collected the money that was due upon the note; that he does not remember ever having seen the rules and regulations issued by the company; that he did not think he received a printed copy of the rules and regulations, edition of March, 1893, from Mr. Forbes, governing him in his business, and did not have any printed instructions at all; that he did not know that, as an agent, he was expressly prohibited from receiving notes as payment for premiums.

A. B. Forbes, whose deposition was taken on behalf of the plaintiff in error, testified that he was the general agent of the company for the states of California, Nevada, Oregon, Washington, and other Pacific states and territories; that F. L. Stinson was his subagent, with limited powers; that he does not know why the policy to Logan was never delivered, if it was not delivered, except from correspondence about the policy after it was sent to Stinson; that in the latter part of 1893 he visited Seattle, and was then told by Mr. Stinson that delivery had not been made because Mr. Logan had not paid the premium; that he then told Stinson that a re-examination must be had, and the premium paid, before the delivery of the policy, and that he must give it immediate attention; that nothing was then said by Stinson to witness about any note made by Mr. Logan being hypothecated in any bank, nor did the witness know of the fact; that he did not recollect any conversation with Stinson about the particular note of Thomas J. Logan for \$1,185, payable to his own order. The witness further testified, and produced and made a part of his deposition a pamphlet book, entitled, "Suggestions for the Guidance and Instruction of Local Agents and Solicitors, Edition of March, 1893, Published for the Mutual Life Insurance Company of New York"; that Stinson had a copy of such pamphlet book of rules; that among such rules was the following: "Agents are expressly prohibited from receiving notes as payment for premiums." The witness further testified that he had no knowledge of the taking of promissory notes for the payment of premiums by soliciting agents of F. L. Stinson or by F. L. Stinson, and that, after 60 days from the date of the policy, a re-examination of the applicant was required, and the premium was required to be paid before the policy was delivered; that Stinson was not a general agent; that he was a sub-

agent, he (witness) being the general agent for the company on the Coast; that Stinson held himself out as general agent, with the knowledge of witness; that he was in the employ of witness; that he had no doubt that Stinson represented himself as general agent of the company.

The plaintiff, Lysander S. Logan, son of the deceased, Thomas J. Logan, and defendant in error here, testified, over the objection of plaintiff in error, that he had a conversation with his father about the 1st of December,—the early part of December,—regarding the note and policy; that his father told him he had given his note for the premium on the policy, and that it was in the hands of attorneys, and he wanted to know if he (witness) could raise the money for him to lift the note; and that he (witness) told him that he could not at that time; and that his father then said, “I believe I will go to the bank and get the policy, and see if I can mortgage it for the money to pay the note,—mortgage it to parties there, to see if he could get the money to lift his note with.”

It is unnecessary to refer further to evidence in the case, as that already stated presents, for the most part, the only question at issue, viz. whether the contract of insurance was consummated on November 20, 1893.

Fenton, Bronaugh & Muir, for plaintiff in error.

Allen & Allen and John H. Powell, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The assignments of error are 32 in number. The errors claimed relate to admission and rejection of evidence, refusal to instruct the jury to bring in a verdict for the defendant, refusal to charge the jury as requested by plaintiff in error, defendant in the court below, and exceptions taken to certain parts of the charge as given. It will be necessary to consider first the alleged errors in admitting or rejecting evidence. If the court below committed a material error either in the admission or rejection of evidence, it follows that the judgment must be reversed, and a new trial ordered.

One of the assignments of error raises the question whether or not the court erred in permitting the witness Lysander S. Logan, the plaintiff in the court below, to answer the following question: “Q. Now, Mr. Logan, did you, subsequent to November, 1893, and, if so, when, have a conversation with Mr. Thomas J. Logan regarding this policy and this note?” To which the witness answered as follows: “A. I had a conversation with my father about the first of December, the early part of December, regarding the note and policy. He told me that he had given his note for the premium on this policy, and it was in the hands of attorneys, and he wanted to know if I could raise the money for him to lift his note; and I told him I could not at that time; and he says, ‘I believe I will go to the bank, and get the policy, and see if I can mortgage it for the money to pay the note,’—mortgage it to parties there, to see if he could get the money to lift his note with.” In the offer to prove this conversation, the following colloquy occurred between counsel and court. Counsel for defendant in error said: “I desire to prove by this witness that Thomas J. Logan stated to him that he knew that the policy was in the bank, and that he could go and get it whenever he wanted it. That was subsequent to November 20, 1893, in the early part of December, 1893, and Thomas

J. Logan did say that he was going to try to get it. I offer to prove that Thomas J. Logan told this witness that the policy was there; that he could go there, and get it; that the attorney was after him for this note; that he was going to go to one Maley, and borrow the money if he could; if Maley would lend him the money, he was going to mortgage the policy to Maley to secure payment." Whereupon the court said: "Have you examined to see whether this kind of testimony was admissible under any circumstances?" Whereupon counsel for plaintiff said: "I took it for granted it was, if your honor pleases." To which the court replied: "If it is a part of the transaction, it is entitled to come in. I think this testimony had better come in subject to your objection, giving counsel and myself an opportunity to consider the question at a later date in the course of the trial." Whereupon counsel for the defendant inquired: "You mean both conversations?" To which the court replied: "No; I am not speaking of the other conversation. I am quite clear as to the other conversation, but as to this transaction, this matter, that seems to be in the nature of an act endeavoring to borrow money." Whereupon counsel for defendant excepted, on the ground that it was incompetent and immaterial. The court then said: "I will allow this testimony subject to the objection. I will endeavor to give the jury such directions as I think the case warrants." As stated above, it does not appear that the court, in its instructions to the jury, again referred to this matter.

We are of the opinion that the admission of this testimony as to the conversation the witness had had with his father at a time subsequent to November 20, 1893, when the alleged delivery of the policy took place, was incompetent and self-serving testimony to show that Thomas J. Logan had accepted and thereby completed the delivery of the policy. In the first place, it was clearly hearsay testimony. The only way in which such testimony would have been admissible, the declarant being dead, was a declaration against interest. But it does not appear to have been offered as such, although the claim is not made that it would have been competent for that purpose. The conversation cannot, however, be regarded as constituting a declaration against interest, for it was plainly intended as, and its inevitable effect was that of, self-serving testimony. It is contended that it was, substantially, a declaration against interest, because Logan admitted his liability upon the note, by endeavoring to raise funds to pay it; but it must be observed that, while the statements indicating an admission of liability upon the note would have been properly admissible in an action on the note against Logan or his estate, the present suit is not brought to enforce a liability against him on the note, but is brought by his executor, who is also one of his heirs and legatees under the will, to enforce a liability against the company upon the policy, in which one of the chief questions of fact for the determination of the jury is whether or not the policy was delivered to, and accepted by, Thomas J. Logan. The court below, however, evidently considered it as part of the *res gestæ*, and admitted it as

such. But it is difficult to see how this conversation could be admitted as a part of the *res gestæ*. It took place, according to the witness, about the first part of December, 1893, although the witness does not remember exactly when it occurred. This was at least some 10 days after November 20, 1893, when the alleged delivery of the policy took place. A declaration, to be admissible as part of the *res gestæ*, must be contemporaneous with it, and so limit, explain, or characterize the fact it assists to constitute as to be in a just sense a part of it, and necessary to its complete understanding. 1 Greenl. Ev. § 110; Whart. Ev. § 259. That the conversation held between Logan, the plaintiff in the court below, and his father, and the statements made by the father in the course of such conversation, are not necessary incidents of the litigated act,—that is, whether the contract of insurance was consummated by a delivery of the policy on November 20, 1893,—is too clear for argument. The admission of this testimony must have had some effect on the jury, and, in our opinion, was material error.

The next question for our consideration is whether the court below erred in refusing to instruct the jury to bring in a verdict in favor of the defendant, plaintiff in error here. This alleged error is covered by assignment No. 1. As stated, the only issue in the case was whether the contract of insurance had been consummated. Three questions of fact may be said to arise under this issue: (1) Did Stinson have the authority to take a note in payment of the premium for the policy? (2) Did he, in fact, take the note in payment of the premium? (3) Was there a delivery of the policy to Logan? So far as these questions involve matters of fact, it was, undoubtedly, for the jury to determine them. *Smith v. Assurance Soc.*, 13 C. C. A. 284, 65 Fed. 765. Their verdict, subject to the law as given by the court, is conclusive on this court, especially as the evidence may be said to be contradictory and conflicting. We think there was sufficient evidence to go to the jury, even excluding the evidence which we think the court below improperly admitted. It may not be of the strongest and most satisfactory character, but still it was sufficient to justify the jury in passing its judgment thereon. Upon the question of delivery, the case depended very much upon the credence given by the jury to the testimony of Baldwin, the cashier of the First National Bank of Princeton, Or., and an intimate friend of the deceased Logan.

Upon the question of law whether or not the taking of a note constitutes a payment, it is well settled by the weight of authority that an agent of a life company, who is intrusted with the business of closing the contract by delivering the policy, has an implied authority to determine how the premium then due shall be paid, whether in cash, or, as is sometimes done, by giving credit, in which case the agent becomes the creditor of the insured, and the debtor of the insurer. In that event, though the agent should subsequently default, and the premium should never reach the company, the policy would still be binding. *Richards, Ins.* (2d Ed.) § 93; *Miller v. Insurance Co.*, 12 Wall. 285; *Ball & S. Wagon Co. v. Aurora F. & M. Ins. Co.*, 20 Fed. 235; *Smith v. Assurance Soc.*, 13

C. C. A. 284, 65 Fed. 765. The authorities cited by plaintiff in error are not inconsistent with this rule. While the rule itself is well settled, still an agent must have the authority, either actual or apparent, to take notes in payment of premiums, or the course of business of the company must be such as to warrant an implication of authority. *Insurance Co. v. Willets*, 24 Mich. 268. Whether or not Stinson possessed this authority, either actually or ostensibly, was, as has been stated, a question of fact. It appeared, on the one hand, that Stinson had made it a practice of taking notes in payment of premiums, and that the general agents knew this; that they acquiesced in this method of receiving payment, making no serious objection beyond admonishing Stinson to be cautious, as he might involve himself too heavily. On the other hand, Mr. Forbes, one of the general agents, directly contradicted this evidence. It was for the jury to pass upon this conflicting evidence.

It is, however, further contended that Stinson was prohibited by a rule of the company from taking notes. Stinson, in his testimony, made some claim that he was not aware of such a rule; but, however that may be, assuming for the purposes of the case that he did not know of the rule, the fact remains that there was evidence tending to show that the company knew of his frequent violations of the rule, and that it made no objection thereto, beyond advising Stinson to be cautious, as he might involve himself too heavily. It is not claimed that the insured knew of this rule. He cannot be prejudiced in his rights by the failure of Stinson, on the one hand, to observe a rule of the company, and of the company, on the other hand, to enforce the rule. It must be deemed that the company, through its general agent, waived the application of the rule in this case. *Insurance Co. v. Norton*, 96 U. S. 234; *Insurance Co. v. Carder*, 42 U. S. App. 659, 665, 27 C. C. A. 344, and 82 Fed. 986.

We now come to consider the charge of the court to the jury, and its refusal to charge as requested by the plaintiff in error. The court refused to give the following instruction:

"The fact, if it be a fact, that plaintiff, as executor of the estate of T. J. Logan, may have allowed the note as a claim against the estate, and in favor of the National Bank of Commerce, cannot be considered by you. Such action by the executor, if taken, cannot bind the insurance company or add anything to the rights of the plaintiff in this case."

This, in our opinion, was error. The only issue before the jury was whether or not the contract of insurance was consummated on November 20, 1893. The mere fact that, long subsequent thereto, the note was allowed as a claim against the estate, cannot be deemed to bind the plaintiff in error in any way, the note not having been presented on behalf of the insurance company. If the contract of insurance was never consummated, if Logan never accepted the policy, the fact that the note, which at the outset he had given to Stinson, was allowed as a claim against his estate, cannot bind the insurance company, nor add anything to the rights of the plaintiff. We think that the instruction requested should have been given, in view of the evidence presented in the case.

The court, in its charge, instructed the jury as follows:

"Now, in determining what was done, or what Logan said or did, you must take the testimony of witnesses as to what Logan did or said, and not consider the statements contained in the letters that passed from Baldwin to Stinson."

In objecting to this instruction, the following colloquy occurred between the court and counsel for the plaintiff in error:

"Judge McArthur: We also except to your honor's instruction to the jury that the statements in the letters are not to be considered by them as evidence. The letters of Baldwin to Stinson are not to be considered as evidence in the case."

Whereupon the court, in response to said objection, and before the jury retired, said:

"I do not wish to be understood in that way. I say the statements in the letters of Baldwin to Stinson as to what Logan did are not to be considered, but, instead, Baldwin's testimony as to what Logan did and said; that they may consider that rather than the statements of Baldwin in his letters as to what Logan said."

Whereupon counsel for defendant replied to the court, in the presence of the jury:

"Yes, I understand the court to draw the distinction between the statement in the letter and the statement under oath as evidence; but we consider that the statement in the letter is simply a verbal act, and is the best evidence of what was done, coming so recently after the statements said to have been made by Logan, and are receivable in evidence, and should have full force and effect as a verbal act."

This part of the charge was clearly error. The jury were told, in effect, that they should consider the testimony of Baldwin in preference to the statements made by him, and contained in his letters to Stinson. But it was for the jury to say which of the statements they preferred to accept. It was for them to pass upon the credibility of Baldwin's testimony. They might have considered that the statements contained in his letters to Stinson written at the time were preferable and more truthful than his subsequent testimony. The significance of this is seen in the fact that in the letters Baldwin stated that Logan refused to take the policy, while in his testimony he swore that Logan never absolutely refused to take the policy, and that, furthermore, he never directed him (Baldwin) to return the policy. This variance was matter for the jury to consider and judge. It may be that the learned judge felt justified in believing that the testimony of Baldwin was entitled to more credence than the statements contained in his letters to Stinson; but the instruction was couched in such language that it may well be that the jury considered they were bound to give more weight to Baldwin's testimony than to his statements in the letters. The court should have been careful to distinguish the law from the facts. See *Starr v. U. S.*, 153 U. S. 614, 14 Sup. Ct. 919.

The remaining assignments of error do not, in our opinion, show any error committed by the court in its other instructions to the jury. For the reasons stated above, the judgment will be reversed, and the cause remanded for a new trial.

## NORTHERN PAC. R. CO. v. MURRAY.

(Circuit Court of Appeals, Ninth Circuit. May 9, 1898.)

No. 372.

**1. RAILROAD RIGHT OF WAY—DEFINITE LOCATION OF NORTHERN PACIFIC—RIGHTS OF SETTLERS.**

Act July 2, 1864, § 3, makes the grant to the Northern Pacific Railroad Company definite, taking effect from the date of the act, when the line of road is definitely fixed by the company, and a plat thereof filed in the general land office. *Held* that, when the company thus signified its location of any portion of its line, it was concluded thereby, and, if it afterwards constructed its road on a different line, it must procure a right of way by purchase or condemnation proceedings, where private rights had intervened.

**2. SAME—LIABILITY FOR COMPENSATION—TRANSFER OF LAND.**

The liability of a railroad company to make compensation for land taken for right of way is to the owner of the land at the time of the taking, and a subsequent vendee has no right of action unless the same is specially assigned to him.

**3. SAME—ENTRY WITHOUT RIGHT—ACQUIESCENCE OF OWNER—REMEDY.**

Where a landowner, knowing that a railroad company has entered upon his land and is constructing its road without having procured the right of way, remains inactive until the road is in operation, he cannot maintain ejectment for the entry, but is restricted to an action for damages.

**4. SAME—AMENDMENT OF COMPLAINT—WAIVER OF EXCEPTION.**

Plaintiff brought ejectment against defendant railroad company for land upon which it had wrongfully entered and constructed its road. The court decided that the action would not lie, but, upon plaintiff's request, permitted him to file an amended complaint for damages only. *Held* that, by electing to amend, plaintiff waived his right to a review of the question as to his right to maintain the action in its original form, and was not aided by a stipulation agreeing that such question should be submitted to the court of appeals.

In Error to the Circuit Court of the United States for the Western Division of the District of Washington.

This was an action by David Murray against the Northern Pacific Railroad Company to recover for land taken for a right of way. Judgment below was given for plaintiff, and defendant brings error.

Crowley & Grosscup, for plaintiff in error.

Parsons, Parsons & Parsons and Carroll B. Graves, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and BELLINGER, District Judge.

BELLINGER, District Judge. This action grows out of the construction and maintenance by the Northern Pacific Railroad Company of its branch line from Yakima to Swank Creek, in the state of Washington, upon lands claimed by the defendant in error. By section 2 of the act of congress of July 2, 1864, creating the Northern Pacific Railroad Company, it is provided as follows:

"Sec. 2. \* \* \* the right of way through the public lands be and the same is hereby granted to said Northern Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power and authority is hereby given to said corpora-

tion to take from the public land adjacent to the line of said road, material of earth, stone, timber and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain."

At the date of the passage of this act the lands in dispute were unoccupied public lands of the United States. On May 10, 1884, the railroad company definitely located its branch line of road from Yakima to Swank Creek, and on May 24th filed a plat of such location in the office of the commissioner of the general land office, which was approved by the secretary of the interior; and on January 8, 1885, the lands so located were withdrawn from sale. Subsequent to the grant, and prior to the definite location of the line of road, on July 5, 1873, one Frederick Ludi received a patent for a portion of the tract including the land now used for right of way by the company, in accordance with steps theretofore taken by him to that end; and on June 5, 1873, one William Berry in like manner received a patent for the tract which includes the remaining portion of the lands in dispute. The defendant in error succeeded to these titles in 1888, through one Smith, grantee of Ludi and Berry. In the year 1886 the railroad company built its road on the lands in dispute, and has since maintained and operated it there. But the line so constructed and maintained is not upon the line as definitely located in 1884. It is conceded that a definite location of a line of road takes effect, as to the right of way, by relation from the date of the grant.

The first question to be considered is whether the grant of right of way is fixed by the location of the road as constructed, without reference to variations of such location from that shown by maps filed in the land office by the grantee company. If so, the company has a right of way, effective by relation from July 2, 1864, the date of the granting act, and has priority over the title under which the defendant in error claims. By section 3 of the granting act, the grant becomes definite when the line of road is definitely fixed, and a plat thereof is filed in the office of the commissioner of the general land office, so that the limits of the grant become fixed when the line of route is thus located. In this case such line was established by a map of definite location filed in May, 1884, nearly 20 years after the granting act was passed. It is undisputed that the right of way, as thus ascertained, was vested in the company as of the date of the act of congress, and it does not follow the line of construction where that deviates from the line of such location. *Smith v. Railroad Co.*, 7 C. C. A. 397, 58 Fed. 513. It is conceded that the route must be considered as definitely fixed when its map of location is filed, upon the authority of decisions of the supreme court of the United States, where the question related to the limits of land grants, but it is sought to distinguish the question thus presented from that arising in this case. As to this, the circuit court of appeals for the Eighth circuit, in the case cited, says:

"But it is not perceived how the line of this railroad can be consistently held to be definitely and unalterably fixed, under the act of congress, by filing its map of definite location, and yet be subject to another and subsequent definite fixing, on a different line, by its actual construction; for this is simply to say that a line which is 'definitely fixed' is indefinitely changeable.

Nor is it perceived how this act of congress can be held to give the company the power to select and definitely fix one line of railroad for the purposes of its land grant, and another and a parallel line for the purposes of its right of way."

Every consideration upon which the land-grant companies are held to the lines of location designated in maps filed for that purpose by them, when the question was with reference to the grant of lands, applies equally in cases involving rights of way. The company makes its own selection of route, and it takes its own time in doing so. It is not concluded by any survey and selection it may make. As stated by the court in *Land Co. v. Griffey*, 143 U. S. 32, 12 Sup. Ct. 362:

"It may survey and stake many, and finally determine the line upon which it will build by a comparison of the cost and advantages of each; and only when, by filing its map, it has communicated to the government knowledge of its selected line, is it concluded by its action."

It is argued in this case that there is nothing in the act of congress that required the company to file a map of definite location; that the failure to do so simply had the effect to extend the time within which interests in lands within the limits of the grant might vest in others. This may be true, and, if so, it was open to the company not to signify its location of route by this method. It might have indicated its route by the construction of its road. But by whatever means it chose, if it had choice of methods, to signify its adoption of a line of route, when it had formally announced its selection the limits of its grant became fixed for all purposes. The case of *Smith v. Railroad Co.* also holds that the report of the railroad commissioners that the road was completed according to the requirements of the act of congress does not operate as a judicial determination of the company's title to the right of way occupied by it. It clearly was not a function of the commission to determine anything but the practical question whether the road was well and serviceably built. But, if the right of way is not subject to change, it does not follow that the company may not abandon the right of way, so long as private rights are not affected, and purchase another, by the method of condemnation or otherwise. There is no reason why it may not surrender the right conferred upon it if it sees fit to do so,—why it should be less free to change its route than it would be if the government had not favored it in this respect. It is well settled that a railroad company seeking to condemn a right of way may, after the assessment of damages, change the location of its road. 1 *Rorer*, R. R. 326; *State v. Graves*, 19 Md. 351. And it may do this without the payment of the damages assessed, so long as it has not taken possession of the right condemned.

Defendant in error asks especial consideration for the case of *Moorhead v. Railroad Co.*, 17 Ohio, 349. That case involved the question whether a railroad company, under a charter which authorized it "to vary the route and change the location after the first selection had been made, whenever a better and cheaper route could be had, or whenever any obstacle to continue said location was found," etc., could relocate its road on distinct ground after having

once located and constructed it. The court held that the power to change the road was not intended to be a continuing power, that "might be exercised and re-exercised again and again; as often as might suit the convenience of the company"; that "the completion of the road upon the route first located exhausted all the power of the company"; that the right to change must be exercised before the road is built. The statute having provided in what cases a located line might be changed, the conclusion was unavoidable that changes not within the statute were unauthorized. The right to change the line once located was not involved; the sole question being whether, under the statute, the road when once built, could be changed. The railroad company, therefore, having the power of eminent domain when it entered upon the land in question and built its road, its liability to make compensation for the taking is to the grantor of the defendant in error,—to the owner whose land was taken. The question is decided by the supreme court of the United States in *Roberts v. Railroad Co.*, 158 U. S. 10, 15 Sup. Ct. 758. The court says:

"It is well settled that where a railroad company, having the power of eminent domain, has entered into actual possession of land necessary for its corporate purposes, whether with or without the consent of the owner of such lands, a subsequent vendee of the latter takes the land subject to the burthen of the railroad; and the right to payment from the railroad company, if it entered by virtue of an agreement to pay, or to damages, if the entry was unauthorized, belongs to the owner at the time the railroad company took possession."

The court refers to a number of cases where it is held that claims for damages in such cases were personal to the owner "when the injury occurred,—that they did not run with the land, nor pass by a deed, though not reserved," "unless expressly conveyed therein." Without deciding the further question as to the remedy available to the owner at the time of the entry and taking, the court goes on to say:

"So, too, it has been frequently held that if a landowner, knowing that a railroad company has entered upon his land and is engaged in constructing its road without having complied with the statute, requiring either payment by agreement or proceedings to condemn, remains inactive, and permits them to go on and expend large sums in the work, he will be estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein, and be restricted to a suit for damages."

It appears from the complaint, and from the stipulation of facts in the case, that the railroad company entered upon the land in question and built its road in March, 1886, "wrongfully and without the consent" of the then owner; that the road has since been maintained and operated; and that in May, 1888, the plaintiff, presumably with knowledge of the occupation and use by the railroad, purchased the land, and became, and has since been, the owner in fee. This cause of action existed in favor of plaintiff's grantor more than two years before plaintiff made his purchase. It is not claimed that this right was assigned to plaintiff, unless the conveyance of the fee of the land had that effect; but, as we have seen, the conveyance did not have that effect.

When the trial of this case in the court below was begun, the complaint of the defendant in error was to recover the possession

of the land which is the subject of controversy, and for damages. During the trial, upon a motion for nonsuit by the defendant company, the court announced that the action could not be maintained in the form in which it then was, and that, unless an application for leave to amend was made and allowed, the motion for nonsuit would be granted. Thereupon the defendant in error made application for leave to file his second amended complaint, which motion was allowed, and the complaint in its present form was filed. The defendant in error excepted to the ruling of the court to the effect that ejectment would not lie, and he now requests a review of this ruling, in the event of a reversal by this court of the judgment in his favor; and to this end he relies upon a stipulation by which "it is stipulated and agreed that plaintiff's exceptions upon the trial to the rulings of the court, as shown by the transcript upon defendant's writ of error, may be considered upon the hearing in the circuit court of appeals with the same force and effect as if a writ of error had been allowed upon plaintiff's part, and duly certified by the court upon the trial." The decision already announced is decisive of the question. Moreover, the objection was waived by the defendant in error, by his election to amend his complaint and proceed as he has done. It was open to him to have stood upon his right to proceed in ejectment, or to adopt the course he has taken. He was at liberty to take one of two roads, but not both; nor can he at the same time accept and reject the judgment under review. It follows that the judgment of the court below should be reversed, and the case remanded for further proceedings in accordance with this opinion.

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### THE BRANDYWINE.

(Circuit Court of Appeals, Fourth Circuit. May 3, 1898.)

No. 258.

**1. ADMIRALTY APPEALS—FINDINGS OF COURT BELOW.**

The circuit courts of appeals, in reviewing admiralty cases, are not limited to questions of law; but it is the settled practice of these courts to give great weight to the conclusions of fact by the trial judge, unless they are based on evidence manifestly insufficient, and in cases of conflicting testimony, apparently of equal merit, to follow the conclusions reached below.

**2. SALVAGE—AMOUNT OF COMPENSATION.**

An award of \$500 upon a salvaged value of \$1,522.50 held excessive for services rendered by the first to arrive and most efficient of a number of tugs which pumped water into a burning barge; the time occupied being about 6½ hours, and there being no danger to life or property. The award should be reduced on appeal to \$250.

Appeal from the District Court of the United States for the Eastern District of Virginia.

Robert M. Hughes, for appellant.

T. S. Garnett, for appellee.

SIMONTON, Circuit Judge. This is an appeal from a decree of the district court of the United States for the Eastern district of Virginia. It is a case of salvage. The barge Brandywine, on the

morning of 20th April, 1897, was lying at the pier of Lambert's Point, near Norfolk. She was a large barge, some 190 feet in length, drawing when loaded  $23\frac{1}{2}$  feet, engaged in carrying coal, and with a capacity of about 1,800 tons of coal. She had two decks. She had no propelling power of her own, but was equipped with an engine used in the hoisting apparatus. This engine was forward in the between decks, in the forward part of the deck, in an engine room the whole width of the vessel, about 30 feet from the stem, back where the bulk-head comes. The engine room was entered by what was called the "companion way hatch," not the "fore hatch." The crew of the barge consisted of four men. Between 4 and 5 o'clock of this morning, the master of the barge was aroused from sleep by the call of a watchman on the pier that the barge was on fire. Calling his men, he got out, and found the fire was in the engine room, and getting some assistance from the crew of a four-mast schooner near, he began to get the fire hose from the pier aboard his barge, and to put it in the hatch of the companion way. Just at that time, the tug, Emma Kate Ross, which was lying some distance off the pier with scows in tow, discovered the fire, and leaving her scows at anchor, went at once to the Brandywine. Placing her bow opposite the bow of the barge, she put on two streams of water, one from a pipe on her own bow, the other from the deck of a pile driver alongside of her. Her deck was 10 feet below the deck of the barge, and the deck of the pile driver about on a level with the barge's deck. The Emma Kate Ross is a large tug, equipped with a powerful fire apparatus, her pump having the capacity of 6,000 gallons a minute. With these two streams she played water on the barge, chiefly on her deck and bow. After the Ross had been at the barge about a half or three-quarters of an hour, another tug, the Little Nell, came to the assistance of the latter, and began pumping water into her, followed in rapid succession by the Pocahontas, Louisa, Alvah Clark, and E. B. McCaully, all tugs more or less suitably equipped for extinguishing fires, but none as well equipped as the Ross. For some time no men from the Ross went aboard the barge. But, after men from one or more of the other tugs boarded the barge, the master and crew of the Ross did so also. The testimony is very conflicting as to the amount and effectiveness of the assistance rendered to the barge by the Emma Kate Ross. She stood by the barge as long as she was at the pier, pumping water on and into her. About 9 o'clock two of the other tugs towed her away to some flats near. The Ross accompanied them, and, as soon as they reached the flats, rendered efficient service in turning the head of the barge to the wind. But the witnesses differ very much in their testimony upon the point who put out the fire. The court below, although no specific findings of fact are given, evidently solved this conflict in favor of the Emma K. Ross, by awarding her \$500 as a salvage award.

This court is not limited, as the supreme court was under act of 1875, to the review of questions of law only in an admiralty appeal. It can also review the findings of facts. *The Havilah*, 1 U. S. App. 1, 1 C. C. A. 77, and 48 Fed. 684; *The State of California*, 7 U. S. App. 20, 1 C. C. A. 224, and 49 Fed. 172; *The Philadelphian*, 21 U. S. App.

90, 9 C. C. A. 54, and 60 Fed. 423. Yet it is now the settled practice of this court to give great weight to the conclusions of fact by the trial judge, unless they are based upon evidence manifestly insufficient, and in cases of conflicting testimony, apparently of equal merit, to follow the conclusions reached below. The Wilhelm, 16 U. S. App. 356, 8 C. C. A. 72, and 59 Fed. 169; The Alejando, 15 U. S. App. 98, 6 C. C. A. 54, and 56 Fed. 621; The Lucy, 20 C. C. A. 660, 74 Fed. 572. In subsequent discussion of this case, we assume that the services rendered by the Emma K. Ross were salvage services of meritorious character; and the only remaining question is as to the amount of the award.

The barge Brandywine, after the fire was extinguished, was sold at auction, her owners being present, and was bought by a third person for \$1,522.50. This is the gross value of the salvaged property to her owner, and the award must be ascertained with this sum as a factor. As has been seen, the district court awarded to the Emma K. Ross alone \$500, a third of this sum. The services of the other tugs do not seem to have entered into the estimate. We think this allowance excessive. The services of the Emma K. Ross had some of the elements of salvage service,—promptness and efficiency. They had no element of danger to life or property. Nor were they rendered to a vessel hopeless of aid from any other quarter than the salving vessel. Nor were they rendered alone. The other tugs were with her, rendering aid, if not as effective as that rendered by the Ross, certainly contributing materially in making her assistance successful. The capacity and efficiency of those other tugs are demonstrated by the fact that after the Emma K. Ross had left the barge, the fire being absolutely to all appearance subdued, it broke out afresh, and they were without her aid able to extinguish it entirely. For their services their owners are content with \$50 each. The Emma K. Ross was at work from 4:30 a. m. to 11 a. m.; the Little Nell from about 5 a. m. to about 3 p. m.; and the other tugs left about an hour before her. The cases in this circuit of salvage for rescue from fire are very few. The Alice Minot, 30 Fed. 212, was a case in which a cotton vessel afire was towed by a tug into deep water, away from her wharf, and was there sunk by her crew who scuttled her. The court of the Eastern district of Virginia awarded the tug for salvage \$500. In that case the value of the property saved was \$72,000. In The Cherokee, 31 Fed. 167, a steamship of the Clyde Line, with a full cargo, was found to be afire very soon after leaving her dock. The tug Monarch went to her rescue, began pumping on her with powerful pumps, and towed her afire to her wharf. Then the fire department took charge of her, and extinguished the flames. The district court for the district of South Carolina awarded \$850 for the salvage service. The property at peril was valued at \$272,500. The S. B. Baker, 23 Fed. 109, decided by the district court for the Southern district of New York, is a case which somewhat resembles the case at bar. A fire broke out during a westerly gale among the cotton bales which composed the cargo of the lighter Baker. Upon a signal from the superintendent of the wharves, a tug towed her out, with her burning cargo, from the slip into the river, and played upon the fire with her small hose un-

til the arrival of two city fire department tugs. The tug then towed the three vessels (the lighter and two steam fire department tugs) to a place convenient for taking out the burning cotton. The value of the cotton saved was \$20,000; of the lighter, \$3,000; and of the tug, \$14,000. Held, that \$750 was a proper salvage award. This award was reduced on appeal in the circuit court to \$350. It is true that new evidence in the higher court influenced this reduction. It is evident, however, that the court thought that the award of the district court, without this new evidence, was high enough. See, also, *The Alice Clark*, 39 Fed. 621. In the light of these cases, and taking into consideration the number of tugs actively engaged in the same work and at the same time with the *Emma K. Ross*, we think that \$250 is a liberal reward to her for her salvage services on that occasion. Let the case be remanded to the district court, with instruction to modify its decree in reducing the salvage award to this sum of \$250.

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BUTLER v. UNITED STATES.

(District Court, D. Indiana. June 15, 1898.)

No. 5,796.

1. FEES OF COURT OFFICERS—ATTENDANCE AND PER DIEMS.

Rev. St. §§ 574, 638, declare that the circuit and district courts sitting in equity or admiralty shall be deemed "always open" for the transaction of certain business. The act of March 3, 1887, forbids payment of per diems or attendance fees except for days "when the court is opened by the judge for business, or business is actually transacted in court," etc. *Held*, that the clerk is entitled to attendance fees for days between regular terms on which he is required to attend, and does attend, on the transaction of business by the judge.

2. SAME—CLERK'S FEES—DOCKETS AND INDEXES.

When, after docket entries, indexes, etc., have been made, a criminal case is transferred from one place of holding the district court to another, and then discontinued in the former place, the clerk is entitled to his docket and index fees therefor, although the costs have not been taxed at the place to which the case is removed.

3. SAME—SWEARING WITNESSES.

Where the witnesses for both parties are sworn at the same time, pursuant to an order of the judge, the clerk is entitled to have his fees therefor paid by the government.

4. SAME—AFFIDAVITS OF INDIGENT DEFENDANTS.

The clerk is entitled to a fee of 10 cents each for filing and entering affidavits of indigent defendants in criminal cases, on which the court makes an order for summoning witnesses in their behalf.

5. SAME—AFFIDAVITS TO MARSHAL'S ACCOUNTS.

The clerk is entitled to fees for taking the affidavit of the marshal proving the accounts rendered by him, since such proofs are for the convenience and protection of the government.

The facts in the above-entitled cause are stated in the finding of the court as follows:

(1) The court finds that the material averments of the petition and the facts alleged therein are true.

(2) And the court finds that Noble C. Butler, the petitioner, was on the filing of the petition, and is now, a citizen, and resident of the city of Indianapolis

and state of Indiana, and that the petitioner was on and before the first day of January, 1897, and has been ever since, and is now, clerk of the circuit and district courts of the United States for the district of Indiana, duly appointed, commissioned, and qualified, and acting as such clerk during all of said period.

(3) And the court finds that during the calendar year 1897 said courts were open under and by virtue of sections 574 and 638 of the Revised Statutes of the United States, for the transaction of equity and admiralty business therein as provided in said statutes on each and all of the days hereinafter mentioned, to wit, said circuit court was open, as aforesaid, at Indianapolis on January 13th, 15th, 19th, 22d, 23d, 28th, 29th, February 6th, July 2d, 24th, August 7th, 14th, 16th, 17th, 23d, 30th, September 6th, and October 16th, and at Evansville on October 22d, and said district court was open, as aforesaid, at Evansville on January 1st, February 5th, June 11th, August 12th, October 19th, 30th, and November 2d, making an aggregate of twenty-six days; that on each and all of said days one of the judges of said courts respectively was present therein for the transaction of such business; that on each and all of said days such business or some portion thereof was actually transacted in and by said courts respectively; that such business so transacted as aforesaid consisted of orders, decrees, and rules which were made and entered in and by said courts, respectively, upon their records in equity and admiralty causes that were pending therein, and as authorized by said statutes; that on each and all of said days the petitioner was required to be, and was, in attendance as such clerk upon and in said courts, respectively, with the records of said courts at the place where said records are required to be kept by him, and received from said courts, respectively, their orders, decrees, and rules as aforesaid, and their instructions concerning the same, and spread said orders, decrees, and rules on the records of said courts, respectively, in accordance with their instructions, as aforesaid, and also the date of each and all of said orders, decrees, and rules, and the name of the judge by whom said courts, respectively, were held when said orders, decrees, and rules were made and entered by them as aforesaid, and other matters incident thereto, all of which appears upon said records for each and all of said days in manner and form as recited and set forth in a transcript of the records of said circuit court for one of said days, to wit, the 19th day of January, 1897, which is as follows:

"November Term, 1896. In Recess. Tuesday, January 19th, 1897. In Chambers.

"Before Honorable William A. Woods, Judge.

"Mark T. Cox et al, vs. The Terre Haute & Indianapolis Railroad Company.  
(9,395, Chancery.)

"Comes now Frank A. Pickerill, and files his petition herein, praying the court to authorize Volney T. Malott, receiver herein, to pay the petitioner the sum of fourteen hundred dollars in settlement of his claim for damages for injuries, which petition is in the words and figures following, to wit: [H. I.] And now also comes the said receiver by John G. Williams, his solicitor. And the court having examined said petition, and inquired into the truth of the matters therein averred, finds that the same is true, and that the court is of the opinion that the prayer of said petition ought to be granted. It is accordingly here and now ordered by the court that the receiver herein be and he is now and hereby, authorized and directed to pay to said petitioner the sum of fourteen hundred dollars in settlement of his said claim for damages, upon his executing a proper voucher and acquittance therefor."

(4) And the court finds that on the 23d day of February, 1897, the case of the United States against Albert Wade, which was then pending in said district court and upon its dockets at Indianapolis, was, by order of said court, discontinued at Indianapolis, and transferred to the dockets of said court at Evansville; that previous to the discontinuance and transfer of said case, as aforesaid, the petitioner, as such clerk, entered the same upon the dockets and indexes of said court at Indianapolis, and taxed the costs therein at Indianapolis, and rendered other services at Indianapolis in connection therewith.

(5) And the court finds that on the 24th day of May, 1897, during the progress of the trial of the United States against Benjamin Barnard, in said district

court, the petitioner, as such clerk, was ordered by said court to administer oaths to eighteen witnesses therein; and in obedience to the order of said court, and not otherwise, such oaths were administered by the petitioner, as such clerk.

(6) And the court finds that during the months of April, May, and June, 1897, twenty-two affidavits of indigent defendants under indictment in said district court for witnesses in their behalf at the expense of the United States were presented to said court; and the petitioner as such clerk, was thereupon ordered by said court to file and enter said affidavits, and enter orders thereon for the attendance of such witnesses accordingly; and said affidavits were filed and entered, and orders were entered thereon by the petitioner, as such clerk, in obedience to the order and direction of the court, and not otherwise.

(7) And the court finds that during the months of July, August, and September, 1897, the petitioner, as such clerk of the district court, administered eleven oaths to the United States marshal for the district of Indiana, and made and entered eleven certificates thereof or jurats in the verification of his accounts as such marshal with the government of the United States, the same being required for its own convenience and protection.

(8) And the court finds that accounts for the foregoing fees, duly verified by the oath of the petitioner, have been rendered by him as such clerk, according to law, in and to said courts, respectively, in the presence of the district attorney for the district of Indiana or his assistant; and that the petitioner has proved in open court to the satisfaction of said courts, respectively, that the services aforesaid have been actually and necessarily performed as stated therein, and that orders approving said accounts have been duly entered of record in and by said courts, respectively, and that said accounts, with duly-certified copies of said orders approving the same, have been presented for audit and payment to the accounting officers of the treasury department of the United States, and have been disallowed by them, and are now unpaid.

(9) And the court finds that the whole amount of the fees and emoluments of the petitioner as such clerk in each and both of said courts during the calendar year 1897, including the fees aforesaid, was less than the maximum amount of his personal compensation, as allowed by law.

The court thereupon found, as its conclusions of law from these facts, that there was due the petitioner from the United States the sums of \$130 for attendance, \$1 for dockets and indexes, etc., \$1.80 for administering oaths to witnesses, \$2.20 for filing and entering affidavits for indigent defendants, \$2.75 for jurats to marshal's accounts, and rendered judgment for the total sum of \$137.75 accordingly.

John R. Wilson, for petitioner.

Albert W. Wishard, U. S. Atty., and Jesse J. M. La Follette, Asst. U. S. Atty.

BAKER, District Judge. The chief question in this case may be stated as follows: Is a clerk of a United States circuit or district court, which is, by express terms of the statutes, "always open" for the transaction of the business which is described therein, who is required to attend and attends on the transaction of such business by a judge or judges of the court under the authority of these statutes, upon days that are not within or any part of a regular term, entitled to attendance fees, under other statutes that allow such fees to him on days when "business is actually transacted in court"? A bare statement of the question shows that it is entitled to receive an affirmative answer, but, as a negative answer has been recently given the question by the accounting officers of the treasury, a further discussion of it seems to be necessary.

The nisi prius courts of the United States are described in the statutes according to their territorial jurisdiction as circuit and district courts; and, according to the subject-matter of their jurisdiction, as common law, equity or chancery courts, admiralty courts, and bankruptcy courts. A common-law court is in session during a regular term which is begun and held at a time and place fixed by law, and continued by adjournment until its close. It is also in session during a special term, which may be appointed by the court itself or a judge thereof. Chancery, admiralty, and bankruptcy courts are in session during these regular and special terms, and they also sit, and therefore are in session, whenever and wherever the judicial business which is described in sections 574, 638, and 4973 of the Revised Statutes, and in section 16, Act Feb. 4, 1887, is actually transacted by one or more of the judges of these courts. In all of these cases, when a court is in session during a regular or special term, or when it is in session by reason of the transaction of business under the sections aforesaid, it is equally necessary that its clerk should be in attendance upon it, with its records, at the place where the records are kept by him, to receive the orders, decrees, and rules of the court and its instructions concerning them. If no business were transacted at a regular or special term, his attendance would be necessary; and it is always necessary when business is transacted in or by the court. It was accordingly provided by the act of congress approved February 26, 1853, and section 828, Rev. St., that for such attendance a clerk should have a fee of "five dollars a day." Under this law, clerks were allowed for their "attendance" only, without reference to the transaction of business by the court, until after the appointment of Mr. Durham as first comptroller of the treasury, in the year 1885. Without any change in the law, he refused to allow clerks for their "attendance" unless the court had transacted business; and the court of claims held, on December 14, 1885, in the case of Jones v. U. S., 21 Ct. Cl. 1, that his refusal to do so was illegal. He thereupon secured a "rider" on the sundry civil act of August 4, 1886, limiting the appropriation for the current fiscal year for attendance upon the courts to those days only "when business is actually transacted" in them, without changing the general law upon the subject; and it was apparently passed without discussion or notice. It is as follows:

"\* \* \* Nor shall any part of the money appropriated by this act be used in payment of a per diem compensation to any clerk or marshal for attendance in court except for days when business is actually transacted in court, and when they attend, under sections 583, 584, 671, 672, and 2013 of the Revised Statutes, which fact shall be certified in the approval of their accounts." 24 Stat. 253.

Under this Durham act of 1886, a per diem fee for the transaction of business was substituted for the attendance fee. It deprived clerks of their fees for mere attendance. The basis of their compensation was changed from "attendance" to the "transaction of business," and a per diem fee for the general transaction of business was added to the specific fees which are allowed in connection therewith. But the Durham act of 1886 applied to a single appropriation only, and was

limited thereto by its own terms. It did not change the general law on the subject. *U. S. v. Aldrich*, 7 C. C. A. 431, 58 Fed. 688.

Within seven months afterwards, the Durham act of 1886 was proposed for enactment as a general law; and, congress being advised that it was unjust to clerks because it deprived them of any compensation for their "attendance" on those days when no business is transacted by the courts, it was rejected on that account only. In order to relieve the Durham act of 1886, as a general law, from any objection on that account, it was thereupon amended, on March 3, 1887, by inserting in it, after a full and thorough discussion of the whole matter, the words, "The court is open by the judge for business or," making it read as follows:

"\* \* \* Nor shall any part of any money appropriated be used in payment of a per diem compensation to any attorney, clerk or marshal for attendance in court except for days when the court is open by the judge for business or business is actually transacted in court, and when they attend under sections 583, 584, 671, 672 and 2013 of the Revised Statutes, which fact shall be certified in the approval of their accounts." 24 Stat. 541.

It appears from an examination of the proceedings in congress, as reported on pages 1229, 1232, 1233, and 1234, vol. 18, pt. 2, and page 2606, pt. 3, Cong. Rec. 49th Cong., 2d Sess., that the word "open" in the act of March 3, 1887, is a misprint for the word "opened."

In this act of March 3, 1887, the per diem fee for the general transaction of business was retained, and the per diem fee for mere attendance, which had been excepted from the previous appropriation, was restored and given a permanent place in the appropriations for judicial expenses, and the provision for both is in accordance with the terms of the general law of 1853 and section 828, Rev. St. The legislative history of the act of March 3, 1887, shows, and the supreme court of the United States and the circuit court of appeals for the First circuit have held, that it is a legislative interpretation and construction of the act of 1853 and section 828, Rev. St., and in aid of those statutes, instead of a limitation on them. *U. S. v. Pitman*, 147 U. S. 669, 13 Sup. Ct. 425, and *U. S. v. Aldrich*, 7 C. C. A. 431, 58 Fed. 688. The circuit and district courts are therefore actually in session, and per diem or attendance fees are authorized when (1) "the court is opened by the judge for business," or (2) "business is actually transacted in court."

An elementary and fundamental rule in the construction of statutes is stated by Sedgwick in his work on Statutory Law (page 199), as follows:

"That construction is favored which gives effect to every clause and every part of the statute, thus producing a consistent and harmonious whole. A construction which would leave without effect any part of the language used should be rejected if an interpretation can be found which will give it effect."

This rule is supported by federal and state authorities, and is universally conceded to be an accurate exposition of the law. The authorities are so numerous that it is hardly possible to cite all of them. It was held by the supreme court of Indiana in *Palmer v. Stumph*, 29 Ind. 333, that "the rule in construing a statute requires that effect is to be given to every part, and we are not to suppose words have been used which were intended to import nothing." And in *Balti-*

more v. Howard, 6 Har. & J. 383, the supreme court of Maryland held that "it is a rule in the exposition of statutes that one part shall be taken with another, and the whole considered together, and so construed that no clause, sentence, or word shall, if it can be avoided, be superfluous or insignificant." Even when there are two acts on the same subject, the rule is to give effect to both if possible. *U. S. v. Tynen*, 11 Wall. 88; *Chicago, M. & St. P. Ry. Co. v. U. S.*, 127 U. S. 406, 8 Sup. Ct. 1194; *District of Columbia v. Hutton*, 143 U. S. 18, 12 Sup. Ct. 369; *Frost v. Wenie*, 157 U. S. 46, 15 Sup. Ct. 532.

In the late ruling and opinion of the comptroller on the appeal of the petitioner herein (4 Dec. Compt. 161), holding that a clerk is entitled to per diem fees only when "the court is opened by the judge for business," the second clause of the act of March 3, 1887, as quoted above, viz. "business is actually transacted in court," is not given any meaning whatever. The whole of the second clause is rejected as mere surplusage. It is treated as an absolute nullity, and stricken from the body of the statute. Under the rule of construction which has been quoted above, the second clause ought to have been retained by giving it a reasonable interpretation if it were possible to give it one. If a reasonable construction of the second clause is possible, it is the duty of the court to adopt it. The possibility of a reasonable construction of the second clause is therefore the first thing to be determined. Its determination depends on the meaning which shall be given the word "court." If it refers exclusively to the regular term of a court when it is "opened by the judge for business," the second clause is unnecessary and meaningless, because it is embraced in the first clause. But the word is limited in the first clause by the phrase "opened by the judge for business," because the word has a broader meaning. Otherwise the limitation would be unnecessary. Its limitation in the first clause is evidence that a court may exist without being opened by the judge, just as its limitation in the second clause, by the phrase "business is actually transacted," is evidence that a court may exist without the transaction of business. A broader meaning is expressly given the word by sections 574, 638, and 4973, Rev. St., which provide that the courts shall be "always open," and by section 16 of the act of February 4, 1887, which provides that they shall be "always in session" for certain purposes without any formal act or order of the judge in aid of them, as follows, viz.:

"Sec. 574. The district courts, as courts of admiralty, and as courts of equity, so far as equity jurisdiction has been conferred upon them, shall be deemed always open, for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules and other proceedings, preparatory to the hearing, upon their merits, of all causes pending therein. And any strict judge may, upon reasonable notice to the parties, make, and direct and award, at chambers, or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court. \* \* \*

"Sec. 638. The circuit courts, as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules and other proceedings, preparatory to the hearing, upon their merits, of all causes pending therein. And any judge of a circuit court may,

upon reasonable notice to the parties, make, and direct and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court."

"Sec. 4973. The district courts shall be always open for the transaction of business in the exercise of their jurisdiction as courts of bankruptcy; and their powers and jurisdiction as such courts shall be exercised as well in vacation as in term time; and a judge sitting at chambers shall have the same powers and jurisdiction, including the power of keeping order and of punishing for any contempt of his authority, as when sitting in court."

"For the purposes of this act, excepting its penal provisions, the circuit courts of the United States shall be deemed to be always in session." Interstate Commerce Act Feb. 4, 1887 (24 Stat. 385).

These statutes were in existence before the act of March 3, 1887, and in its passage congress is assumed to have acted with reference to them, and to have used the word in its broader meaning as used therein. *U. S. v. Trans-Missouri Freight Ass'n*, 7 C. C. A. 15, 58 Fed. 58, 67. A session of the court is held under these statutes whenever the business described in them is transacted by the judge between its regular terms; and its proceedings are entered upon its records without the entry of orders for its opening or adjournment because it is always open and they are unnecessary.

In *Re Delgado*, 140 U. S. 586, 11 Sup. Ct. 874, the supreme court of the United States had under consideration a statute of the territory of New Mexico which provides:

"For the purpose of hearing applications for and issuing writs of mandamus the district court shall be regarded as open at all times wherever the judge of such court may be within the territory."

—and held concerning it:

"This section gives full authority for these proceedings. The original application was entitled 'in the court,' though addressed to the judge, as was proper. The hearing and judgment were by the court, and the peremptory mandamus was issued by direction of the court; and the power of the legislature to provide that the court shall always be open for certain purposes cannot be doubted." 140 U. S. 588, 11 Sup. Ct. 875.

In this decision the supreme court has not only provided a broader definition of the word "court," but it expressly holds that business which is transacted in a court that is always open under the statutes, and while it is open in that way only, is actually transacted in court.

In *Michigan Cent. R. Co. v. Northern Indiana R. Co.*, 3 Ind. 239, the supreme court of Indiana held that:

"An interlocutory order made by a judge in vacation is to be regarded as the order of the court, for which the said judge is authorized by law to act. \* \* \* All orders legally made in a cause, whether by the court in term, or by a judge in vacation, are regarded as orders of 'the court.' \* \* \* The words 'the court' and the 'judge' or 'judges' are frequently used in our statutes as synonymous; and, when used with reference to orders made by the court or judges, they were, we think, intended to be so understood."

And, under a statute of Indiana which authorized the appointment of receivers "by the court or the judge thereof in vacation," it was held in *Pressly v. Lamb*, 105 Ind. 171, 4 N. E. 682, that:

"The judge of the court in vacation is clothed with exactly the same power and authority, no greater and no less, as is the court itself when in regular and open session. \* \* \* When the judge of a court in vacation is

engaged in doing these acts and making these orders, it is clear, we think, \* \* \* that his acts, orders, and proceedings in the premises, although had in vacation, are the judicial proceedings of the court whereof he is judge. \* \* \* In a legal sense, the judge of a court is the court. Certainly, there can be no court under our laws, constitutional or statutory, without a judge. \* \* \* It is in this legal sense, we think, the words 'judge thereof in vacation,' so often mentioned in the sections of the Code before referred to, relating to receivers, should be taken and understood to mean 'court in vacation.'"

In *First Nat. Bank of Mauch Chunk v. U. S. Encaustic Tile Co.*, 105 Ind. 227, 236, 4 N. E. 846, it was again held, in accordance with *Pressly v. Lamb*, *supra*, with reference to the appointment of a receiver by a judge "sitting in chambers in vacation," that:

"The court having jurisdiction of the subject-matter of the suit, and of the parties thereto, plaintiffs and defendants, the proceedings had and orders made by and before the judge of the court in vacation were the proceedings and orders of the court whereof he was judge, and that such orders and proceedings, even though erroneous, were not void, and could not be collaterally attacked."

In these Indiana cases there were no statutes applicable to them like sections 574 and 638, Rev. St., declaring that the courts are "always open" for the appointment of receivers; but the supreme court held that the courts were, nevertheless, open whenever a receiver was appointed by one of their judges under the authority of a statute which authorized "a judge" to make the appointment; the provision of the state constitution concerning the judicial power being substantially the same as the provision of the federal constitution.

It was held in *Bowman v. Railway Co.*, 102 Ill. 459, 467, where a statute authorized applications for the condemnation of private property for public use to be made "to the judge of the circuit or county court, either in vacation or term time," that these applications, whenever made and allowed, were equally proceedings in court, and that the act of a judge in vacation allowing them to be filed then was an act of the court, and could not be anything else, under a similar provision of the constitution of Illinois.

It was held by the supreme court of Georgia in *Pease v. Wagon*, 20 S. E. 637, that, under sections 4221 and 4223 of the Code, a judge of the supreme court, though acting in vacation and at chambers in passing lawful orders touching trust estates, acts as a court of equity, that court being always open, and the presumptions which attach in favor of judgments and decrees by a court of general jurisdiction apply to orders thus granted. See, also, *McClurg v. McClurg*, 53 Mo. 173; *Gold v. Railroad Co.*, 19 Vt. 478; *Real Estate Ass'n v. Superior Court of San Francisco*, 60 Cal. 223.

Even before sections 574 and 638, Rev. St., were enacted, it was held by Mr. Chief Justice Marshall, in *The Little Charles*, 26 Fed. Cas. 982 (No. 15,613), where objections were made to an execution on an admiralty bond because the vessel had been released on an order at chambers, that it was an order of the court. The court said:

"The objections are: (1) That the order for release is a nullity, and all the consequent proceedings void, because the order was made by the judge, at his chambers, and not in court. The judicial act appoints certain stated

terms of the district court, and gives the judge power to hold special terms at his discretion, either at the place appointed by law, 'or at such other place in the district as the nature of the business and his discretion shall direct.' (Vide sections 581 and 669, Rev. St.) No power, it is contended, is given to the judge, except when sitting as a court, and therefore the form of declaring himself to be a court is indispensable to the validity of his acts. This objection seems rather technical than substantial. By law, the district judge alone composes the court. He is a court wherever and whenever he pleases. No notice to parties is required. No previous order is necessary. The various *ex parte* orders which admiralty proceedings require render this informal mode of acting essential to justice and expedition. The judge will take care that neither party be injured by the orders which he makes *ex parte*; and, where they are of course, it is convenient that they should be made without the formality of summoning the parties to attend. It does not seem to be a violent construction of such an act to consider the judge as constituting a court whenever he proceeds on judicial business. Such seems to have been the practice in this and other districts of the United States. Had the judge prefixed to his order such words as these, 'At a special court, held at —, on this — day of —, it is ordered,' etc., the proceedings would have been regular, for the law does not, in terms at least, require that the order for a special court should be made in court, or made any given time previous to its session. To every purpose of justice, the order of the judge, made in his character as a judge, is made by him as a court, whether he declares himself in words to be a court, or not. This order is, in its nature, judicial. It is such an order as may be made *ex parte*. It is signed by the judge in his official character, and is directed to the officer of the court. Under such circumstances, I cannot overturn a practice which is convenient, which is not liable to abuse, on a mere technical objection."

In "Courts and Their Jurisdiction," by John D. Works, the law is stated as follows:

"Although terms of court may be provided for generally, the legislature may provide that, for the transaction of business of an urgent character, the court shall be open at all times; and, under such legislation, the court may act with reference to such business during what is, as to other business, vacation. But this is not the act of a judge in vacation, but of the court. And when a judge is authorized to appoint a receiver or perform other like judicial acts, it is held that his acts, orders, and proceedings, although had in vacation, are the judicial proceedings of the court whereof he is judge. This is, however, based upon the ground that the words 'court' and 'judge' are, as used in the statutes authorizing the appointment of a receiver, synonymous." Page 377.

A review of the decisions and text-books discloses that, under a constitution which vests the judicial power in courts, it cannot be vested by the legislature anywhere else; that, where an exercise of judicial power by a judge is authorized by the legislature, it is held to have meant the court of which he is a judge; that his acts and proceedings in such a case are the acts and proceedings of the court itself; that the business which is transacted by him is actually transacted in court. It also appears that where a legislature has gone further, and specifically declared that a court shall be "always open" for the transaction of particular business, and that, so far as that particular business is concerned, the terms of the courts shall be practically continuous and without any vacations between them, the power of the legislature to do so, and to make the acts and proceedings of a judge in pursuance of his authority the acts and proceedings of the court itself, has never been denied by any court where these questions have been presented for its consideration. A

reason for such legislation by congress exists in the fact that judicial power, under the federal constitution, is vested in courts only. The power to ordain and establish inferior courts is vested in congress, and it, accordingly, regulates the scope and boundaries of their jurisdiction, prescribes the number of judges by whom they shall be held, and determines generally the conditions under which the judicial power that is vested in them shall be exercised. It fixes the time and place for holding regular terms of the courts, and it authorizes the courts or the judges to fix the time and place for holding special terms of the courts; and it authorizes the courts to sit in chambers for the transaction of an important part of their business whenever and wherever they deem it necessary or proper to do so. Rev. St. §§ 572, 574, 576, 581, 638, 661, 664, 666, 668-670, 4973, and Act Feb. 4, 1887, § 16. A single judge may hold a court, and exercise the judicial power that is vested in it, under the conditions that are prescribed by congress. But, whenever judicial power is exercised by a judge in accordance with these conditions, it is exercised by him as a court, or it is unauthorized by any constitutional authority. His acts in the exercise of judicial power are, in short, either acts of a court, or they are absolutely void.

It is therefore quite apparent that the word "court" means something more than a court that is opened by the judge for business at the beginning of a regular term, and continued by adjournment until the close thereof. As used in the act of March 3, 1887, it has a broader and more comprehensive meaning, which is definitely fixed by other federal statutes and the decisions of the supreme court of the United States and other courts. By giving this meaning to the word where it occurs in the act of March 3, 1887, a reasonable construction is given the whole act, which makes it "consistent and harmonious," and gives effect to every part of it. Any other construction fails to do so. Such a construction is not only reasonable and possible, but is in accordance with the purpose of these statutes, which is to provide a compensation for the attendance of an officer when his services are or may be required by the court. It is a compensation for "attendance," as distinguished from "services." Attendance is required in order that judicial functions may be duly performed, and it is just as necessary when judicial functions are performed in vacation as when they are performed during a regular term. It is essential for the due performance of them by the court that a record of its proceedings should be made and kept, and it is the duty of a clerk to make and keep such a record. His attendance on the court is therefore required whenever the court is held. A court is held, and a record of its proceedings is made, and kept on every day of a regular term, and on every day that business is transacted by the court in vacation. *U. S. v. Aldrich*, 7 C. C. A. 431, 58 Fed. 688. If clerical services are rendered in the transaction of business, either in term or vacation, an additional compensation is provided for them. A fee for the entry of orders and decrees does not compensate him for his attendance on the court in vacation, any more than it does in the course of a term. These are separate and distinct functions, and they are separately compensated.

The statement of the comptroller that it was the purpose of congress, in the enactment of the act of March 3, 1887, to "cure" some mysterious and indefinable "evil," is wholly imaginative. There is nothing in the act which justifies any such assumption, or furnishes any excuse for it. On the contrary, the history of that act, and a comparison of it with previous acts, show that it was passed to restore fees that were then arbitrarily disallowed by the comptroller after having been allowed by the accounting officers for nearly half a century. In assuming to give effect to this hypothetical policy of congress, the comptroller subjects himself to the criticism of the supreme court of the United States in the construction of other statutes.

It is said in *Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 36, 15 Sup. Ct. 508, 516, that:

"In our judgment, the language used is so plain and unambiguous that a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action, based upon some supposed policy of congress. But, as declared in *Hadden v. Collector*, 5 Wall, 107, 111, 'what is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable to rest the judgment of the court on in the interpretation of statutes.' 'Where the language of the act is explicit,' this court has said, 'there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the legislature.' *Scott v. Reid*, 10 Pet. 524, 527."

The language of the act of March 3, 1887 is so "natural" and "obvious" and "explicit" that the sole rule of construction that is really applicable thereto is as stated by the supreme court in *U. S. v. Goldenburg*, 168 U. S. 95, 18 Sup. Ct. 3:

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling; but the cases are few and exceptional, and only arise where there are cogent reasons for believing that the letter does not fully and accurately disclose the intent."

The cases of *Converse v. U. S.*, 26 Ct. Cl. 6, and *Ackiss v. U. S.*, 31 Ct. Cl. 283, are cited by the district attorney in support of his contention. In the *Converse Case* it was erroneously held that a clerk is not entitled to his attendance fees under the first clause of the act of March 3, 1887, when the "court is opened by the judge for business," and is entitled to them only under the second clause, when "business is actually transacted in court" at a regular term. Its construction of both clauses has been rejected by the comptroller in his late ruling and opinion on the appeal of the petitioner herein (4 Dec. Comp. 161), and in the later case of *S. Rodman Smith*, clerk of the United States courts for the district of Delaware (Id. 508); and it cannot be accepted as an authority for his construction of the phrase "in court," which was the fundamental error of that case. Although it was decided in 1890, it has never been adopted as a rule of practice. The facts of the *Ackiss Case* disclose that, on the days for which attendance fees were charged, the court was neither opened by the judge for business, nor

was there any business transacted by him as a court or otherwise, and the case is therefore wholly inapplicable here.

The fee which is claimed in the case of *U. S. v. Wade*, was taxed and charged against the government under a provision of section 828, Rev. St., which is as follows:

"For making dockets and indexes, taxing costs and other services in a case which is dismissed or discontinued, or where judgment or decree is made or rendered without issue, one dollar."

In the statutes which established courts at Evansville, New Albany, and Ft. Wayne, provision is made for separate dockets and indexes, etc., and for deputy clerks, who shall reside and keep their offices at each of these points. Before this case was transferred from Indianapolis to Evansville, it was entered upon the dockets and indexes at Indianapolis, and it was subsequently entered upon the dockets and indexes at Evansville. The costs were taxed at Indianapolis, and will have to be taxed again at Evansville upon the final disposition of the cause. Twice the amount of work is done in the case as would have to be done if it had not been transferred. The same amount of work is done as would have been done if there had been two cases. So far as the amount of work is concerned, it is precisely the same in entering one case upon two separate sets of dockets and indexes as in entering two cases on one set of dockets and indexes. When the case was transferred to Evansville, it was "discontinued" at Indianapolis.

In *U. S. v. McCandless*, 147 U. S. 695, 13 Sup. Ct. 465, it was held that a docket fee was not taxable until the final disposition of a cause; but that ruling was overruled in *U. S. v. Kurtz*, 164 U. S. 49, 17 Sup. Ct. 15. Even in the *McCandless* Case it was very plainly indicated that, if the case "had reached that point where costs are taxed," a different view would have been adopted.

The principle that applied to the case under consideration here was announced by the supreme court in *U. S. v. King*, 147 U. S. 676, 13 Sup. Ct. 439, in which it was held that double attendance fees should be allowed a clerk where his attendance was required in two places at the same time, because the "clerk was entitled to charge for his own attendance at one place, and for that of his deputy at another." 147 U. S. 682, 13 Sup. Ct. 441.

The fees which are claimed in the case of *U. S. v. Barnard* were taxed and charged against the government under a provision of section 828, Rev. St., which is as follows: "For administering an oath or affirmation, except to a juror, ten cents."

In this case the witnesses were sworn during the progress of a trial, and in accordance with the order of the judge who was holding the court, and not upon a request which was addressed to the clerk by the defendant therein, as seems to have been assumed by the accounting officers. The witnesses were for both parties, and were sworn together; and they were witnesses in a public prosecution, instead of a civil action between private individuals, and the fees for swearing them are a part of the costs of the general administration of justice, which are payable by the government. It was not optional with the clerk to swear these witnesses or not. When a defendant

applies to the clerk to make an affidavit before him, he can require his fee at the time or before the service is rendered, and, failing to do so, it is his loss. But he cannot arrest the proceedings in a criminal trial until his fees for swearing witnesses are paid or secured. He cannot decline to swear them because payment is refused. In many cases the witnesses for the defendant are brought into court at the expense of the government, because the defendant is unable to procure their attendance. It is the duty of the clerk to comply with the order of the court, and swear all the witnesses in accordance therewith. Their testimony is required by the court for its own information concerning the facts of a case, and not because the defendant is interested in having them sworn. And the clerk is entitled to his fees for services rendered in accordance with the order and practice of the court.

In *U. S. v. Van Duzee*, 140 U. S. 169, 176, 11 Sup. Ct. 758, 761, the supreme court held:

"When a clerk performs a service in obedience to the order of the court, he is as much entitled to compensation as if he were able to put his finger on a particular clause of a statute authorizing compensation for such services."

The decision of the supreme court in the *Van Duzee* Case was followed by the circuit court of appeals for the Seventh circuit in *U. S. v. Converse*, 24 U. S. App. 89, 11 C. C. A. 274, and 63 Fed. 423. And the late comptroller held in *Van Duzee's Case*, 2 Dec. Comp. 217, that:

"A practice established or directly sanctioned by the judge has the same force and effect as a rule of court, and the clerk of the court acting thereunder is entitled to fees for the services rendered necessarily by such practice."

The fees which are claimed for filing and entering affidavits for indigent defendants were taxed and charged against the government, under a provision of section 828, Rev. St., which is as follows: "For filing and entering every declaration, plea, or other paper, ten cents." These affidavits were filed and entered because the court ordered the clerk to file and enter them. They were presented to the court before they were filed and entered by the clerk. They would not have been filed and entered by the clerk unless the court had ordered him to file and enter them. They were filed and entered by the clerk as the foundation of the order of the court which was made upon them. The order of the court to file and enter them, and to issue subpoenas for the witnesses named therein, was a single and indivisible act. It is conceded by the accounting officers that a clerk is entitled to his fee for entering an order of the court for summoning the witnesses (*Locke's Case*, 2 Dec. Comp. 578), but that he is not entitled to his fee for filing and entering the affidavit on which the order is founded (*Brooks' Case*, Id. 224). He is just as much entitled to his fee for one service as the other, and he is entitled to his fee for both services on precisely the same grounds. The filing and entering of the affidavit, and the entry of the order thereon, are parts of the same transaction. See *U. S. v. Van Duzee*, supra, *U. S. v. Converse*, supra, and *Van Duzee's Case*, 2 Dec. Comp. 217, as to fees of clerks for services rendered under an order of the court, and in accordance with its practice.

The fees which are claimed for affidavits to the marshal's accounts were taxed and charged against the government under the act of

congress approved February 22, 1875 (18 Stat. 333), as interpreted by the supreme court in *U. S. v. Van Duzee*, 140 U. S. 169, 171 (item 3), 11 Sup. Ct. 758. Under that statute, a marshal is required to "render" his accounts to the court, and to "prove" them by his own affidavit. An account is "rendered" when it is presented. Rendering an account, and proving an account, are separate and distinct transactions, under the statute. The former does not include the latter. The account is rendered for the benefit of the marshal. It is proved for the "convenience and protection of the government," and "the expenses attendant thereon are proper charges against the government." Such is the language of the supreme court, and the principle of the decision is plain. Whatever is done for the benefit of the marshal is chargeable against himself. Whatever is done for the "convenience and protection" of the government is chargeable against itself. No charge by the clerk for affidavits was under consideration in this case. But in the case of *U. S. v. Allred*, 155 U. S. 591, 15 Sup. Ct. 231, where a charge for affidavits by deputy marshals to their accounts was under consideration, the supreme court held, in accordance with the principle of its decision in *U. S. v. Van Duzee*, supra, that the fees for these affidavits should be paid by the government. It is perfectly clear that, if the fees for affidavits by deputy marshals to their accounts are chargeable against the government, the fees for affidavits by marshals to their accounts must also be chargeable against the government, on the principle of the *Van Duzee* Case. Nevertheless, the accounting officers have invented a novel distinction between these two classes of affidavits, namely: Where an affidavit to an account is required, for the convenience and protection of the government, by an act of congress, it is not chargeable against the government; but where an affidavit to an account is required, for the convenience and protection of the government, by the attorney general or the accounting officers, it is chargeable against the government. *Marsh's Case*, 2 Dec. Comp. 482.

In *U. S. v. Jones*, 147 U. S. 672, 673 (item 1), 13 Sup. Ct. 437, the supreme court placed its own construction on its decision in *U. S. v. Van Duzee*, supra, as follows:

"The labor of preparing one's own accounts for services or fees is a mere incident to the rendition of the service, and is universally assumed by the creditor as his own burden; but the approval of the account of another stands upon a different footing, and if performed at the request of the government, or under a statute requiring it to be performed for the protection of the government, there is no reason why the clerk should not receive such fees therefor as he receives for analogous services in other matters."

These considerations, in the opinion of the court, justify and require the allowance of the fees in question. So ordered.

## HARRISBURG TRUST CO. v. SHUFELDT.

(Circuit Court of Appeals, Ninth Circuit. May 23, 1898.)

No. 388.

**1. SET-OFF—NEGOTIABLE INSTRUMENTS.**

The right to set-off is wholly statutory, and under 2 Hill's Code Wash. § 806, when a party is sued by the assignee of a chose in action, he cannot plead against the assignee a set-off which he holds against the assignor unless the demand sought to be set off existed at the time of the assignment, and belonged to the party in good faith before notice of such assignment.

**2. NEGOTIABLE INSTRUMENTS—UNINDORSED NOTES—EQUITABLE TITLES.**

The assignee of an unindorsed negotiable note takes only an equitable title, but the note then stands on the same footing as nonnegotiable paper, and he may, under the Washington Code, maintain in his own name an action against the maker.

**3. SAME—SET-OFF—DEFENSES.**

The fact that a note is transferred without indorsement is sufficient to put the transferee upon inquiry as to all equitable defenses that existed at the time of the transfer; but a "set-off" is not a defense, as that term is ordinarily used, whether the title to the note be equitable or legal, and is never pleadable as a defense unless expressly made so by statute.

In Error to the Circuit Court of the United States for the Northern Division of the District of Washington.

Strudwick & Peters, for plaintiff in error.

Hastings & Stedman, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and BELLINGER, District Judge.

GILBERT, Circuit Judge. The Harrisburg Trust Company brought an action in the circuit court to recover upon a promissory note for \$3,000 made on March 31, 1894, by the defendant in error, in favor of the Guarantee Loan & Trust Company, payable on demand, with interest at the rate of 10 per cent. per annum, which note was on July 16, 1894, sold and delivered to the plaintiff in the action. In his answer to the complaint the defendant in error set forth an affirmative defense, which was, in substance, as follows: That the note was never indorsed by the payee; that it was delivered to the plaintiff, or to one Edward L. Bailey, an officer thereof, together with other negotiable paper, as a pledge to secure the repayment of an advancement made by the said Bailey, individually, or as an officer of the plaintiff; that said note bears no indorsement save a credit of interest and \$500 on account of the principal; that on May 23, 1896, there was standing to the credit of the defendant with the said Guarantee Loan & Trust Company the sum of \$2,092.80, and on said day the Guarantee Loan & Trust Company certified a certain check, purporting to be drawn by the defendant, payable to the order of the county treasurer, in the sum of \$2,085.30, which check was not accepted by the county treasurer, but has remained and is the property of the defendant; that on October 3, 1896, the defendant demanded from the Guarantee Loan & Trust Company the delivery of said note, and tendered in payment thereof the said certi-

fied check, a receipt for a general deposit of \$7.50, and the sum of \$454.41 in cash, which tender was refused; that the said note was received by the pledgee thereof without the defendant's knowledge or consent, and that the plaintiff acquired no right or title to said note "other than that then and since held by the Guarantee Loan & Trust Company;" that the Guarantee Loan & Trust Company made an assignment on May 25, 1896, for the benefit of its creditors, and that until subsequent to said assignment the defendant had no knowledge that any person other than the payee held the note, and that when the payments were made on account of principal and interest the note was in the possession of the payee thereof. To this affirmative defense the plaintiff demurred, and its demurrer was overruled, the court holding that the matters set forth in the answer were sufficient in law to constitute a set-off to the action, to the extent of the amount represented by the said certified check. The question presented upon the writ of error to this court is whether or not the court erred in so ruling.

The right to set-off is wholly statutory, and in this case its existence and its definition must depend upon the provisions of the statutes of the state of Washington. The Code of Washington (2 Hill's Code, § 806) provides as follows:

"Sec. 806. The defendant in a civil action upon a contract expressed or implied may set off any demand of a like nature against the plaintiff in interest which existed and belonged to him at the time of the commencement of the suit. And in all such actions, other than upon a negotiable promissory note or bill of exchange negotiated in good faith, and without notice before due, which has been assigned to the plaintiff, he may also set off a demand of a like nature existing against the person to whom he was originally liable, or any assignee prior to the plaintiff of such contract, provided such demand existed at the time of the assignment thereof, and belonging to the defendant in good faith before notice of such assignment, and was such a demand as might have been set off against such person to whom he was originally liable, or such assignee while the contract belonged to him."

This statute is clear and explicit, and requires no interpretation. When a defendant is sued by an assignee of a chose in action, he cannot plead against the assignee, a set-off which he holds against the assignor, unless the demand sought to be set off existed at the time of the assignment, and belonged to the defendant in good faith, before notice of such assignment. A similar statute is found in the state of New York, and it has there been held that the demand which constitutes the set-off must be one which existed against the assignor at the time when he made the assignment. *Martin v. Kunzmüller*, 37 N. Y. 396; *Faulkner v. Swart*, 55 Hun, 261, 8 N. Y. Supp. 239; *Brisban v. Caines*, 10 Johns, 45. So far as the record in the present case informs us, the account of the defendant in error as a depositor with the Guarantee Loan & Trust Company did not exist prior to May 23, 1896, which was nearly two years subsequent to the transfer of the note to the plaintiff in error. By the terms of the statute, therefore, the certified check and the amount represented thereby, upon deposit with the Guarantee Loan & Trust Company, cannot be pleaded as a set-off to the note, unless there are other facts in the case which are sufficient to take it out of the statutory provision. It is contended by the defendant in error that the fact that

the note was transferred without indorsement renders the statute inapplicable, and that the delivery of the note, in pledge for money borrowed, conveyed to the transferee thereof only an equitable title to the note, and that in an action on such a note delivered after maturity, especially in a case in which the maker of the note had no notice of the transfer, the latter may avail himself of all the equitable defenses which he possesses. There can be no doubt of the correctness of the latter proposition. The pledgee or assignee of a note which has been delivered to him without the indorsement of the payee takes only an equitable title to the note, but as such equitable owner he may undoubtedly, under the Washington Code, maintain in his own name an action against the maker. The note in the hands of such a holder stands upon the same footing as nonnegotiable paper. *Simpson v. Hall*, 47 Conn. 417. The fact that it is transferred without indorsement is sufficient to put the transferee upon inquiry as to all equitable defenses that existed at the time of the transfer. But a set-off is not a "defense," as that term is ordinarily used (*Chandler v. Drew*, 6 N. H. 469; *Wat. Set-Off*, §§ 5, 6), and is never pleadable as a defense unless it is expressly made so by statute. "The rule that a party taking an overdue bill or note takes it subject to the equities to which the transferer is subject does not extend so far as to admit set-offs which might be available against the transferer. A set-off is not an equity, and the general rule stated is qualified and restricted to those equities arising out of the bill or note transaction itself, and the transferee is not subject to a set-off which would be good against the transferer arising out of collateral matter." 2 Daniel, Neg. Inst. 1435a; *Chit. Bills* (13th Am. Ed.) 251. The set-off in this case is not connected with the note, or with the consideration for the note, or the circumstances under which it was given. It is not a defense to the note or to liability thereunder. It is a separate and independent cause of action, existing in favor of the defendant, which, by virtue of the statute only, is permitted to be set off against the plaintiff's debt for the purpose of adjusting mutual demands and avoiding unnecessary litigation. It follows, therefore, that it is immaterial whether the plaintiff's title to the note was equitable or legal. In either case, the right to plead a set-off against it must depend upon the terms of the statute. The judgment of the circuit court is reversed, and the cause will be remanded for further proceedings not inconsistent with these views.

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BIRD et al. v. HALSY.

(Circuit Court, W. D. Virginia. March 22, 1898.)

**1. DEPOSITIONS—EXHIBITS SEPARATELY MAILED—NOT IRREGULAR.**

No merit lies in attaching exhibits to depositions other than that of safety in preserving and identifying them as parts of the depositions. If this identification be made clear, and especially if it be not denied that they are the exhibits in question, the exhibits cannot be deprived of their char-

acter as part of the depositions because they are, for convenience or for any other reason, mailed to the clerk in a separate package.

**2. SAME—INDORSEMENT OF EXHIBITS.**

No formal certificate is necessary to be attached to exhibits in order to make them parts of the deposition in which reference is made to them. If the indorsements of the examining commissioner on the exhibits and depositions be made by the same person, and the exhibits are so described and marked by the commissioner that their identity is unmistakably established, this is sufficient.

**3. SAME—REFUSAL TO TESTIFY—SUPPRESSION OF TESTIMONY—EXCEPTIONS DELAYED.**

The whole of a deposition may be suppressed on the ground that a witness has refused to answer a material question; but where no effort is made to compel him to answer, no notice given of an intention to move for suppression because of the refusal, and the depositions are subsequently received and opened by agreement, and two terms intervene before such a motion is made, it is then too late to urge it.

**4. SAME.**

Rev. St. §§ 863, 864, providing for the manner and methods of taking depositions, apply to the taking of depositions within the United States, and have no application to foreign countries.

**5. SAME—FAILURE TO OBJECT—WAIVER.**

Objections to depositions because of informalities in the notice to take and in the certification, etc., are waived where the objecting party has consented to the issuing of the commission, and practically united with opposing counsel in executing it, and where no notice of the objections is given, or motion to suppress made, until the trial is in progress.

**6. EVIDENCE—GENERAL REPUTATION—PARTICULAR STATEMENTS—INADMISSIBILITY.**

Evidence to prove the general reputation of a person for integrity, honesty, and fair dealing is governed by the same principles that apply in a case of the impeachment of a witness for truth and veracity; and particular statements made by persons with whom the party has had financial dealings, based on the failure or inability of the said party to meet his pecuniary obligations, especially when made by persons living remote from the accused, are inadmissible.

**7. SAME — ACTS ADMITTED ALLEGED TO BE FRAUDULENT — SIMILAR TRANSACTIONS IRRELEVANT.**

Where acts are admitted which are alleged to be fraudulent, it is irrelevant to prove other similar transactions with other persons in order to show a fraudulent intent on the part of the accused.

This was an action of assumpsit by Walter Bird & Co, against S. P. Halsy. The case was heard on motions made by both parties to suppress certain depositions.

R. G. H. Kean and F. S. Kirkpatrick, for plaintiffs.

Blackford, Horsley & Blackford and John W. Daniel, for defendant.

**PAUL, District Judge.** The defendant moves to suppress certain depositions taken by the plaintiff in this case on the following grounds:

"Because the witnesses respectively refused to answer material questions propounded by the defendant on cross-examination [the questions being designated by their serial numbers, 28 in all], and all other questions which the witness [Frederick Victor Chalmers] refused to answer." "And all of said depositions taken in England are moved to be suppressed for the further reason that the exhibits which are alleged to have been filed with the questions and answers were not returned by the officer taking said depositions along with said depositions, and that certain papers sent by said officer under a separate cover,

and in a different way, are not properly certified; and, even if they were, they would have to be returned attached to the depositions as a part thereof. No exhibit was returned with the same." "There is no return of what purports to be Exhibit No. 1. The other exhibits referred to in said depositions purport to be numbered from 2 to 10, inclusive."

The depositions which the court is asked to suppress were taken on behalf of the plaintiffs in London, England, on the 9th, 10th, and 11th days of August, 1897, and were sent by registered mail to the clerk of this court on the 27th day of August, 1897. They were opened by agreement of counsel prior to the commencement of the regular term of this court in September, 1897. At that term of the court the plaintiff, whose home is in England, was present, and pressing for a trial; but the case was continued on motion of the defendant. There was an adjourned term of this court held in December, 1897. On the first day of the present term the plaintiff moved the court to fix a day of the present term of the court for the trial of the case. Thereupon the defendant interposed this motion to suppress the depositions. The court will consider first that branch of the motion to suppress which is based on the fact that "the exhibits which were alleged to have been filed with the questions and answers were not returned by the officer taking the depositions along with said depositions, and that certain papers sent by said officer under a separate cover and in a different way are not properly certified; and, even if they were, they would have to be returned attached to the depositions as a part thereof. No exhibit was returned with the same." The depositions proper were forwarded in one package, and the exhibits referred to in the depositions, and by designations therein made part thereof, mailed to the clerk in a separate package. The manner of identifying the exhibits in the depositions in a few cases will serve to show how all of them are identified: In the examination of Frederick Victor Chalmers, a witness on the part of the plaintiff, at question 26, page 8, of the depositions, it is noted by the officer taking the depositions: "\* \* \* The paper referred to in question No. 25 was at the same time marked by the commissioner 'Mr. Frederick Victor Chalmers' evidence No. 2, and signed by the commissioner, and dated 9/8/97.'" On examining the exhibits, I find that the paper referred to in question No. 25 as Exhibit No. 2 is marked "Mr. Frederick Victor Chalmers' evidence No. 2. J. Wesley Ward. 9/8/97." In the examination of George Alfred Wills, another witness for the plaintiff, following question 126, on page 25, it is noted by the commissioner as follows: "Four letters were handed by Mr. Kirkpatrick to the witness, who read them. They are dated, respectively, 2d January, 1892, 24th January, 1893, 18th April, 1893, and 26th April, 1893; and were then respectively marked by the commissioner 'Mr. George Alfred Wills' Evidence,' and numbered respectively 'No. 3,' 'No. 4,' 'No. 5,' and 'No. 6,' and all of them were signed by the commissioner, and dated 9.8.97." On examining the exhibits, I find the four papers referred to, and I find them marked "No. 3," "No. 4," "No. 5," and "No. 6," each indorsed, "Mr. George Alfred Wills' Evidence," and signed "J. Wesley Ward. 9.8.97." Accompanying the exhibits is a letter from the commissioner to the clerk, which is as follows:

"Ward & Asplin,  
Solicitors.

Registered  
10 Encls.

37 Lime Street,  
London, 27 August, 1897.  
E. C.

"Bird v. Halsy.

"Dear Sir: I have to-day sent to you, by registered post, as 'commercial papers,' the depositions taken by me in this suit. I now inclose herewith the ten documents put in as exhibits in evidence with such depositions, and shall be obliged by your acknowledging to me, in due course, the safe receipt of all these documents. Your acknowledgment by post card will be quite sufficient. I am yours, faithfully,

J. Wesley Ward.

"The Clerk, Circuit Court of the United States, Western District of Virginia, Lynchburg, Virginia, U. S. A."

An examination of the depositions and of the exhibits leaves no doubt as to their identity and connection. Fastening the exhibits to the depositions of which they are a part cannot more completely identify them with the depositions than these exhibits are by the description of them given by the commissioner in the examination of the witnesses, and indorsed by him on the exhibits themselves. The court can conceive no merit in attaching the exhibits to the depositions, other than that of safety in preserving the exhibit, and identifying it as part of the deposition. If this identification is made clear and unmistakable, as in this case, the exhibits cannot be deprived of their character as part of the deposition because they are, for convenience or any other reason, mailed to the clerk in a separate package. It is not pretended by counsel for the defendant in the argument of the motion to suppress these depositions that the exhibits sent in a separate package to the clerk, with the letter of the commissioner to the clerk, are not in fact the exhibits referred to in the examination of the witnesses, and made part of their depositions.

It is also objected by the defendant's counsel that "there is no return of what purports to be Exhibit No. 1." But the exhibit to the absence of which this objection is made has been produced by one of the counsel for the plaintiff, in whose hands it was for examination, and it is conceded that it came to the clerk in the same package with the other exhibits. I find it marked, "Mr. Frederick Victor Chalmers' Evidence No. 1," and signed "J. Wesley Ward. 9.8.97,"—just as it is designated in the depositions.

It is further objected by counsel for the plaintiff that the exhibits sent by the commissioner to the clerk are not properly certified. We have seen how the exhibits are described in the depositions, and how they are indorsed. An examination of the signature of the commissioner attached to the depositions and the indorsements of the exhibits shows that they were made by the same hand, and are the signatures of the same person. The court knows of no formal certificate necessary to be attached to an exhibit in order to make it a part of the deposition in which reference is made to it. These exhibits are so described in the depositions, and are so marked by the commissioner as such exhibits that the description and marks unmistakably establish their identity. And this is sufficient. That the whole of a deposition may be suppressed on the ground that a witness has refused to answer a material question is well established. In *Sturm v. Insurance Co.*, 63 N. Y. 87, the court of appeals of New York said:

"It may be taken as a rule that, where a party is deprived of the benefit of the cross-examination of a witness by the act of the opposite party, or by the refusal to testify or other misconduct of the witness, or by any means other than the act of God, the act of the party himself, or some cause to which he assented, that the testimony given on the examination in chief may not be read. *People v. Cole*, 43 N. Y. 508; *Smith v. Griffith*, 3 Hill, 333. See *Forrest v. Kissam*, 7 Hill, 465. And the rule may be applied to the examination of a witness on commission, or conditionally out of court, in case the party desiring the benefit of a cross-examination has not been present or represented at the taking of the testimony, and had no opportunity to push his cross-examination, or to know of the refusal of the witness to testify, or of other like misconduct of the witness. *Smith v. Griffith*, supra. But where the party is present at the examination of the witness in person or by counsel, and is thus fully apprised of the facts upon which he afterwards relies at the trial to suppress the testimony, and does not at the examination, or afterwards before the trial, seek to avail himself of them to that end, or to procure for himself before or at the trial the benefit of a full cross-examination, he may not, waiting until the trial, then for the first time object to the reading of the deposition, or move to suppress it. He should take an earlier opportunity for action, so that, if successful, his opponent might move for a commission to examine his witness anew out of court, or might obtain a personal attendance at the trial."

In *Howard v. Manufacturing Co.*, 139 U. S. 205, 11 Sup. Ct. 502, the supreme court said:

"It is the settled rule of this court that the failure of a party to note objections to depositions of the kind in question when they are taken, or to present them by a motion to suppress, or by some other notice, before the trial is begun, will be held to be a waiver of the objections. Whilst the law requires due diligence in both parties, it will not permit one of them to be entrapped by the acquiescence of the opposite party in an informality which he springs during the progress of the trial, when it is impossible to retake the depositions."

It does not appear from the depositions that counsel for the defendant, though present at the time the witness refused to answer the questions propounded on cross-examination, then entered any objection to the reading of the depositions for that reason, or gave any notice to the plaintiff that he would move the court to suppress the depositions on the ground of the refusal of the witness to answer the questions on cross-examination. It also does not appear that any steps were taken by the commissioner, or any effort made by counsel for the defendant, to have the commissioner apply to a court of competent jurisdiction to compel the witness to answer the questions propounded to him on cross-examination, or be punished for contumacy in refusing to do so. On this subject the supreme court of Indiana says:

"Where a witness under examination before an officer not having power to punish for contempt refuses to answer a proper question, the officer should report to a court having jurisdiction, and ask it to compel an answer, or punish the contumacious witness. On the principle of comity, the courts of the state where a deposition is taken to be used in another state will exercise its authority, when appropriately invoked, to secure competent testimony, and will assist an officer within its jurisdiction, when assistance is properly asked, to secure answers to competent questions." *Keller v. B. F. Goodrich Co.*, 19 N. E. 199.

That the English courts have power, when appropriately invoked, to compel contumacious witnesses, before an officer authorized to take depositions within their jurisdiction, to answer competent questions, is asserted by counsel for the plaintiff, and is not denied by counsel

for the defendant. No effort having been made by the defendant to compel the witness to answer the questions propounded to him on cross-examination; no notice having been given by the defendant of a motion to suppress the depositions on the ground of the refusal of the witness to answer the questions propounded to him on cross-examination, and the depositions having been received by the clerk, and, by agreement of counsel, opened more than six months prior to the present term of the court, two terms having intervened at which such motion might have been made,—the court holds that the motion to suppress now made comes too late. Counsel for the defendant insist that the case had not been called for a trial when the motion to suppress was interposed, but the court is of opinion that, so far as the motion to suppress is concerned, the case was practically called for a trial when the plaintiff moved the court to fix a day during the present term for the trial. In view of the great distance which the plaintiff has now twice traveled in order to secure a trial of this case, and the fact that the witness whose deposition it is sought to suppress is not within the reach of the process of the court, but lives in a foreign country, it would work a very great injustice and hardship to the plaintiff to sustain the motion to suppress these depositions. The court, in the exercise of the sound discretion with which it is invested, overrules the motion to suppress the depositions.

The defendant, S. P. Halsy, by counsel, also moves the court to suppress certain depositions offered on behalf of the plaintiff on the ground that they are not certified in accordance with the provisions of section 864 of the Revised Statutes of the United States, in this, to wit: that the certificate does not state that the testimony of the witnesses was reduced to writing by the commissioner taking the depositions, or by the witness himself in the magistrate's presence, and by no other person. The section of the Revised Statutes of the United States on which this motion is based is as follows:

"Sec. 864. Every person deposing as provided in the preceding section shall be cautioned and sworn to testify the whole truth, and carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or by himself in the magistrate's presence, and by no other person, and shall, after it has been reduced to writing, be subscribed by the deponent."

The preceding section of the Revised Statutes of the United States referred to in section 864 is section 863, and is as follows:

"Sec. 863. The testimony of any witness may be taken in any civil cause depending in a district or circuit court by deposition *de bene esse*, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm. The deposition may be taken before any judge of any court of the United States, or any commissioner of a circuit court, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the cause. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, as either may be

nearest, which notice shall state the name of the witness and the time and place of taking his deposition; \* \* \* and whenever, by reason of the absence from the district and want of an attorney of record, or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such circuit or district shall think reasonable and direct. Any person may be compelled to appear and depose as provided by this section in the same manner as witnesses may be compelled to appear and testify in court."

An examination of this statute shows clearly that its provisions apply to the taking of depositions of witnesses within the United States, and have no application to the taking of depositions of witnesses in a foreign country. This is clearly shown by the designation of the officials before whom the depositions may be taken. They may be taken before the following federal officials, viz.: "Any judge of any court of the United States, or any commissioner of a circuit court, or any clerk of a district or circuit court;" or before any of the following state officials, viz.: "Any chancellor, justice or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas, of any of the United States, or any notary public not being counsel or attorney to either of the parties, nor interested in the event of the cause." Further, it confers authority on the official to take a deposition *de bene esse* in the following cases only: (1) Where the witness lives at a greater distance from the place of trial than 100 miles. This does not mean living in a foreign country. The language used in the United States statutes when providing for taking the deposition of a person living in a foreign country is, "the testimony of any witness in a foreign country." (2) Where the witness is bound on a voyage to sea; (3) or is about to go out of the United States; (4) or out of the district in which the case is to be tried, and to a greater distance than 100 miles from the place of trial, before the time of trial; (5) or when he is ancient and infirm. *Harris v. Hall*, 7 How. 693. The cases cited by counsel for the defendant in support of the motion to suppress are all of them cases in which the depositions rejected were taken within the United States. *Bell v. Morrison*, 1 Pet. 351; *Cook v. Burnley*, 11 Wall. 659; and the other cases cited. I have not found a case, nor do I think one can be found, in which a court has held that the provisions of section 864 of the Revised Statutes of the United States apply to depositions taken in a foreign country. The motion to suppress the depositions will be overruled.

The defendant, S. P. Halsy, by counsel, moves to suppress and reject the depositions of Chalmers and others, offered on behalf of the plaintiff, on the grounds that "it has not been made to appear, as required by section 865 of the Revised Statutes of the United States, that any one or all of the said witnesses is now 'dead, or has gone out of the United States, or to a greater distance than one hundred miles from the place where the court is now sitting, to wit, at Lynchburg, Virginia, or that by reason of age, sickness, bodily infirmity, or imprisonment he is unable to travel and appear at court,' and the defendant says that in such case it is provided by section 865 of the Revised Statutes of the United States that 'such deposition shall not be used in

the cause.” These depositions were taken in London, England, on the 9th, 10th, and 11th days of August, 1897. Notice of the time and place of taking them was accepted by counsel for the defendant. Both parties appeared by counsel. The witnesses were examined and cross-examined. No objection was made at any time during the taking of the depositions to the competency of the officer taking the same, or to the regularity of the proceedings in any respect. The signatures of the witnesses to their depositions were waived by mutual consent, and it was further agreed by counsel for both parties that the commissioner taking the depositions should transmit them by mail to the clerk of this court. The depositions were mailed on August 27, 1897, were received by the clerk in due course of mail in the early part of September, 1897, and by agreement were opened by counsel for the parties. The case was first called for trial at the September term, 1897, of this court, which commenced on the 14th day of September, 1897, and was continued on motion of the defendant. An adjourned term of this court was held in December, 1897. No objections to the depositions were taken on the grounds now stated until the trial of the case before the jury had progressed three days. It is unnecessary, in the view of the court, to discuss the effect of the motion had it been made before the trial commenced. It seems to the court that this case clearly falls within the principle laid down by the supreme court in *Howard v. Manufacturing Co.*, 139 U. S. 199, 11 Sup. Ct. 500. The grounds of the motion to suppress in that case were as follows:

“(1) Because said deposition is not certified to by the officer who took the same, as required by law regulating the taking of depositions *de bene esse*; (2) because no reasonable notice was given the defendant, as required by law regulating the taking of depositions *de bene esse*; (3) because said deposition was not taken under authority of any *dedimus potestatem* granted by any court of the United States according to common usage.”

The supreme court in that case, through Mr. Justice Lamar, said:

“In our opinion, the motion in this instance was too late. The counsel for defendants, by waiving copy of the interrogatories when notice of them was served upon them, and consenting to the issue of the commission, and practically uniting with plaintiff’s counsel in executing it, by adding their own cross-interrogatories, and withholding the objections until after the trial had begun, must be considered as having waived such objections. It is the settled rule of this court that the failure of a party to note objections to depositions, of the kind in question, when they are taken, or to present them by a motion to suppress, or by some other notice, before the trial is begun, will be held to be a waiver of the objections. Whilst the law requires due diligence in both parties, it will not permit one of them to be entrapped by the acquiescence of the opposite party in an informality which he springs during the progress of the trial, when it is not possible to retake the deposition.”

The same principle is announced in *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. 950. Justice Jackson, delivering the opinion of the court, said:

“If the deposition was in any respect open to irregularities, the motion to suppress it, under the circumstances, came too late. Such motions should be made before the case is called for trial, so as to afford opportunity to retake the testimony or correct defects in the taking of the deposition,”—and cites *Howard v. Manufacturing Co.*, *supra*, and other cases.

This principle is also recognized in *Banking Co. v. Teiger*, 90 Va. 277, 18 S. E. 195.

In view of these decisions, and others that might be cited, the court holds that this motion comes too late. For the court to hold otherwise would be to contravene a fixed principle of our laws, federal and state, and might work great injustice. The motion will be overruled.

The plaintiff objects to the reading to the jury of the deposition of James N. Boyd, taken on behalf of the defendant. The deposition is offered for the purpose of impeaching the character of the plaintiff for integrity and fair dealing in commercial transactions. The objection of the plaintiff, which was noted at the taking of the deposition, is based on the ground that the witness has not shown such an acquaintance with the general reputation of the plaintiff for integrity and fair dealing as qualifies him to speak thereto. The witness is asked by the attorney for the defendant:

"Third Question. Do you know, by reputation, Walter Bird, of the firm of Walter Bird & Co., of London, England? Ans. I have heard of the firm ever since I have been in business. I think fifteen or twenty years ago I made them a small shipment of tobacco. Fourth Question. Will you please state what is, at this time, the reputation of that house for integrity and fair dealing in commercial transactions? Ans. At this time it is not good with the leaf tobacco men. Fifth Question. Are you familiar with their reputation with the leaf tobacco men? Ans. I am with our leaf tobacco men here. I have heard several of them say that they didn't consider Mr. Bird treated them right when he made his failure in England. I have heard the bank officers at the Planters' Bank say that the drafts drawn on them by their customers were dishonored, and returned here to be paid, after the bank had indorsed those drafts and sold them. Those are the two lines that make me answer 'not good.'"

The production of evidence to prove the general reputation of a person for integrity, honesty, and fair dealing is governed by the same principles that apply in a case of the impeachment of a witness for truth and veracity; at least the court sees no reason why such is not the case. When the credit of a witness is called in question (*Greenl. Ev.* § 464), "the examination must be confined to his general reputation, and not be permitted as to particular facts; for every man is supposed to be capable of supporting the one, but it is not likely that he should be prepared to answer the other, without notice; and, unless his general character and behavior be in issue, he has no notice. This point has been much discussed, but may now be considered at rest." The doctrine as to reputation is thus stated in *Teese v. Huntingdon*, 23 How. 11:

"Courts of justice differ very widely whether the general reputation of the witness for truth and veracity is the true and sole criterion of his credit, or whether the inquiry may not properly be extended to his entire moral character and estimation in society. They also differ as to the right to inquire of the impeaching witness whether he would believe the other on his oath. All agree, however, that the first inquiry must be restricted either to the general reputation of the witness for truth and veracity, or to his general character; and that it cannot be extended to particular facts or transactions, for the reason that, while every man is supposed to be fully prepared to meet those general inquiries, it is not likely he would be equally so without notice to answer as to particular acts. \* \* \* Both Mr. Greenleaf and Mr. Taylor agree, however, that the impeaching witness must be able to state what is

generally said of the other witness by those among whom he resides, and with whom he is daily conversant, and, in effect, admit that unless he can so speak he is not qualified to testify upon the subject, for the reason that it is only what is generally said of the witness by his neighbors that constitutes his general reputation."

The latest case decided by the supreme court in which this question is discussed is that of *Williams v. U. S.*, 168 U. S. 382, 18 Sup. Ct. 92, in which it is held that "the estimate placed upon the character of a government employé by the community cannot be shown by proof only of the estimate in which he is held by his co-employés" (in this case in the custom house at San Francisco, Cal.); and, further, that "the prosecution should have been restricted to such proof touching the character of the accused as indicated his general reputation in the community in which he resided." Applying the doctrine as thus defined to the testimony of the witness Boyd, it is clearly inadmissible. He speaks of particular statements and criticisms made by persons with whom the plaintiff has had financial transactions, based on the failure or inability of the plaintiff to meet his pecuniary obligations. Besides, these statements are made by persons living remote from the home and place of business of the plaintiff. If we should relax the rule, as contended for by counsel for the defendant,—which cannot be done,—and allow it to include persons with whom the plaintiff has had business transactions, living remote from the plaintiff's neighborhood and established place of business, still we are confronted with the requirement that the testimony must be confined to general reputation, and cannot extend to particular facts. The deposition of the witness Boyd must, for the reasons given, be suppressed.

The plaintiff also moves to suppress the deposition of John P. George, taken in behalf of the defendant, on the ground that the same is irrelevant and immaterial. The objections were noted at the taking of the depositions. This motion involves an examination of certain defenses set up by the special pleas filed by the defendant. These pleas are five in number. Numbers 1 and 2 are substantially the same, and are, in substance, that, contrary to the promises and undertakings made by the plaintiff to the defendant, the plaintiff failed to use due diligence in selling the tobacco consigned to him from time to time by the defendant, and delayed selling the same for a long and unreasonable time, whereby the tobacco was injured, and sold for a much less price than it would have sold for if it had been sold within a reasonable time; and that the plaintiff did not obtain the highest price for said tobacco which could reasonably be obtained upon the market, but sold it for a price much less than could reasonably have been obtained upon the market.

The special plea numbered 3 is to the effect that, relying upon the promises and undertakings made by the plaintiff to the defendant, the defendant consigned and delivered to the plaintiff large quantities of tobacco from time to time, to be sold by the plaintiff as factor or commission merchant for and on behalf of the defendant; but the plaintiff, disregarding his promises and undertakings aforesaid, did wrongfully appropriate the said tobacco to his, the said plaintiff's, own use, without the knowledge or consent of the defendant.

The special plea numbered 4, after reciting, as in the other pleas, the promises and undertakings made by the plaintiff to the defendant, is as follows:

"That, relying upon said promises and undertakings of the plaintiff, the defendant consigned and delivered to the plaintiff large quantities of tobacco from time to time, to be sold by the plaintiff as factor or commission merchant for and on behalf of the defendant, but that the plaintiff, disregarding his promises and undertakings aforesaid, did not sell and dispose of the tobacco consigned and delivered to him as aforesaid, for the highest price reasonably to be obtained upon the market, and did not faithfully and honestly account with and pay over to the defendant the proceeds of the said tobacco delivered as aforesaid, and did not true returns make of the sales of said tobacco, but, contriving craftily, and subtly intending to deceive and defraud the said defendant in this behalf, did wrongfully appropriate said tobacco to his (the plaintiff's) own use, without the knowledge or consent of the said defendant."

The special plea numbered 5, after reciting the promises and undertakings made by the plaintiff to the defendant, is as follows:

"That, relying upon said promises and undertakings of the plaintiff, the defendant consigned and delivered to the plaintiff large quantities of tobacco from time to time, to be sold by the plaintiff as factor or commission merchant for and on behalf of the defendant, but the plaintiff, disregarding his promises and undertakings aforesaid, did wrongfully pledge and hypothecate the said tobacco of the defendant to secure the said plaintiff's own debts."

The object of the testimony taken by the deposition of George is to show that he, as a tobacco merchant of Richmond, Va., consigned tobacco to the plaintiff as a commission merchant in London, England, and that the plaintiff hypothecated the said tobacco to secure loans of money borrowed by the plaintiff from the banks in London; and to show the condition of the account between the plaintiff Bird and the witness George, and for what amount the tobacco was sold that was consigned by the witness George to the plaintiff Bird, and what amount Bird still owes George on these transactions. The plaintiff has been examined in this case as a witness in his own behalf, and both in his examination in chief and on cross-examination he admitted that he had, prior to May, 1894, hypothecated the defendant's tobacco, and also the tobacco of John P. George, and of F. M. Boykin, of Richmond, of Watson & Macgill, of Petersburg, of Mr. Bass, of North Carolina, and of Mr. Matthews, of Kentucky, as collateral security to the banks of which he had borrowed money. Counsel for the defendant contend that he has a right to introduce this evidence to show that the plaintiff dealt with the tobacco of other consignors in the same or a similar manner that he dealt with the plaintiff's tobacco; that is, that he hypothecated it, along with other tobacco consigned to him, as collateral security for the payment of money borrowed by the plaintiff from the banks. They cite numerous unquestioned authorities to the effect that, where a party is charged with fraud, other similar transactions with other persons may be proved in order to show a fraudulent intent on the part of the party charged with fraud. There is no doubt of the correctness of this position where the acts which it is alleged constitute the fraud are denied; but the court, after examining every case cited and the text-books, finds no authority for the position that similar acts may be shown where the acts charged as constituting fraud are admitted,

and not denied. The fraud, if any, arises out of the acts charged and admitted to be true. Where is the necessity of proving similar acts in like dealings with other people? It seems to the court a superfluous and useless work (especially as to the transactions between the plaintiff and George), because the plaintiff has admitted and does not deny the material facts embraced in the deposition of the witness George. The transactions between the plaintiff and George touching the tobacco consigned to the former by the latter, and the state of their accounts, can have no relevancy to the issues involved in the trial of the case at bar. These issues are clearly defined, and should not be involved with irrelevant matters. If this evidence be admitted, it would impose upon the jury the necessity of investigating all of the transactions between Bird and Boykin, and each and every of the consignors whose tobacco Bird admits he hypothecated at the time he hypothecated the defendant's tobacco; thus diverting the attention of the jury from the real issues in this case on which their verdict must be rendered. The deposition of the witness George is irrelevant and immaterial, and must be suppressed.

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**ASHENFELTER v. EMPLOYERS' LIABILITY ASSUR. CORP., Limited,  
OF LONDON, ENGLAND.**

(Circuit Court of Appeals, Ninth Circuit. May 9, 1898.)

No. 415.

**1. ACCIDENT INSURANCE—EXCEPTING CLAUSES.**

Under an accident policy excepting from the risks "voluntary exposure to unnecessary danger," an accident is not within the exception unless the insured was aware of the danger he incurred, and purposely assumed the risks thereof.

**2. SAME—QUESTION FOR JURY.**

Whether a contractor, who was suffocated or burned to death by the ignition of a bucket of tar pitch which he was heating inside a tank for calking purposes, was aware of the danger arising from the character of that material, so as to bring him within the exception of "voluntary exposure to unnecessary danger," contained in his accident policy, *held*, on the evidence, to be a question which should have been submitted to the jury.

In Error to the Circuit Court of the United States for the Eastern Division of the District of Washington.

This was an action by Lida M. Ashenfelter against the Employers' Liability Assurance Corporation, Limited, of London, England, to recover upon a policy of accident insurance. In the circuit court a verdict was directed for defendant, and judgment entered accordingly, to review which the plaintiff sued out this writ of error.

R. J. Danson and William A. Huneke, for plaintiff in error.

L. C. Gilman, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This action was brought in the court below by the plaintiff in error against the defendant in error to recover

the amount of an accident insurance policy issued by it upon the life of one H. C. Ashenfelter, since deceased. The amended answer of the defendant admits the averments of the complaint in respect to its corporate existence, the issuance of the policy in consideration of the payment of the required premium, the death by accident of the insured, and the nonpayment of the amount for which the policy was issued. It denies the averment of proof of death, but that fact was admitted on the trial. The answer alleges the fact that the policy does not insure against "voluntary exposure to unnecessary danger," and further alleges that the accident by which the insured lost his life was caused by his voluntary exposure to unnecessary danger, and that was the real defense made at the trial. On the conclusion of the testimony, the defendant, by its counsel, moved the court to instruct the jury to return a verdict for the defendant, upon the ground that the evidence showed that the deceased lost his life by reason of having voluntarily exposed himself to unnecessary danger. The court so instructed the jury, and a verdict was returned as directed. The plaintiff duly excepted to the action of the court, and brings the case here by writ of error.

The evidence in the case shows that the deceased was a contractor of great energy and of extensive business, and, at the time of his death, was engaged in the performance of a contract with the state of Washington for the erection of buildings for its university, which were nearing completion. Among them was a large tank for the storage of water. The tank itself was 16 feet in diameter, and 17 feet high, and rested on a platform constructed upon a trestle rising 75 feet above the ground. Every ninth stay of the tank extended upward about 14 inches, and upon these stays so extended was constructed a roof having a projection of 3 feet beyond the outer edge of the tank. Through the spaces thus left, ingress and egress was had into and out of the tank by means of a ladder. The platform projected from 14 inches to several feet beyond the tank, the projection being greatest at the corners, which were square, and of which projection about 6 inches in width was occupied by a railing. For the purpose of making the tank water-tight, it became necessary to calk the seams with oakum, and to mop them with a mixture of heated pitch and tar. It was in preparing and applying that mixture that the insured lost his life. Although, as has been said, the deceased was a contractor of extensive business (the contract with the university aggregating about \$117,000), the evidence shows without conflict that he was a man of such energy that, when any part of the work he had contracted for lagged, he turned his hand to it, and pushed it along, until properly under way. It was in this way that he went with a workman named Gallagher to make water-tight the tank. Gallagher and he only were in the tank at the time of the fatal accident, and Gallagher's deposition was taken on behalf of the defendant, and introduced in evidence. In answer to a question asking him to describe as briefly and accurately as he could the circumstances under which the deceased was killed, the witness said:

"We started in to work on Sunday morning. He came to me before that. Harry [deceased, Ashenfelter] spoke to me on Saturday, and he said, 'Will

you come over and work to-morrow?" And I said, 'If there is anything pressing, I have no objection;' and he said it was. So, we came on over to the tank at ten o'clock. On going over there, he said, 'Have you been in the tank?' and I said, 'I have not.' He said, 'Come up and come in,' and we went up in the tank. There was about six inches of water in it, and we drained it out by boring plug holes in it, to keep the sediment from pouring down. There would be six inches of water there, and we went and bored the holes in there; and Harry said, 'We must dry this tank up, so we can see what we can do with it.' I said: 'There is a salamander over to the little observatory which I used in drying the plaster on the observatory. If you want it, Harry, you can take it.' He says: 'All right; the next thing is to get it in.' We went and measured the space, and we found it was in the neighborhood of fourteen inches; and we took and flatted up the salamander, so as to get it in there. So, we put the ladder up against the tank, and looked over into the tank, and Harry said, 'The only thing we can do is to calk the tank.' The seams were a little open. And I said, 'All right; we will get in and calk it.' I said, 'There is plenty of oakum over there.' I don't know but he carried the oakum, and I got some calking irons, and started in calking, till about eight o'clock. We have two lamps in the office, and we were working with them; and he went out of the tank possibly in the neighborhood of half-past seven or eight, and I followed him; and we came over to the building, and came back Monday morning, and finished the calking. Monday, about noon, I should judge, we got through with the calking of the tank. He took no part whatever in the calking of the tank. He carried the oakum to me, and I got through calking, and he got some paints from Baker & Richards, called 'paraffine paints,' supposed to be applied on tanks for to preserve it, and also to purify the water. We looked over that material, and found it to be pretty thin. It was heavy paint, but not sufficiently heavy to cover the seams in good condition; and we concluded to put pitch on the top of the seams, or on the top of the oakum, so as to make it water-proof. So, the first kettle we heated below, and it became stiff at the time we got it into the tank. He said, 'We will use that old salamander, and we will heat the tar below, and get along with it;' and we got along Monday and Tuesday, till the accident occurred. The first knowledge I had of the fatal accident was Harry hollering to me. He said, 'Frank, hold that ladder!' And I looked down below, and I seen a blaze,—very small. It was very smoky in the tank. I saw the smoke and blaze, and started down the ladder immediately, because I knew— The first impulse was that the fire could be extinguished, and knowing that there was no means of reaching the fire, and as I rushed to the bottom, it was all igniting. It was a big sheet of flame all around me, and I used the support, and moved the ladder to the opposite side, where the exit would be to the outside, and picked up the body of Mr. Ashenfelter, which was lying on the floor between me and the salamander. He was lying on the floor, and I picked him up, and tried to make the rim of the tank; but the fire had drove in on me so I couldn't make it, and I became partly suffocated, and I drew myself out of the tank, and that is the last I remember. I felt his body going from me, and I heard him strike the floor. I could not tell you any more till I got on the bottom of the platform myself."

Gallagher further testifies that the deceased was not in the tank much of the time while he was calking, but that he heated and prepared the mixture of pitch and tar, filled the buckets with it, and attended to the fire, and was so engaged at the time of the accident. The witness described the salamander as an open stove, made of about 16-gauge sheet iron, standing about 6 inches from the floor, on four legs, with air holes underneath, and with a grate, and, in the bottom, a pan to receive the ashes or coals. Near its top was a hole in each side, through which an iron pipe passed to hold the buckets. The witness further testified that he and the deceased were afraid to use charcoal because of the gas which would be formed by it, but

used bark, and said, "Bark is harmless, although it will cause more smoke." The witness Gallagher further testified that, shortly before the fatal fire, another fire had occurred, and, being asked how, answered:

"A. That was occurred by a bucket of tar,—one of the buckets which contained the tar or a gallon bucket; whichever it was, I don't know. I had passed the bucket down, and he was holding it over the fire; and the flames rushed out, and caught hold of the side of the bucket, and melted off this ear which is upon the bucket. The bucket upset when the ear melted off, and the fire ran down through the bottom of the salamander on the floor; and I noticed that immediately, because I was about to hand the bucket; and I slipped down the ladder, and I extinguished the blaze with the Mackinaw jacket that I had on; and then, when I had extinguished the blaze, I took the five-gallon bucket out of the salamander before it caught fire, and then I threw my jacket over the fires that were on the floor. Q. Is not tar pitch, when heated that way, likely to boil up and boil over? A. Pitch itself, after it is generated, is not liable to boil as fresh tar before it is generated, before it is heated, will. Q. This accident that occurred was one that was likely to occur, this ear of the bucket being unsoldered? Is it such an accident as is likely to occur? A. Well, it is liable to occur, certainly. Q. Now, as I understand you, you were able to put out this fire by seeing it at once, and getting there very promptly, and slashing out the fire, and taking off the pitch? A. Yes, sir. Q. Had you been less prompt, that fire might also have been fatal? A. Well, I don't know. It would have surely have went under the same circumstances this last one did. I don't see how it could have been prevented. Q. Do you know how the second fire occurred, and what were the causes that induced it? A. Well, simply on account of the first fire causing from the ear melting off. I always presume, and still presume, that the second might have been caused by the same, and it might have been caused otherwise. The man might have fell."

The defendant introduced several witnesses to show that the method adopted by the deceased of heating the pitch and tar inside the tank was extremely dangerous; that the proper way, and the way adopted by those understanding the preparation and handling of the mixture, was to heat it on the ground, and convey it in buckets to the places of use; and the testimony to this effect is without conflict. But there is no testimony tending to show that the deceased knew this, or was experienced in the business of preparing or handling the mixture. On the contrary, there is a good deal of testimony tending to show that the deceased was not conscious of any particular danger. For example, the defendant called C. B. Smith as a witness, and asked him, among other things, this question:

"From your experience and your knowledge of this material and its use, would a prudent man, exercising reasonable foresight, have voluntarily done that work by heating the pitch on the inside of the tank?"

—To which the witness answered:

"My experience with contractors and people generally in applying that material (that is, coal tar or pitch) would lead me to state that it would be the most natural method that would be applied by a man that was not directly in that line of business, from the fact that they don't,—men that don't handle the material as a business, and have had experience, don't realize the danger there is in handling it. I have in many cases had people advise me to heat my material on the kitchen stove. Q. Assuming that it was being heated by a pail over a salamander, and that, once before the fatal accident, the ear had become unsoldered from the pail, and started a fire, and the pitch slopped over, and started a fire, what would you say as to whether any ordinarily prudent man, exercising reasonable foresight, would

have continued to do the work in that way? A. In answering that question, I would think that a man would be apt to go at it some other way. At the same time, to a man that knows how to put out a tar fire, and it does not get the best of him, and feeling confident that he can,—why, if he had already gone through one experience, and successfully put out the fire, he might think he could do it again if occasion arose, and he would hardly think that it would occur again; but an accident is apt to occur. It is a hard matter for a man that is directly in that line of business, and a man that always uses every caution to avoid against just such accidents,—it is a hard matter for him to give an opinion as to what an inexperienced man might do in a certain set of circumstances. Q. I will ask you, as a rule, whether contractors who have had experience in building, covering a period of years, including large buildings, understand the nature of this article, and the danger of using it. A. My experience has been that they know—contractors know—absolutely nothing of handling this material."

Moreover, the witness James A. Johnson, introduced by the defendant, testified, among other things, that, within 10 minutes before the fatal accident, he was in the tank, and, the fire having gone out, the deceased asked him, as his own hands were covered with pitch, and he could not get his knife, to whittle some shavings, and start the fire, and, as the witness was going down to the engine house, asked him to tell the engineer to start the pumps, adding: "By the time you get down there, I will be through with this work." The witness Smith further testifies that, as he was going out of the tank, he said to the deceased that the atmosphere in there did not suit him, or that the work was more or less dangerous (not being certain as to his language), to which the deceased replied, as he remembers his reply, "We will be done in a few minutes, and there is no danger." This reply, if made, certainly tends to show that the deceased did not regard himself as exposed to danger. It is true the testimony is that, on the occasion of the first fire, the deceased stated to Gallagher that he was almost overcome by the fumes. But it also tends to show that that fire was extinguished without difficulty and without apparent harm. Of course, the case can only be properly determined by the consideration of all of the facts and circumstances properly in evidence. But we think enough has been stated and quoted to show that the jury, under appropriate instructions, should have been allowed to pass upon the proposition as to whether the deceased knew of the danger to which he was subjecting himself, and, knowing it, voluntarily exposed himself to it. Unless he was so conscious, and purposely assumed the risk, it is plain that the case does not fall within the exception in the policy relied on in defense of the action. *Insurance Co. v. Randolph*, 24 C. C. A. 305, 78 Fed. 759; *Association v. Hubbell* (Ohio) 47 N. E. 544; *Insurance Co. v. McConkey*, 127 U. S. 666, 8 Sup. Ct. 1360. Judgment reversed, and cause remanded for a new trial.

GEORGE A. FULLER CO. v. DOYLE et al.

(Circuit Court, E. D. Missouri, E. D. June 4, 1898.)

No. 4,097.

1. ACCOUNT—WEIGHT OF EVIDENCE.

Where, in an action for the cost of erecting a building, defendant has had possession of plaintiff's itemized account for several months, its failure to question any item thereof at the trial is strong evidence that the account is correct.

2. BUILDING CONTRACT—CONSTRUCTION—RELEASE OF SURETY.

A building contract provided that, if the contractor should fail to supply a sufficiency of properly skilled workmen or of materials of the proper quality, or to prosecute the work with promptness and diligence, the owner might, upon securing a certificate of the architect to the fact of such failure, and after giving three days' notice to the contractor, enter upon the premises and finish the work. *Held*, that such provision contemplates a case where the contractor claims to be complying with his obligation, and not a case where the contractor, before doing any substantial part of the work, absolutely abandons it, and voluntarily surrenders the premises to the owner for its completion. *Held*, also, that neither the failure to secure the architect's certificate and give the three days' notice to the contractor, nor the waiver of them by the contractor, under such circumstances, will release the surety on the contractor's bond.

3. CONTRACTOR'S BOND—SURETY—NOTICE OF BREACH.

In the absence of a provision in the bond requiring it, a surety is not entitled to any formal notice of a breach of the contract by the principal, before the institution of a suit.

4. BUILDING CONTRACT—CONSTRUCTION.

A building contract provided that, upon failure by the contractor to perform its conditions, the owner "shall be at liberty \* \* \* to provide any such labor or materials, \* \* \* and to enter upon the premises and take possession, for the purpose of completing the work, \* \* \* of all materials, tools, and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor." *Held* that, upon a breach of the contract, the owner could complete the building himself, and need not employ some other party to do so.

5. ALTERATION OF BUILDING CONTRACT—LIABILITY OF SURETY.

A building contract provided that upon a failure by the contractor to perform the contract, the owner might complete the building at the contractor's expense. *Held* that, after the abandonment of the contract by the contractor, the fact that the owner in completing the building used some materials different from those specified in the contract, due allowance being made for difference in price, did not constitute such an alteration of the contract as would release the sureties on the contractor's bond.

6. BREACH OF BUILDING CONTRACT—PLEADING.

A building contract, under which the owner had the right to complete the building upon default by the contractor, provided that the expenses incurred by the owner should be audited and certified by the architect, whose certificate should be conclusive on the parties. *Held* that, in an action by the owner for expenses so incurred, the failure of the owner to obtain such certificate could not be raised by the general denial.

This was an action by the George A. Fuller Company against J. G. Doyle and the American Bonding & Trust Company of Baltimore on a contractor's bond.

Boyle, Priest & Lehman, for plaintiff.

M. W. Huff and Wm. J. Stone, for defendants.

ADAMS, District Judge. This is an action at law wherein the plaintiff, as obligee in a penal bond for \$5,000, seeks to recover from defendant Doyle, as principal obligor, and the other defendant as surety, certain damages resulting from a failure of the principal to do certain brickwork in the construction of what is known as the "Fullerton Building," located on the corner of Seventh and Pine streets, in the city of St. Louis, as required by a contract existing between the plaintiff and defendant Doyle in relation thereto. The condition of the bond, among other things, requires the defendant Doyle to well and truly perform the contract referred to.

In order to properly dispose of this case, it seems to me necessary to refer quite at length to the pleadings, with a view of ascertaining the issues on trial.

The plaintiff counts on the bond, and, by way of assigning breaches, alleges that Doyle, soon after commencing the work required by his contract, totally abandoned the same, and that plaintiff afterwards undertook, and did perform, the work and labor required of Doyle under his bond, and in so doing did necessarily and reasonably expend \$4,765.93 over and above the amount for which Doyle had agreed to do it. Plaintiff's allegations in relation to the abandonment of the work by Doyle consist of statements of admissions made by Doyle to that effect, and hardly reach that degree of certainty, in stating ultimate facts, required by rules of pleading; but the answers of both defendants so clearly treat the petition as alleging a total abandonment of the work, and so supplement the same, as to present the issue of abandonment clearly and distinctly.

The defendant trust company, for its amended answer, first denies every allegation of the petition, except such as it afterwards expressly admits. I will confine myself to a consideration of this amended answer, as it includes all that is claimed in the answer of Doyle. An analysis of the trust company's answer shows that it admits—First, that the defendants executed the bond sued on; second, that Doyle had a contract with the plaintiff to furnish all the materials and do the work referred to in the petition; third, that Doyle, soon after making the contract, abandoned the same, and refused to proceed further in its performance, and surrendered the premises to the plaintiff, and that thereafter the plaintiff took possession of the premises described in said contract, and proceeded in its own way, and on its own account, to do the work mentioned in Doyle's contract. And for its affirmative defenses the defendant trust company pleads, in substance, that it was provided in the contract between Doyle and the plaintiff that if Doyle at any time should fail, refuse, or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any agreements contained in said contract, such refusal, neglect, or failure being certified by the architect, the plaintiff, after three days' written notice to said Doyle, should be at liberty to provide such labor and materials, and to deduct the cost thereof from any money due, or thereafter to become due, to said Doyle under said contract, and that the plaintiff should be at liberty to terminate the employment

of said Doyle for said work, and to enter upon the premises and take possession, for the purpose of completing the work comprehended under said contract, of all materials, tools, and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and, in case of such discontinuance of the employment of said Doyle, that he (Doyle) should not be entitled to receive any further payment under said contract until the said work should be wholly finished, at which time, if the unpaid balance of the amount to be paid under said contract should exceed the expense incurred by plaintiff in finishing the work, such excess should be paid by plaintiff to said Doyle, but if such expense should exceed such unpaid balance then said Doyle should pay the difference to the plaintiff. Defendant trust company, after pleading the foregoing provisions of the contract known and referred to as article 5 thereof, alleges, in substance, that after the making thereof, to wit, on the 12th day of May, 1897, Doyle, by his certain writing described in plaintiff's petition, made and delivered to the plaintiff, waived the three-days notice provided for in that part of the contract to which attention has just been called, and also waived the certificate therein provided for to be made by the architect, and notified the plaintiff that he could not perform said contract, and thereupon fully abandoned the performance of the same, and surrendered the premises to the plaintiff, and that the plaintiff proceeded, in its own way and on its own account, to construct the building mentioned in said contract, including the brick masonry therein, without giving notice to this defendant, namely, the trust company, of the fact that said Doyle had waived said three days' written notice and certificate of the architect, or of the fact that the said Doyle had abandoned said work, and that plaintiff had undertaken to perform the same. The defendant trust company further alleges that it was not advised of such action on the part of Doyle until after plaintiff undertook to do the work; meaning, by necessary inference, that it was so advised at that time. The defendant trust company further alleges that it was the duty of the plaintiff to notify it of Doyle's abandonment of the contract, and further alleges, in its answer, that, under the terms and conditions of said contract so pleaded by it, it became and was the duty of the plaintiff to employ some other person or persons to finish the work which Doyle had contracted to do and had abandoned as aforesaid. And defendant trust company concludes that, by reason of the plaintiff's failure to give the notice to defendant, prior to its entering upon and performing the work which Doyle had undertaken to do, of the fact that Doyle had abandoned the same, and by reason of the fact that the plaintiff had not employed some other person or persons to finish the work which Doyle had failed to do, but, on the contrary, proceeded to perform the work itself, the trust company was discharged from any liability. And for a second affirmative defense the trust company alleges, in substance, that, under the contract between Doyle and the plaintiff, Doyle was required to perform the work in question in strict accordance with the terms and conditions of the contract, including the

drawings and specifications referred to in the contract; and then alleges, in substance and effect, that after Doyle had abandoned the performance of his contract altogether, and the plaintiff had taken possession of the premises to do the work undertaken to be done by Doyle, the plaintiff, in completing the work, made certain changes from that which was specifically provided for in the contract with Doyle, namely, that whereas, said contract, specifications, and drawings provided "that the three faces of the court on the south elevation should be laid up with a light buff press brick, standard size," the plaintiff proceeded to lay the faces of the court on said elevations with white enameled brick; and whereas, it was provided in said contract, specifications, and drawings "that the brick in the walls above the first three stories should be laid in lime-mortar bedding," the plaintiff, after it took hold of the work, substituted and used, in place of lime-mortar bedding in laying the brick in said walls, mortar composed one-half of lime mortar and one-half cement; and whereas, it was provided in said contract that the facings of all exterior walls should be hollow brick, the plaintiff, after it took possession of said work, substituted other and different brick and material. Defendant trust company alleges that all said changes were made by the plaintiff wholly without the knowledge or consent of the trust company defendant, and that by reason of said changes it (the trust company) is discharged from any liability on the bond.

The foregoing constitute all of the defenses pleaded by the defendant trust company in this case.

There are several statements of fact found in the answer of the defendant trust company which seem to me to be isolated expressions of fact, and not intended to state any defense whatsoever, such as the statement found in the early part of the answer to the effect that, according to the terms of the contract between Doyle and the plaintiff, all the work was to be done by Doyle to the satisfaction of the architect; and also that, in accordance with the terms of the contract, no alterations should be made in the work shown or described in the specifications and drawings, except upon a written order of the architect, and, even when so made, that the value of the work added or omitted should be computed by the architect, and the amount so ascertained added to or deducted from the contract price; and also that, in accordance with the terms of the contract, in case of any dissent from the determination of the architect, the value of the work added or omitted should be referred to three disinterested arbitrators, and that the decision of any two of them should be final and binding; and also that, under the terms and conditions of the contract, no alterations should be made in the specifications and drawings for the brick masonry work to be done by Doyle, nor could the architect order any changes or alterations therein, unless the parties to said contract and this defendant should first consent and agree thereto.

Concerning these several independent statements of fact, it is proper to say that, while the provisions of the contract in relation thereto are set forth in the answer, there is no allegation of any vio-

lation of them, or any statement of their relation to other subject-matters involved in the answer pleaded as defenses, and accordingly the further consideration of them is dispensed with.

This brings me to consider the following issues raised by the pleadings: First. What is the reasonable value of the work done by the plaintiff in completing the performance of Doyle's contract after he abandoned it? Second. Does the waiver by Doyle of the three-days written notice and the architect's certificate, required by article 5 of the contract, or (to give the defendants the broadest possible construction of their pleadings) does the fact that no such notice was given, or no such certificate furnished, constitute a defense to the trust company? Third. Was it the duty of the plaintiff to notify the defendant trust company of the fact that Doyle had abandoned his contract before it (the plaintiff) undertook the performance of it? Fourth. Was the plaintiff, under the terms of the contract, at liberty to perform Doyle's contract itself, or was it obligatory upon it to employ some other person or persons to do it? Fifth. Does the fact that the plaintiff, after Doyle abandoned the performance of the contract altogether, made some changes in executing the details of the work, as specified in the answer, constitute a defense in favor of the trust company?

I will consider these issues in the order stated.

And, first, as to the reasonable value of the work done by the plaintiff in completing the performance of Doyle's contract. The plaintiff's superintendent produced an itemized account of all expenditures made in doing the work which Doyle had undertaken to do, with vouchers detailing the same, and furnished proof that the same were necessary, and the amount of money paid therefor, as shown in the account, reasonable. The defendants did not question any one of the items charged, but introduced certain expert testimony concerning some features of the work. On the cross-examination of these witnesses it became more apparent that plaintiff's itemized account was not unreasonable. Not only is this true, but the evidence discloses that the defendants had been in possession of plaintiff's account for several months before the suit was brought. They therefore had ample opportunity to investigate and assail each and every item of such account. The fact that no attempt is made to do so is quite significant of the opinion of the defendants themselves, and, as one of them is the contractor who had bid for and contracted to do the work in question, he must be presumed to be entirely familiar with every detail of the cost. The failure, therefore, to question any item, is, in itself, under the circumstances, very persuasive assurance that the court cannot go far amiss in giving credence to the reasonableness and necessity of each of them. A complication arises from the method which plaintiff employed in keeping its account of this work. It appears that, after Doyle abandoned the work, the plaintiff, as it progressed with it, varied from particular specifications, in the respects specified in the defendant's answer, by using certain enamel brick where light buff brick were specified, and by using cement in place of mortar for certain parts of the work, and by substituting certain other kinds of brick where hollow brick were

specified, and in setting certain terra cotta which was not specified in the Doyle contract. In making up and stating its account of the material furnished and work done, plaintiff embraced all the work done by it in one account, and gives credit to the defendants for all the excess in value of the work not included in the Doyle contract, over and above the value of the work called for by that contract. I am satisfied from the evidence that full credits were allowed to the defendants for them, and that the amount sued for, namely, \$4,765.93, is the reasonable value of the materials necessarily furnished and the labor necessarily done by the plaintiff in furnishing the materials and doing the very work which Doyle ought to have done, but failed to do.

The next issue tendered by the answer is that Doyle waived the three-days notice required to be given to himself by article 5 of the contract already quoted, and waived the certificate therein provided for on the part of the architect, and that the plaintiff proceeded to do the work without giving the defendant trust company notice of the fact of such waiver by Doyle, or that Doyle had abandoned his work. A true construction of the provisions of article 5 of the contract, in relation to the giving of the three-days notice to Doyle, and requiring the certificate of the architect, seems to me to be that when the owner, which in this case is the plaintiff, should, at any time during the prosecution of the work by Doyle, become dissatisfied with it, and determine to take it out of his hands while he was proceeding to do the work, and claiming that he was conforming to the requirements of the contract in so doing, before taking it out of his hands, under such circumstances, it should have a certificate of the architect to the effect that Doyle was not conforming to the contract, and afterwards should give to him (Doyle) three days' notice before it (the plaintiff) should be at liberty to take possession of the work and proceed to finish it.

The facts as disclosed by the pleadings and the proof do not fall within the provisions of the contract, as so construed. The pleadings show, and the evidence proves beyond question, that there was no dispute between the plaintiff and Doyle in relation to the non-performance of his contract. He scarcely began work under it. He says in his testimony that he did only five or six days' work. He voluntarily abandoned the performance of his contract. Under such circumstances, the requirement of a certificate by the architect of a failure to do the work in accordance with the requirements of the contract was inapplicable, and the three-days notice on the part of the owner to Doyle that the owner would proceed with the work was not required. It follows that, if no such notice or certificate was required, the surety in the bond was entitled to no notice that they were not given, or that they were waived. It is also to be observed that there is no provision of the contract requiring any notice to be given to the trust company of the fact of such want of certificate, or of such notice to Doyle, or of the fact that Doyle had abandoned his contract; and I know of no legal principle, in the absence of such a provision of the contract, which requires the obligee in a bond to give formal notice to a surety of a breach of the condition of the bond.

But if the three-days notice in question and the certificate of the architect were required, it being only for the benefit of the contractor, Doyle, his waiver thereof, as shown by the evidence, under the peculiar facts of this case, amounting, as it does, to evidence of actual notice, is so immaterial and inconsequential a matter as will not affect the surety's liability; and, if it were necessary to give formal notice to the surety of a breach of the condition of the bond, the answer of the surety shows that it was fully advised thereof as soon as the plaintiff undertook to do the work in question, and this, according to the proof, was on or very near to the day of Doyle's actual abandonment of it.

The next issue tendered by the answer, namely, that the plaintiff, by undertaking itself to do Doyle's work, instead of employing some other person or persons to do it, discharged the surety, necessitates a consideration of the contract between the plaintiff and the defendant Doyle, and especially of article 5 thereof, which is set forth in the answer. By reference thereto it appears that, in the event of failure on the part of Doyle to furnish the necessary workmen and material and to perform his contract, "the plaintiff \* \* \* shall be at liberty \* \* \* to provide any such labor or materials, \* \* \* and to enter upon the premises and take possession, for the purpose of completing the work comprehended under such contract, of all materials, tools, and appliances thereon, and to employ any other person or persons to finish the work and to provide the materials therefor." It is contended that this phraseology, "and to employ any other person or persons," etc., evinces an intention on the part of the contracting parties to make the employment of some person or persons other than the plaintiff the exclusive method of doing the work, in the event that Doyle failed to do it. I cannot agree to this construction of the contract. In my opinion, ample authority had been conferred upon the plaintiff by language preceding this clause, so that the particular language relied upon by the defendants should be held to enlarge, rather than limit, the authority. The intention of the parties manifestly was to authorize the plaintiff either to do the work itself or to employ others to do it. This construction is reinforced by the language employed in the latter part of article 5, where reference is made to the expense to be incurred by the plaintiff "in finishing the work." Such being my construction of the contract, it follows that the bare fact that the plaintiff proceeded by and through its own officers and agents to do the work which Doyle had failed to do, instead of employing some outside persons to do the same, constitutes no defense.

The next issue tendered by the answer is whether the changes made by the plaintiff in executing the details of the work, as already specified, after Doyle had abandoned it, constitute any defense on the part of the surety. Plaintiff's cause of action accrued at the time Doyle abandoned the work, and such abandonment constitutes the breach of the bond sued on in this case. While the court must carefully consider any and all changes made in the progress of completing the work by the plaintiff, with a view of accurately ascertaining the actual cost of finishing the very work contracted to be done

by Doyle, it cannot, in my opinion, treat these changes as modifications of the contract between plaintiff and defendant Doyle. Before plaintiff undertook the work, the contract had been broken by Doyle, and plaintiff's rights and Doyle's obligations under it had become fixed. If plaintiff made any changes in the details of the work in the progress of completing it, they were not made as a result of any agreement between it and Doyle, such as usually operate to discharge a surety, and such changes imposed no new or modified obligations upon Doyle. He had already failed to perform his contract, and abandoned the work, and plaintiff's cause of action had arisen thereupon, and, in my opinion, the surety's liability is in no manner affected by the fact that plaintiff, while it was doing the very work which Doyle had contracted to do, did, of its own motion, some other things, for the doing of which no claim is made against Doyle or his surety. The evidence offered by the defendant to prove the changes referred to at the trial was, on the objection of the plaintiff, ruled out, and I think no error was committed in so doing.

I have now considered and disposed of the several issues raised by the pleadings in the case, but another question is seriously debated by counsel for the defendant trust company, and that is that the plaintiff's petition fails to state a cause of action, in this: that, after setting forth so much of article 5 of the contract between the plaintiff and Doyle as has already been quoted, the plaintiff proceeds and copies the balance thereof in its petition, as follows: "The expense incurred by the owner [George A. Fuller Company], as herein provided, either for furnishing materials or for finishing the work, and any damages incurred through such default, shall be audited and certified by the architect, whose certificate thereof shall be conclusive upon the parties." It is contended in argument that, in this suit on a bond to secure the faithful performance of this contract, there can be no recovery against Doyle, or the trust company as surety, on the bond, without an averment that the damages incurred by Doyle's default had been audited and certified by the architect. This stipulation of the contract relates to the amount of recovery, and not to the right of recovery. It is that kind of a stipulation which the plaintiff, if it desired to avail itself of it as a right conferred upon it by the contract, should have pleaded, and alleged the award made by the architect, and relied upon this award as its measure of damages. The plaintiff having failed to do so, the defendants might have pleaded this stipulation, and claimed under it, but in doing so must have pleaded the facts as the basis of the right. In this case neither party by their pleadings claim under this stipulation. On the contrary, a distinct and positive issue is tendered by the plaintiff as to reasonable value of the work required to be done by the plaintiff to perform Doyle's contract. This issue was accepted by the defendants in and by their general denial, and insisted upon by their counsel as the issue at the trial of the case. Each and both of the parties, by their pleadings and conduct at the trial, must therefore be held to have waived the benefits of this stipulation. This was the view entertained by the court at the trial, and, in harmony with it, the objection of defendants' counsel to plaintiff's offer

to prove the award of the architect was sustained, and plaintiff was required to stand on the issue of reasonable value, as then insisted upon by the defendants' counsel. Because, therefore, conformity to the requirement of the stipulation in question did not affect the right of recovery, but only the remedy or the amount of recovery, and because the parties, notwithstanding the stipulation, deliberately joined issues on the reasonable value of the work done by plaintiff in the performance of the work required of Doyle under his abandoned contract, it cannot now be held that the petition failed to state a cause of action.

The plaintiff having offered no evidence to sustain its claim for liquidated damages by reason of the delay in the completion of the building resulting from Doyle's default, there is no occasion for any reference to that part of plaintiff's petition or the issues raised thereby. There will be a judgment for the plaintiff in this case for the amount of \$4,765.93, with interest thereon from the date of the institution of this suit.

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BALL v. WARRINGTON.

(Circuit Court, E. D. Pennsylvania. May 7, 1898.)

1. PLEADING—AFFIDAVIT OF DEFENSE—CONCLUSIONS OF LAW.

In an affidavit of defense to an action on a judgment, an allegation that such judgment "was fraudulently and collusively obtained by the said plaintiff" is too general to be of any weight, in the absence of any allegations of fact to base it on.

2. SAME—RES JUDICATA.

In an action on a judgment, an affidavit of defense averring that the cause of action on which the judgment was founded was fraudulent, and that plaintiff had knowledge thereof, is conclusively refuted by an amendment to plaintiff's pleading alleging a judgment affirming the judgment sued on.

3. PLEADING—AMENDMENTS—AFFIDAVIT OF DEFENSE—MOTION FOR JUDGMENT.

In a suit in Pennsylvania by a judgment creditor of a Kansas corporation to enforce a stockholder's liability, where the affidavit of defense alleged that plaintiff's judgment was fraudulent, irregular, and void, *held*, that a delay of nearly five years in moving for judgment for want of a sufficient affidavit of defense was justified by the pendency of a decision of the supreme court of Kansas, whereby said judgment was at length declared valid; and, such decision being set up in an amended claim, *held*, further, that plaintiff was entitled to judgment on his motion unless the affidavit were amended within a specified time.

4. SERVICE OF PROCESS—CORPORATIONS.

Under the Kansas statute providing that a summons against a corporation may be served on "the president, \* \* \* or other chief officer," a service on the vice president is sufficient.

This was an action by William E. Ball, a citizen of Kansas, against Anna M. Warrington, a citizen of Pennsylvania, to enforce an alleged liability of defendant as a stockholder in a Kansas corporation.

S. Morris Waln and A. U. Barnard, for plaintiff.

E. Spencer Miller and Charles F. Warwick, for defendant.

DALLAS, Circuit Judge. This is an action brought to enforce an alleged liability of the defendant as a stockholder in a corporation

of the state of Kansas, under certain constitutional and statutory provisions of that state. The plaintiff alleges that he has obtained a judgment against the corporation in question in a Kansas court, upon which execution has been issued and returned unsatisfied. Upon May 1, 1893, an affidavit of defense was filed, wherein it was averred that the judgment above referred to was rendered in a suit in which the service of process for appearance had not been lawful, and also that the instrument of writing upon which that judgment was founded "was a fraud against the same [the corporation] and the stockholders thereof," and that "plaintiff in the present action knew of all the facts constituting the said fraud," etc. To this there was added the averment that "the judgment recovered in the said district court of the Ninth judicial district of the state of Kansas was fraudulently and collusively obtained by the said plaintiff," but to this general statement no weight can be attached. Except as it may be regarded as having reference to the more particular allegation of fraud which precedes, but does not support it, it fails to point out—explicitly or otherwise—the facts constituting the fraud and collusion intended to be alleged. *Kneedler v. Woodruff*, 1 Wkly. Notes Cas. 42; *Ephraim v. Pollock*, Id. 102; *Starr v. Phillips*, Id. 471. On October 17, 1893, a plea was filed, and a rule to take depositions on behalf of the plaintiff was entered. Nothing further was done until March 8, 1898, when the plaintiff, by leave of court, filed an amended statement. The order permitting this amendment gave the defendant 15 days in which to file a further affidavit of defense; reserving to her, however, the right to insist that she could not lawfully be required to file any other or further affidavit of defense, and none has in fact been filed. Under these circumstances, the plaintiff now moves for judgment for want of a sufficient affidavit of defense.

The amended statement of claim does not change the plaintiff's cause of action as originally presented. It adds nothing, in substance, but an allegation that since the original statement was filed the court of last resort of the state of Kansas has decided that the judgment in question was regular and valid. The effect of the amendment, therefore, is merely to bring to the actual knowledge of this court a decision which, in my opinion, should be judicially noticed; and I see no reason why this may not be done upon the present motion as well as upon a trial of the case. The delay which has occurred in making the motion does not preclude the court from entertaining it. It was postponed—properly, I think—to await the rendition of the judgment of the Kansas court already mentioned. *Jones v. Gordon* (Pa. Sup.) 16 Atl. 862; *Wetherill v. Stillman*, 65 Pa. St. 105. In the case first cited it appears from the record, though not from the report, that a plea had been filed; and in the other, although there had been a discharge or withdrawal of a previous rule for judgment, and plea pleaded, a judgment for want of a sufficient affidavit of defense was entered nearly two years after the action had been commenced. In view of what has been said, the affidavit of defense in this case is clearly insufficient. The judgment set out in the amended claim completely and conclusively refutes it. But, as plaintiff's counsel concede that defendant should be afforded further opportunity to

file an additional affidavit, sufficient time for that purpose will be allowed, in accordance with the practice approved by the supreme court of Pennsylvania in *Jones v. Gordon*, supra. It was there said:

"The act of 1887 authorizes the service of a copy of plaintiff's claim on the defendant, and requires him to answer under oath. Amendments are liberally allowed in our practice. Where an amended statement has been filed with leave of the court, it is competent for the court to make such order for personal service thereof, and for the defendant's reply, as the justice of the case may require. The plain purpose of the act of assembly is to reach the real point in dispute by the most direct road, and in the most expeditious manner consistent with a due regard to the rights of the parties. We see no objection to such a construction as shall secure this purpose, and we accordingly hold that the court allowing an amendment in the statement may provide by rule or order for its actual service, and for judgment for want of a reply within such reasonable time as it may fix."

The defendant is allowed 15 days in which to file an additional affidavit of defense, and, in default thereof, judgment for the plaintiff and against the defendant for want of a sufficient affidavit of defense may be entered.

(June 24, 1898.)

The affidavit filed on May 1, 1893, set up as a defense that the Kansas judgment which is the basis of the present suit was founded upon a fraudulent claim, not that the court by which that judgment was entered had been fraudulently misled. Consequently, the fraud alleged being one which was triable by that court and in that proceeding, I held that the subsequent decision of the court of last resort of the state of Kansas that the judgment here attacked was regular and valid completely refuted the assertion of its invalidity. Two additional affidavits of defense have since been filed, and their sufficiency is contended for on grounds which are well stated and ably argued in the briefs submitted on behalf of the defendant.

The objection that the summons was not served in accordance with the law of Kansas is, in my opinion, not well taken. The statute of that state provides that "a summons against a corporation may be served upon the president, \* \* \* or other chief officer." Gen. St. 1868, c. 80, § 68. In the instance in question the return is, "Delivered a copy to John Reese, vice president." I think that in general the vice president of such a corporation is to be regarded as one of its chief officers, and I do not perceive that section 129 of chapter 23 of the General Statutes of Kansas of 1868 varies this general rule. It provides that the directors shall designate a president and a secretary, but it does not prohibit the corporation from also having a vice president. Moreover, I deem it proper to follow the decision of the Kansas court, by which it was said, "The service of summons in the case is regular, and as required by law." This, it is true, was said by the court of first instance; but the court of review, in remanding the cause, also held that "the judgment was valid," and, without so holding, it could not have disposed of the case as it did.

I am not convinced by the further argument which has been addressed to me, that the alleged fraudulent character of the original cause of action may be interposed in this proceeding. The cases cited in support of that proposition do not, in my opinion, sustain it.

*Schrader v. Bank*, 133 U. S. 67, 10 Sup. Ct. 238, is plainly distinguishable from the present case. If it could be given the effect now sought to be ascribed to it, it would, I think, conflict with the law as generally laid down, and especially by the courts of Kansas, in cases which are cited upon the plaintiff's brief, but which need not be here mentioned. *Schrader v. Bank* was in several respects essentially different from the present case. It arose under the statute relating to national banks, and the decision was put mainly upon the ground that under that statute the individual liability which it imposes upon stockholders is restricted to such contracts, debts, and engagements as had been duly contracted in the ordinary course of its business, and that when the bank went into liquidation there was no authority on the part of its officers to transact any business in the name of the bank, so as to bind its shareholders, except that which is implied under the duty of liquidation. That case is clearly without pertinency to this one. The plaintiff's rule for judgment for want of a sufficient affidavit of defense is made absolute.

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UNITED STATES v. STANTON.

(Circuit Court of Appeals, Second Circuit. March 10, 1898.)

No. 9.

UNITED STATES ATTORNEYS—COMPENSATION.

Under Rev. St. § 835, a United States attorney is entitled to all the fees and emoluments of his office, when, in addition to the amount of his necessary expenses, they do not exceed \$6,000 per annum.

In Error to the Circuit Court of the United States for the District of Connecticut.

This was a petition by Lewis E. Stanton to recover from the United States certain fees claimed to have been earned by him as United States attorney. The court below gave judgment in plaintiff's favor for \$1,496.82 (75 Fed. 357), and the United States have appealed.

Chas. W. Comstock, U. S. Atty.

Lewis E. Stanton, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. We agree with the court below that it is the meaning of section 835 of the Revised Statutes of the United States that the United States attorney is entitled to all of the fees and emoluments of his office, when, in addition to the amount of his necessary expenses, they do not exceed the sum of \$6,000 per annum. As it now appears that the defendant in error had not received the amount of the items in controversy from the emoluments of his office, the judgment should be affirmed.

## SILL v. UNITED STATES.

## UNITED STATES v. SILL.

(Circuit Court of Appeals, Second Circuit. April 7, 1898.)

Nos. 77 and 78.

## 1. DISTRICT ATTORNEY—FEES—CLERK HIRE.

A district attorney is entitled to recover for clerk hire. U. S. v. Stanton, 87 Fed. 698, followed.

## 2. SAME—EXTRA SERVICES—COMPENSATION.

A district attorney is not entitled to extra compensation for services rendered in examining titles to sites for public buildings. U. S. v. Ady, 22 C. C. A. 223, 76 Fed. 359, followed.

## 3. SAME—ATTENDING COURT.

Section 824 of the Revised Statutes, which allows compensation to a district attorney for each day of the term where court is held at a place other than his place of abode, is limited by the act of congress of March 3, 1887 (24 Stat. 509, 541, c. 362), to each day when the court is opened by the judge for business, or business is actually transacted in the court.

## 4. SAME—EXAMINATION OF INTERNAL REVENUE CASES NOT PROSECUTED.

A district attorney is entitled to compensation for services rendered in investigating violations of the customs laws reported to him by a collector in accordance with section 838 of the Revised Statutes, and in which he determined that no prosecution should be instituted.

In Error to the Circuit Court of the United States for the District of Connecticut.

George G. Sill, per se.

Chas. W. Comstock, U. S. Atty.

Before WALLACE and LACOMBE, Circuit Judges.

**PER CURIAM.** These writs of error involve the right of the United States attorney for the district of Connecticut to recover the following items disallowed in his accounting by the accounting officers of the treasury: (1) Disbursements for clerk hire; (2) opinions and services as to title to post office building sites; (3) per diem fees for attending terms of the circuit and district courts held at places other than his place of abode; (4) fees for examination of internal revenue cases reported to him by the collector, in which he determined that no prosecution should be instituted.

As to the first item, the case is controlled by the decision of this court in U. S. v. Stanton (decided at this term) 87 Fed. 698, where we concurred in the opinion of Judge Shipman in 37 Fed. 252, and adjudged that the disbursements should be allowed.

As to the second item, we approve of the decision of the circuit court of appeals in U. S. v. Ady, 22 C. C. A. 223, 76 Fed. 359, where the reasons why there can be no compensation for such services are convincingly stated.

The third item is claimed under section 824 of the Revised Statutes, which allows compensation to a district attorney "for each day of his necessary attendance in the courts of the United States, when the court is held at the place of his abode, five dollars; and for his attendance when the court is held elsewhere, five dollars for

each day of the term." The court below allowed the per diems because upon the days in question the courts were open by the order of the court, and the district attorney was constructively in attendance. Neither the judge nor the district attorney was in actual attendance upon these days, and the court was in session only in the sense that the term had not been formally adjourned. The section was considered in *U. S. v. Smith*, 158 U. S. 346, 15 Sup. Ct. 846, to authorize an allowance per diem to the district attorney when the court is held at a place other than his place of abode, whether he was actually in attendance or not, "since he is presumed to be present at each term for the protection of the interests of the government." In this case, however, the court was speaking of attendance at an ordinary term of court,—a term at which the judge and all the officers are expected to be present,—and did not have occasion to refer to the act of congress of March 3, 1887 (24 Stat. 509, 541, c. 362), which provides as follows:

"Nor shall any part of any money appropriated be used in payment of a per diem compensation to any attorney, clerk or marshal for attendance in court except for days when the court is opened by the judge for business, or business is actually transacted in the court, and when they attend under sections five hundred and eighty three, five hundred and eighty four, six hundred and seventy one, six hundred and seventy two and two thousand and thirteen of the Revised Statutes which fact shall be certified in the approval of their accounts."

When these officers attend under sections 583, 584, 671, and 672, they are present to adjourn court because of the absence of the judge. We think it was the purpose of the act of 1887 to disallow per diem fees for constructive attendance on occasions not covered by the enumerated sections, when there is no judge in attendance for the transaction of judicial business. The interests of the government cannot require the district attorney to be present when no officer is in attendance who can exercise any judicial function, and when the court is only open or in session for the purpose of making clerical entries in the books or records, or of being adjourned from day to day. Within the meaning of the section, the court is not opened by a judge when he is not in attendance, and it is opened merely to be adjourned by a clerk or marshal upon his order; otherwise there would have been no reason for including sections 583, 584, 671, and 672 in the enumerated sections of the act.

The fourth item is for services rendered pursuant to section 838 of the Revised Statutes, similar to those in controversy in *U. S. v. Bashaw*, 4 U. S. App. 360, 1 C. C. A. 353, and 50 Fed. 749, and subsequently considered in 152 U. S. 436, 14 Sup. Ct. 638. In the *Bashaw Case*, however, the secretary of the treasury did not fix the sum which he deemed a just and reasonable allowance for the services. In this case he did so. The question whether a district attorney is entitled to an allowance for such services, under the terms of the section, has been variously decided by the district courts. It was decided affirmatively by the circuit court of appeals for the Eighth circuit in the *Bashaw Case*, and was not decided by the supreme court when that case was before it. Unless we are convinced that the opinion of a circuit court of appeals is

erroneous, we think, upon principles of comity, this court should follow it. It would seem that a district attorney ought to be compensated for such services, and we do not think the language of the section is necessarily inconsistent with the intention that he shall be. The judgment is reversed, with instructions to the court below to render a judgment in conformity with this opinion.

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SPURR v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. June 1, 1898.)

No. 502.

**1. NATIONAL BANKS—OFFICERS—CERTIFICATION OF CHECKS WITHOUT FUNDS—PRESUMPTION OF KNOWLEDGE.**

In a prosecution against a national bank president for unlawfully certifying checks, it is not error to instruct the jury that the presumption is that he had knowledge of the condition of the account upon which the checks were drawn, where the same instruction cautions them that such presumption may be rebutted by evidence that the defendant did not in fact have such knowledge.

**2. SAME—WILLFUL FAILURE TO INVESTIGATE.**

In order to convict a national bank officer of wrongfully certifying checks, it is not necessary to show that he had actual knowledge that the account against which the checks were drawn was not sufficient; it is enough if he willfully refrained from investigation, in order to avoid knowledge.

**3. EVIDENCE — ADMISSIBILITY — SPECULATION BY BANK OFFICER WITH BANK FUNDS.**

Upon the trial of the president of a national bank for certifying checks without funds, evidence of speculations by the cashier with funds of the bank, with defendant's knowledge, is admissible for its bearing upon the right of the latter to rely upon the former's representations as to the state of the customer's accounts.

**4. SAME—TO ESTABLISH INTENT—PERIOD OF TIME COVERED.**

The period of time within which collateral transactions offered to show a guilty intent must have occurred is largely discretionary with the court.

**5. SAME—REPUTATION FOR HONESTY.**

Upon the trial of a national bank officer for official misconduct, evidence as to the defendant's reputation for honesty and integrity should be limited to such reputation down to the time of the failure of the bank.

**6. SAME—REPUTATION FOR TRUTHFULNESS.**

In general, where no attempt has been made to impeach the defendant's testimony, he may not add to the weight of his evidence by evidence of his general reputation for truthfulness.

**In Error to the Circuit Court of the United States for the Middle District of Tennessee.**

Three indictments were found against the defendant, each of which contained several counts, for violation of section 5208 of the Revised Statutes, by which it is provided: "It shall be unlawful for any officer, clerk or agent of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check." By section 13 of the act of congress approved July 12, 1882, it is enacted as follows: "That any officer, clerk or agent or any national banking association who shall willfully violate the provisions of an act entitled 'An act in reference to certifying checks by

national banks,' approved March 3, 1869, being section 5208 of the Revised Statutes of the United States, or who shall resort to any device or receive any fictitious obligation, direct or collateral, in order to avoid the provisions thereof, or who shall certify checks before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association, shall be deemed guilty of a misdemeanor and shall, on conviction thereof in any circuit or district court of the United States, be fined not more than five thousand dollars, or shall be imprisoned not more than five years, or both, in the discretion of the court." The three indictments found against the defendant were consolidated and tried together. The several counts of the indictments mutatis mutandis charge that "he, the said Marcus A. Spurr, being then an officer, to wit, the president of said the Commercial National Bank, did willfully violate the provisions of section 5208, United States Revised Statutes, and did, without the consent of the bank, its board of directors and committees, willfully, unlawfully, and knowingly certify a check drawn upon said the Commercial National Bank by said company, to wit, the said Dobbins & Dazey, they, the said Dobbins & Dazey, as he, the said Marcus A. Spurr, well knew, not having at said time on deposit with the said the Commercial National Bank an amount of money equal to the amount specified in said check," etc. The several counts of the consolidated indictments charged the certification by defendant of four checks drawn by Dobbins & Dazey, between December 9, 1892, and February 13, 1893, both inclusive, on the Commercial National Bank of Nashville, Tennessee, aggregating \$95,641.95. The total amount of checks of Dobbins & Dazey certified by defendant between said dates was \$110,366.54.

The Commercial National Bank was organized in 1884. Defendant was president, and F. Porterfield was cashier, from its organization to its failure, March 25, 1893. The original capital stock of the bank was \$200,000, which was increased from time to time to \$500,000. The firm of Dobbins & Dazey was engaged in the purchase, sale, and exportation of cotton. Its financial standing and credit was excellent, but its assets consisted only of money, choses in action, and cotton on hand and in transit. On December 9, 1892, at the close of business, the individual ledger of the bank showed that Dobbins & Dazey's account was overdrawn in the sum of \$64,417.97, and on that date the defendant certified that firm's check for \$15,000. At the close of business December 17, 1892, Dobbins & Dazey's account was overdrawn in the sum of \$51,070.65; and on that day their check for \$31,000 was certified by defendant. At the close of business January 2, 1893, Dobbins & Dazey's account was overdrawn \$77,515.59, and, at the close of business the next day, \$38,125.84, on which day defendant certified their check for \$40,000. At the close of business February 11, 1893, Dobbins & Dazey had overdrawn their account \$49,454.59 (February 12th was a holiday); and at the close of business February 13, 1893, their account was overdrawn \$68,243.73. On that day defendant certified their check for \$9,641.95. The evidence on the part of the government tended to show that the account of Dobbins & Dazey was continuously and largely overdrawn upon the individual ledger during the period covered by the checks certified by defendant (except one day in January, 1893, when there was a small credit balance), and that this fact was known to Porterfield, the cashier, and all the employees of the bank under him in authority. The board of directors of the bank consisted of 21 members. It had two standing committees, known as the "Executive Committee" (of which defendant was a member), whose duties were prescribed by by-law 17, and an "Examining Committee," with the powers and duties prescribed by by-law 28. By-law 17 empowered the executive committee to discount and purchase bills, notes, and other evidences of debt, and to buy and sell bills of exchange, and required them to report at each regular meeting of the board of directors all bills, notes, and other evidences of debt purchased by them since their last regular report. By-law 28 made it the duty of the examining committee to examine, four times a year or oftener, the affairs of the bank, count its cash, compare the assets with the accounts of the general ledger, and ascertain if these and all other accounts were correctly kept, and whether the bank's condition corresponded therewith, and whether the bank was in a sound and solvent condition, etc., and report the result of their ex-

amination at the next regular meeting of the board. Under by-law 8, the cashier was primarily responsible for all funds, property, and valuables of the bank. Under by-law 9, the president was responsible only for such funds, property, and valuables of the bank which should come into his hands as president. Both officers were required under these by-laws, respectively, to give security for the faithful and honest discharge of their respective duties. By-law 19 provided: "That no officer or clerk of this bank shall pay any check drawn upon it or pay out money on any order unless the drawer of such check or order shall, at the time of the presentation thereof, have deposited in the bank sufficient funds to meet such check or order."

There was evidence tending to show that defendant had access to the books of the bank, and that he frequently made inquiries of the clerks and book-keepers concerning various matters and accounts. The only direct testimony that defendant was informed of the state of that account at the dates of the certifications was that of Porterfield, the cashier, who testified that between November 25, 1892, and the failure of the bank, March 25, 1893, he apprised defendant that Dobbins & Dazey's account was continuously and largely overdrawn. Evidence was also received, as indicating defendant's knowledge of the state of Dobbins & Dazey's account, that defendant and Porterfield, the cashier, were each engaged in speculation in cotton futures, through Dobbins & Dazey, during the period covered by the dates of the checks certified by defendant, and that Porterfield was so engaged without furnishing any margins, and that the funds of the bank were used by Dobbins & Dazey in such speculations without the knowledge of defendant. The evidence upon these points was conflicting. Defendant was also sworn as a witness in his own behalf.

For the purpose of establishing defendant's knowledge and intent, evidence was admitted to show that, in 1886 and 1887, Porterfield, with defendant's knowledge, but without the consent or knowledge of the bank, its directors or committee, used a large amount of the funds and moneys of the bank in the purchase on speculation of stocks for the joint account of himself and defendant and other persons in the name of the bank or in his (Porterfield's) name as cashier. For the same purpose, evidence was also admitted bearing on two other accounts, one opened March 12, 1889, with Herzfeld & Co., New York City, in the name of "Frank Porterfield," separate, and the other opened October 3, 1889, with Latham, Alexander & Co., of New York City, in the name of "Porterfield & Spurr," both of which were continued down to the close of the bank, in 1893, and that the defendant and Porterfield were jointly interested in the speculations indicated by those accounts during the entire period of their existence; that numerous purchases and sales of stocks, bonds, and other funds were made by them for their joint benefit on those accounts; and that large sums of the moneys and funds of the bank were used by Porterfield without securing or reimbursing the bank in such purchases, with the knowledge and consent of defendant after the accounts had been running some time (not when they were opened). There was also evidence that defendant and another director objected to opening an account with Dobbins & Dazey, on the ground that their business was understood to be large, and would require the bank to provide cash to meet the checks of the firm on Eastern drafts, secured by bills of lading, for cotton, and the bank might not always be able to provide sufficient funds to carry the account; that Dudley, the director who shared Spurr's objections to receiving the account, had been in the cotton business, and stated at the directors' meeting that Dobbins & Dazey would be likely to overdraw their account; that, when the account was accepted, the cashier was instructed by the committee, in defendant's presence, not to allow Dobbins & Dazey to overdraw their account, nor to borrow more than their line of credit, which was \$30,000, and not to discount their drafts without bills of lading attached, and the cashier promised obedience to the order, and reported to Dudley several times that the account was profitable and satisfactory; that the committee understood and believed that the cashier was obeying his instructions; that the members of both committees and the directors had no information, before March 25, 1893, that Dobbins & Dazey's account was overdrawn, or that they were depositing and discounting, or had deposited or discounted, Eastern drafts,

without bills of lading attached; that the directors and committee did not regard it as their duty to examine depositor's ledger accounts or the drafts deposited by them; that, prior to and during the period covered by the dates of the checks certified by defendant, Dazey, one of the firm of Dobbins & Dazey, was conducting a system of what is known among bankers as "kiting" between Nashville and New York,—that is, he would draw in the firm name large drafts on John Monroe & Co. and Latham, Alexander & Co., bankers and brokers, the New York correspondents of Dobbins & Dazey, and deposit and discount such drafts without bills of lading attached, and take credit for the proceeds as cash on the account of Dobbins & Dazey in one or the other of the two banks of Nashville in which they carried regular accounts, viz. the Commercial National Bank or the First National Bank. Dazey would then draw in his firm's name checks on one of these banks, generally in favor of the Fourth National Bank of Nashville, but sometimes on another bank. These checks were then certified by the Commercial National Bank or the First National Bank, whereupon the Fourth National or the American National Bank would transmit to New York, by wire, the money to meet Dobbins & Dazey's drafts maturing in New York, and the latter banks would collect the amount of the checks from the Commercial National or the First National Bank, as the case might be. Dazey would then draw another set of drafts in Dobbins & Dazey's name, without bills of lading attached, on the same drawees in New York, and take credit for their proceeds as cash in the Commercial National or First National Bank. He would then draw a second set of checks on the Commercial National Bank or the First National Bank, in favor of the Fourth National Bank or the American National Bank, and these would be certified by the Commercial or the First National Bank. The Fourth National Bank or the American National Bank would transmit the necessary amount by wire to New York to meet the second set of drafts, and would again reimburse themselves by collecting the several sets of checks from the certifying banks. When these drafts were drawn by Dazey, his firm was largely overdrawn with the drawees. This process was repeated again and again for nearly six months preceding the failure of the Commercial National Bank, during which time said bank received and entered as cash Dobbins & Dazey's drafts for \$1,829,427.25, which had no bills of lading attached; and at the bank's failure, March 28, 1893, it had on hand Dobbins & Dazey's drafts of this kind to the amount of \$142,000, which had been discounted and credited to the drawers by the Commercial National Bank, February 27, 1893.

The jury found the defendant guilty upon certain counts of the consolidated indictments. Motions in arrest of judgment and for a new trial were overruled, and the defendant was sentenced to be imprisoned for two years and six months upon three counts of the consolidated indictments, based on the checks certified by the defendant, January 3, 1893. To reverse this judgment, the defendant brought this writ of error.

John A. Pitts and B. P. Waggener, for plaintiff in error.  
Ed. Baxter, for defendant in error.

Before BARR, RICKS, and SWAN, District Judges.

SWAN, District Judge (after stating the facts). The errors assigned and relied upon are 19 in number. Some of these present questions dependent upon the same principles as others, and will not be separately discussed.

The first assignment is predicated upon the following excerpt from the charge of the court, viz.:

"It was the defendant's duty, before certifying the checks, if he was not informed, to inform himself of the state of the account on which they were drawn. From the existence of such a duty you may draw an inference of fact that he did so inform himself, if he did not already know it. But the presumption of knowledge is not an absolute one, and the defendant may show, if he can, that he did not in fact acquire information of the truth."

In the next sentence of the charge, the jury were instructed:

"And, in general, if the defendant acted in good faith in making these certifications, believing that the state of the account of Dobbins & Dazey justified it, he was not guilty of the offense charged. Mere negligence or carelessness, unaccompanied by bad faith, would not render him guilty."

The learned judge had previously instructed the jury that the checks had become the obligations of the Commercial National Bank solely by defendant's certification. The facts of certification by defendant, as president, and that Dobbins & Dazey had no funds in the bank at the times of the certifications, were admitted. The only question of fact, therefore, left for determination, it is admitted, were the defendant's knowledge of the state of Dobbins & Dazey's account when the checks were certified, and his purpose or intent in the certifications. The instruction criticised did not inform the jury that the effect of the legal presumption was to shift the burden of proof to defendant to negative the inference of fact, but was permissive merely, and left the jury free to determine, upon all the evidence in the case, whether, notwithstanding the inference derivable from the existence of the duty, the defendant had that knowledge of the account which the court, elsewhere in its charge, made a necessary element of the offense. Defendant's legal duty, as an officer of the bank, to be informed, was *prima facie* evidence of his performance of that duty. *Insurance Co. v. Pendleton*, 115 U. S. 339, 347, 6 Sup. Ct. 74; *Finn v. Brown*, 142 U. S. 71, 12 Sup. Ct. 136. This was all the effect given it by the instruction in question. The case of *Agnew v. U. S.*, 165 U. S. 36, 49, 17 Sup. Ct. 235, approved an instruction that an inference or presumption of an unlawful intent throws the burden of proof on defendant.

There was other evidence, direct and circumstantial, tending to show that defendant knew or had reason to believe, at the times of certification of the checks, that the account of Dobbins & Dazey was largely overdrawn. The case therefore was not committed to the jury solely upon the inference predicated upon defendant's official position that he had discharged the duty it devolved upon him before the acts of certification; but the jury were explicitly instructed that the government must establish the defendant's knowledge of the state of the Dobbins & Dazey account beyond a reasonable doubt, in order to maintain any of the counts in the indictment. Nor did the last sentence of the charge covered by this assignment put upon defendant the disproof of knowledge of the account in question. Referring to the inference of knowledge, the court added:

"But the presumption of knowledge is not an absolute one, and the defendant may show, if he can, that he did not, in fact, acquire information of the truth."

This certainly deprived that presumption of any controlling influence, in the minds of the jury, against the defendant, and emphasized its rebuttable nature. But even if a hypercritical construction, adverse to the defendant, could be extracted from this passage of the charge standing by itself, it is manifest that its connection with other parts of the charge clearly negatives any argument based upon this isolated sentence.

2. The modification of defendant's third, and the refusal of his seventh, request for instructions, were justified by the fact that both were pervaded by the common error that they singled out particular circumstances, omitted all reference to others of importance, and sought to confine the jury to the matters narrated, thus excluding other evidence which the jury might have deemed important. Both were calculated to mislead the jury, and were argumentative. *Railway Co. v. Ives*, 144 U. S. 433, 12 Sup. Ct. 679; *Railway Co. v. Leak*, 163 U. S. 280, 16 Sup. Ct. 1020; *Agnew v. U. S.*, 165 U. S. 51, 17 Sup. Ct. 235; *Catts v. Phalen*, 2 How. 382.

3. The fourth request of defendant was properly refused. It not only prayed for an instruction on the weight of conflicting evidence, but also for a direction to the jury to disregard presumptive proof on the assumption that it was rebutted by other matters of fact. It was no part of the duty of the court to decide upon the relative force of the facts. *Crane v. Morris*, 6 Pet. 598, 616, 617; *Lilienthel's Tobacco Co. v. U. S.*, 97 U. S. 237, 268; *Kelly v. Jackson*, 6 Pet. 622.

4. The refusals of the defendant's sixth and ninth requests were also proper. Both were fully covered by the charge given. The court instructed the jury:

"The government is bound, in order to maintain any of the counts in the indictment, to prove \* \* \* (3) that the defendant knew that there were no funds of the drawer in the bank sufficient to meet them [the checks]."

Again: "You must be satisfied from the proof, beyond a reasonable doubt, of every fact essential to the guilt of the defendant, of the specific charges contained in the indictment, before you will be warranted in convicting him. \* \* \* The facts which are charged as constituting guilt must be so proven as to persuade a clear and abiding conviction of defendant's guilt,—such conviction as is not shaken by any reasonable doubt grounded upon the testimony. If you are so convinced of his guilt, he should be convicted; otherwise, not."

The remainder of the sixth request was also fully covered by the following passages in the charge:

"Knowledge of the defendant of the state of Dobbins & Dazey's account, when he certified the checks, is thus made the pivotal question in the case. Upon this question of knowledge, the court charges you that it is not necessary for the government to show that the defendant knew of the lack of funds of Dobbins & Dazey, from an actual examination of the books of the bank or from any inquiries made at that time. If the defendant knew that he had good reason for believing Dobbins & Dazey's account to be overdrawn, and refrained from making such inquiry for the reason that he knew of the condition of the account, or because he was purposed to certify the check without reference to whether there were funds sufficient to meet it or not, that is sufficient; that is to say, if he shut his eyes to what he believed was the fact, and kept himself in ignorance of the state of the account because he believed an examination would disclose the facts, this would be equivalent to express knowledge. Nor is it necessary to prove that the defendant knew just what was the extent of the overdraft on Dobbins & Dazey's account, or of the lack of funds to meet the checks. If he knew of the substance of the fact that Dobbins & Dazey had not funds to meet their checks, and that there was no warrant for marking the checks good, that was sufficient."

This correctly states the law. The government was not bound to show defendant "actually knew" that Dobbins & Dazey had no funds in the bank. The judge further said:

"And, in general, if the defendant acted in good faith in making these certifications, believing that the state of the account of Dobbins & Dazey justified it, he is not guilty of the offense charged. Mere negligence or carelessness, unaccompanied by bad faith, would not render him guilty."

Again: "If the proof fails to satisfy your minds clearly and beyond a reasonable doubt that the defendant did actually know, at the time he certified the checks mentioned in the indictment, that Dobbins & Dazey did not have on deposit in the bank sufficient funds and credits to meet the checks so certified, then you should acquit him, unless you are convinced by the proof beyond a reasonable doubt that he willfully, designedly, and in bad faith—these words mean substantially the same thing—shut his eyes to the facts and purposely refrained from inquiry and investigation for the purpose of avoiding knowledge."

5. The modification of defendant's second request affords no just cause of complaint. The request recited the respective duties of the president and cashier of the bank as apportioned under by-laws 8 and 9, and the jury were instructed, as prayed:

"These two by-laws taken together mean and imply that the cashier is primarily responsible for all the funds, property, and valuables of the bank, and that the president is responsible only for such funds, property, and valuables of the bank that may be placed in his hands as president, and that both of these officers are each to faithfully and honestly discharge their respective duties."

The court then added:

"But I further charge you that the president is a general officer of the bank, and it is admitted that he had authority, notwithstanding these by-laws, \* \* \* to certify checks; and, when the president assumes to certify these checks as good, the faithful and honest discharge of his duties required him to be informed of the condition of the account on which they were drawn."

Without this modification, the instruction prayed would have been misleading, and would have given the jury to understand that by-laws 8 and 9 alone were the measure of defendant's official duty in dealing with the funds of the bank by certification of checks, and that under those the primary responsibility of the cashier for such funds and property would relieve the defendant, as president, from civil and criminal responsibility, under section 5208, Rev. St. U. S., and section 13 of the act of July 12, 1882. These statutes, by necessary implication, impose upon the certifying officer the duty of knowledge of the state of the account before certification of checks drawn upon it. This duty could not be abrogated by by-laws of the bank, or any division of duties between its officers. Nor was it the purpose of these by-laws to exempt the president, when he assumed to certify checks, from the statutory duty of knowledge. This is evident from the bank's by-law No. 19, which provided that:

"No officer or clerk of this bank shall pay any check drawn upon it or pay out money on any order unless the drawer of such check or order shall, at the time of the presentation thereof, have deposited in the bank funds sufficient to meet such check or order."

By-laws 8 and 9 were, perhaps, properly called to the attention of the jury for their bearing upon the question of the intent with which defendant acted in the certifications. *Potter v. U. S.*, 155 U. S. 447, 15 Sup. Ct. 144. There is no substantial difference between the requirements of these by-laws and the duties imposed by the statute and defendant's official oath required by section 5147, Rev. St. U. S.

The defendant certainly could not complain that the adoption from the language of the request of the phrase "faithful and honest discharge of his duties" by the court was an expression of opinion on the facts. If it were, it would not have been an error, as the facts were left to the decision of the jury. *Simmons v. U. S.*, 142 U. S. 148, 12 Sup. Ct. 171; *Allis v. U. S.*, 155 U. S. 123, 15 Sup. Ct. 36.

6. The court instructed the jury:

"The government is bound, in order to maintain any of the counts in this indictment, to prove (1) that the defendant certified the check; (2) that the drawers of the check had not sufficient funds in the bank to meet such check; (3) that the defendant knew that there were no funds of the drawer in the bank sufficient to meet them. This last element of the offense charged will be explained, and its modification stated further on."

It is argued that the jury were thus informed that the establishment of these three facts—the first two of which were conceded—would authorize conviction. This would be true if the instruction had been submitted as complete in itself upon the essentials of the crime, and as dispensing with the necessity of proof of the intent which accompanied the act of certification; but the last paragraph clearly excluded that view of its design and scope. Its promise was fulfilled in the passages in the charge quoted in our review of the sixth request. These, in connection with the extract criticised, defined fairly the essentials of the offense and the degree of proof required upon the questions of knowledge and intent. The court was not bound to adopt the language of the request. *Railroad Co. v. Horst*, 93 U. S. 295; *Tucker v. U. S.*, 151 U. S. 164, 170, 14 Sup. Ct. 299.

Assignments 7 and 9: The seventh and ninth assignments are based upon defendant's fifth, and part of defendant's seventh, request for instruction. The former was, in substance, that if the jury found that the account of Dobbins & Dazey, upon the books of the bank, was overdrawn continuously during the period covered by the checks certified, and that the defendant certified the checks in ignorance of such overdraft, "believing at the time that the exchange deposited by Dobbins & Dazey, on the days on which such checks were certified, was sufficient to cover the amount of such checks [besides the overdraft then existing], then he is not guilty, and you should acquit him unless such ignorance was willful, as elsewhere explained in the court's instructions." The modification criticised consisted in adding the words inclosed in brackets. The subject had been fully treated in the charge, and the request should have been refused. Without the modification, it is clear that the instruction prayed would, if granted, have given the jury to understand that it was not necessary for defendant to have ascertained the state of the Dobbins & Dazey account before certifying the check, but it would be sufficient per se to acquit him if he believed that the amount of the exchange deposited—inclusive, necessarily, of the "kiting" and other drafts made by that firm upon overdrawn accounts without bills of lading attached—equaled the checks certified. This would have been in direct conflict with that part of the charge presented by the first assignment, which we have approved, and would have nullified the

statute which prohibits certification of checks "before the amount thereof shall have been regularly entered to the credit of the drawer upon the books of the banking association." The purpose of the modification was to preclude such a misconception of the defendant's duty, and to bring the request into harmony with the statute and the general charge definitive of that duty. The only lawful basis for certification is that prescribed by the statute, and the utmost effect that can be ascribed to the instruction as amended was that it required the defendant to act upon the state of the account, not merely upon his belief in the amount of the exchange deposited, leaving the jury free, however, under the general charge, to determine the intent with which the defendant acted. The pith of the instruction, as thus modified, was so fully covered by the extracts from the charge given in the examination of the first, fourth, and tenth assignments of error as to leave the defendant no ground of complaint against the amendment.

The court adopted part of defendant's seventh request, after modifying it so that it read:

"If you find that in each instance, when he certified a check, the defendant had information from the cashier or exchange clerk upon which he relied in good faith, that a sufficient amount had been deposited that day, and was in the bank to cover the checks certified [I add, in addition to the existing overdraft], he would not be guilty under the indictment, and you should acquit him."

The qualification of this request complained of is contained in the words in brackets. The reasons stated in the consideration of the seventh assignment of error approve the action of the court in making the same addition to this part of the charge.

Assignment 11: The eleventh assignment of error has nothing to sustain it. The jury returned into court after receiving the charge, and asked the following question: "We want the law as to the certification of checks when no money appeared to the credit of the drawer." The court, in response, read the first paragraph of section 5208 of the United States Revised Statutes, and asked the jury if that answered their question. The foreman responded, "Yes." The court then read said paragraph a second time, remarking, "I read it again, that you may all understand it." This action was excepted to, on the ground that the court failed to read and explain section 13 of the act of July 12, 1882, imposing the penalty for the willful false certification of checks. The argument in support of this exception assumes that "what the jury wanted to know was the law applicable to this case, \* \* \* the law applicable to the criminal false certification,"—and therefore the court should have read section 13 of the act of July 12, 1882. It is also urged that the court gave the jury to understand that the certification of a check, when there were no funds in bank to meet it, was sufficient to sustain the indictment. The assumption is negated by the answer of the jury. The court charged that, to warrant conviction, the certification must have been willfully made, not merely false in fact. That distinction was emphasized in the following extract from the charge:

"The question remains for you to settle upon all the evidence whether the defendant, Spurr, in certifying these checks, acted in good faith, and without any intent to do that which the law forbids, and which he must be presumed to know was unlawful, namely, the certifying of a check as good when the maker of it had no funds in the bank to meet it. If he acted in good faith, believing that the makers of the checks had funds in the bank to pay them, he should be acquitted. If he certified the checks either knowing that the funds to respond were not in the bank, and that the making of the check was unwarranted, or, having in his conscience good reason for believing that such was the fact, purposely refrained from inquiry, then the charge against him is made out. The facts which are charged as constituting his guilt must be proven beyond a reasonable doubt."

This was a full and fair exposition of the disputed elements of the offense charged. Other parts of the charge were equally explicit to the same effect, as we have shown elsewhere.

Assignment 12: Error is assigned on the admission of evidence of the stock transactions had through the bank or Porterfield, as cashier, in 1886 and 1887. This was received "for its bearing upon the right of Spurr to rely upon Porterfield's representations upon the question of fact,—whether he did rely upon any assumed correctness or honesty of action." Upon this question the government offered evidence of purchases and sales of stock on the New York Exchange, through certain brokers and dealers in stocks in New York in the name of Porterfield, cashier of the Commercial National Bank, for the account of sundry customers of said bank, as well as Porterfield, R. S. Cowen, assistant cashier of said bank, and defendant. These purchases and sales were made with funds of the bank remitted to New York by Porterfield, and embraced transactions from February 18, 1886, to January 15, 1887, both inclusive. The amount of the bank's money remitted by Porterfield to be used as margins in these transactions was over \$66,000. The profits accruing to defendant from these ventures were credited to him on the books of the Commercial National Bank at the times of the sales, and afterwards were credited on his pass book, and drawn out by him. There was also evidence that defendant accounted for the exact amount of losses shown upon the accounts, statements, tickets, slips, and memoranda made out by Porterfield in reference to said transactions, and gave his notes to the bank with collateral security for his share of the losses; but defendant never informed the executive committee of the bank or its directors that these notes were given to cover losses on stock speculations. There was evidence that the funds of the bank were thus used by the cashier with defendant's knowledge, but without that of the directors or committees of the bank. The evidence relied upon to show defendant's intent in certification of Dobbins & Dazey's checks was largely circumstantial. In such cases, a broad range of inquiry is permitted, and when the evidence tends even remotely to establish the ultimate fact, its admission will not be ground for reversal. *Clune v. U. S.*, 159 U. S. 593, 16 Sup. Ct. 125; *Alexander v. U. S.*, 138 U. S. 353, 11 Sup. Ct. 350. Evidence of similar transactions to illustrate the character of the act in question has repeatedly been held competent in both criminal and civil cases, and is often the only method of establishing the intent with which they were done. *Allis v. U. S.*, 155 U. S. 119,

15 Sup. Ct. 36; *Wood v. U. S.*, 16 Pet. 342; *U. S. v. Wood*, 14 Pet. 230; *Taylor v. U. S.*, 3 How. 197-208; *Mining Co. v. Watrous*, 9 C. C. A. 415, 61 Fed. 163-179.

The objection that the collateral transactions were too remote is not tenable. It goes only to the weight of the testimony. The period of time within which the matter offered to establish the guilty purpose must have occurred to permit of their admission is largely discretionary with the court. *Moore v. U. S.*, 150 U. S. 60, 14 Sup. Ct. 26. In *U. S. v. Thirty-Six Barrels of High Wines*, 12 Int. Rev. Rec. 40, 41, Judge Woodruff said that, for the purpose of showing the *quo animo* of an act under inquiry, he would not hesitate to admit evidence of acts running back to the enactment of the internal revenue law, which had then been passed fully five years. Similar evidence was received in *Coffin v. U. S.*, 162 U. S. 664, 16 Sup. Ct. 943, for the same purpose. It is every-day practice to admit proof of this character to show intent on the trial of persons charged with counterfeiting. The evidence was properly received, and its purpose carefully defined and limited, in the charge of the court, in accordance with the case last cited.

Assignments 13 and 14: The instruction which is the subject of this assignment and the refusal of defendant's thirteenth request may be considered together. The first declared and the second conceded the illegality of speculation by a national bank or its officers in stocks and bonds upon margins. This was correct. *First Nat. Bank v. National Exchange Bank*, 92 U. S. 128; *Bank v. Kennedy*, 167 U. S. 362, 367, 17 Sup. Ct. 831. The court then told the jury that if Porterfield, with Spurr's knowledge, was engaged in misusing the bank's funds and credits on cotton and stock exchanges in his own or the interest of others, "the jury were at liberty to find in that a reason why Mr. Spurr should not have confidence in Porterfield's integrity and fidelity to the interests of the bank, and why Mr. Spurr would, in the exercise of his own duties, have exercised a closer scrutiny of the dealings of Dobbins & Dazey with the bank, especially if he had reason to suppose that firm was engaged in such speculations." We perceive nothing erroneous in this. *Preston v. Prather*, 137 U. S. 605, 11 Sup. Ct. 162. The request refused would, if granted, have practically directed the jury that the confessedly illegal practices of the national banks of the city in receiving and executing orders for the purchase and sale of stocks and bonds on margins, if profitable, the receipt by stockholders of profits therefrom, and the opinions of individuals engaged in like speculations, provided defendant had no reason to suspect the cashier of dishonesty in the conduct of such transactions, and secured the bank against loss from the execution of his orders for such prohibited purchases and sales, could not and ought not to be given any weight against defendant, although the Commercial National Bank did such business. This proposition is entirely untenable, and is irreconcilable with the admission in evidence of those transactions which we have just approved. The evidence of the manner in which the defendant dealt or permitted others to deal with the funds of the bank having been

properly admitted, its weight and effect was a question for the jury, and not one of law for the court.

Assignment 15: The modification of defendant's tenth request was necessary to prevent the misleading of the jury. The court, at defendant's request, had told the jury, in substance, that, if defendant certified the checks in good faith and honest reliance on the cashier's statement as to the Dobbins & Dazey account, his certifications would not be criminal. This followed immediately the clause modified, which read as presented: "And if the cashier was reputed to be, and believed by the defendant to be, a man of honesty and truth, the defendant would have a right to rely upon his statements in regard to that account [Dobbins & Dazey's]." The court struck out the word "truth," and substituted therefor the words "right conduct as respects the affairs of the bank," and with this amendment granted the request. Whether or not defendant had a right to rely or in fact relied in good faith upon Porterfield's statements in reference to that account was a question of fact to be determined, not alone by the cashier's reputation or by defendant's professed belief in his general truthfulness, but from all facts and circumstances known to defendant tending to approve or discredit the bona fides of his confidence in Porterfield's official conduct. Defendant was not prejudiced by this amendment, especially as the general charge covered the subject fully.

Assignment 16: The eleventh request, to the effect that unless defendant knew or had reason to believe that the cashier "was despoiling the bank, and using its funds instead of his own," in his dealings in stocks and bonds and cotton futures, the fact that defendant knew that the cashier had dealt in those commodities "would not deprive the defendant of the right to rely on his statements in respect to the affairs of the bank," was substantially granted, after substituting for the phrase "so despoiling the bank and using its funds" the words "had been using the funds or credits of the bank." There is no merit in the objection made to this change. It is mere verbal criticism. The substitution of the words "unlawfully in respect to its affairs," in place of the word "dishonestly," in the last paragraph of the request,—making it read, "In order to deprive the defendant of the right to rely upon the cashier, it must be shown beyond a reasonable doubt that he knew the cashier was unfaithful to the bank, and acted unlawfully in respect to its affairs,"—fully preserved the rights of defendant, and was an impartial reference to all the evidence of defendant's knowledge of the cashier's transactions. The amendment was a synonym, in substance, of the adverb it displaced. The cashier could not have acted "dishonestly" without acting "unlawfully" in respect to the bank's affairs. This request was also so fully covered by defendant's twelfth request, which was granted, that it might correctly have been refused in toto.

Assignment 17: There is nothing in this assignment by which the accounts whose admission is alleged is error can be identified. They are mentioned as "said accounts," without further description. If we assume the reference to be made to the accounts of Herzfeld &

Co. with "Frank Porterfield, Separate," and that of Latham, Alexander & Co. with Porterfield and Spurr,—and this is the theory of counsel for plaintiff in error,—they were plainly competent, under the same rule of evidence which sanctions the admissibility of the transactions had with Kohn, Pepper & Co., De Neufville & Co., and Latham, Alexander & Co., discussed in the examination of defendant's twelfth assignment.

Assignment 18: Defendant's fourteenth request was rightly denied, because fully covered by the instruction given in response to defendant's twelfth request.

Assignment 19: The questions arising under this assignment are presented as if it involved the right of a defendant in a criminal case to give in evidence his character for truth and veracity. It complains of "the exclusion of the evidence of John Overton and other witnesses offered by defendant—First, as to defendant's good character for truth and veracity; and, secondly, as to defendant's good character for honesty and integrity during the whole period of his residence in Nashville." After defendant had testified, his counsel claimed that his testimony had been impeached by the cross-examination, and offered testimony to his good character for truth and veracity and honesty and integrity during the entire period of his residence in Nashville, down to the time of the trial. The court limited the inquiry into defendant's general character to the time of the failure of the bank, reserving for further consideration his right to adduce evidence of his character for truth and veracity. To this ruling the defendant duly excepted. The government "admitted defendant's good character for honesty and integrity down to the period of the charge"; whereupon the court restricted defendant to 10 witnesses upon that point, and that number was examined under the above limitation as to time. The correctness of that limitation is the first inquiry. The reasons assigned by the learned judge for restricting the evidence of defendant's reputation for honesty and integrity to the time of the bank's failure meet our approval. He said:

"If we were to bring the time down to the present, it would be liable to embarrass the jury, and turn their minds from the real merits of the case, and put before them opinions which ought to be kept as far from the jury as possible. \* \* \* We would proceed to launch ourselves upon an inquiry as to what the people of the community thought of the case at present. \* \* \*

The authorities support this ruling. *State v. Marks* (Utah) 51 Pac. 1090; *State v. Kinley*, 43 Iowa, 296; *Wroe v. State*, 20 Ohio St. 460, 472; *White v. State*, 111 Ala. 92, 21 South. 330.

The question raised by the second branch of this assignment was rightly decided. The ground on which the offer of evidence as to defendant's character for truth and veracity was based and is here urged was "that defendant had been attacked as a witness, and his testimony impeached by the substance and manner of his cross-examination by counsel for the plaintiff, which had shown a purpose to argue to the jury that he had not testified honestly and conscientiously, but had testified falsely." No testimony was introduced by the government attacking defendant's character for truth and veracity, nor was any evidence offered in rebuttal by the government.

A careful reading of defendant's cross-examination fails to disclose any ground for the admission of evidence of his general reputation for truth and veracity. The fact that contradictions exist between his testimony and that of other witnesses affords no ground for its admission. 1 Greenl. Ev. § 469. In his character as a witness, defendant is not entitled to any privilege not extended to other witnesses. *Reagan v. U. S.*, 157 U. S. 301, 305, 15 Sup. Ct. 610; *U. S. v. Hollis*, 43 Fed. 248. In general, where no attempt has been made to impeach him by evidence of bad character, or of contradictory statements, or by the cross-examination, he cannot corroborate his testimony or give it weight by evidence of his general reputation for truthfulness; nor will his own view of the effect of his cross-examination make such testimony competent. The rule as to the admissibility of evidence of character is thus broadly stated by Greenleaf (1 Greenl. Ev. § 54):

"And, in all cases where evidence is admitted touching the general character of the party, it ought manifestly to bear reference to the nature of the charge against him."

The evidence offered was obviously intended to give weight to the defendant's personal testimony, not for the purpose of establishing a general character inconsistent with the offense charged. The weight of reasoning and authority justified its exclusion. *Stevenson v. Gunning*, 64 Vt. 609, 25 Atl. 697; *Funderberg v. State*, 100 Ala. 36, 37, 14 South. 877; *Tedens v. Schumers*, 112 Ill. 266, 267; *People v. Cowgill*, 93 Cal. 597, 29 Pac. 228.

A careful examination of the record satisfies us that the defendant has had a fair trial, and that, both in the rulings upon evidence and in the submission of the case to the jury, his rights were carefully protected. The judgment of the circuit court for the Middle district of Tennessee is therefore affirmed.

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UNITED STATES v. ZABRISKIE et al.  
(Circuit Court, D. Nevada. June 6, 1898.)

No. 627.

EMBEZZLEMENT FROM UNITED STATES MINT—LIABILITY OF OFFICIALS.

Under Rev. St. § 3501, providing that the melter and refiner of each mint shall give a bond "with condition for the faithful and diligent performance of his office," and that similar bonds may be required of assistants and clerks, "but the same shall not be construed to relieve the [melter and refiner] from liability for acts, omissions, or negligence of their subordinates or employes"; and section 3508 which provides that the melter and refiner "shall be responsible for all bullion delivered to him until the same is returned to the superintendent, and the proper vouchers obtained,"—the melter and refiner is liable on his official bond given "for the faithful and diligent performance" of his duties, for the embezzlement of bullion by his assistant, although the theft was not committed through any fault of his own.

This was an action on the official bond of Elias B. Zabriskie, as melter and refiner of the United States mint at Carson City, Nev. Defendants demur to the complaint.

Sardis Summerfield, U. S. Atty., for plaintiff.  
M. A. Murphy and Robert M. Clarke, for defendants.

HAWLEY, District Judge (orally). This action is brought upon the official bond of E. B. Zabriskie, as melter and refiner of the United States mint at Carson City, Nev. The condition of the bond is "for the faithful and diligent performance by the said E. B. Zabriskie of the duties of his said office of melter and refiner of the United States mint, at Carson, Nevada." It is averred in the complaint that Zabriskie did not keep and perform this condition of the bond. The particular facts alleged in the complaint which furnish the objections raised by the demurrer are as follows:

"(4) The plaintiffs allege that one John T. Jones was, on the first day of March, 1890, appointed to the office of assistant melter and refiner of the mint of the United States, at Carson City, Nevada, and immediately entered into the said office and upon the performance of the duties of said office, and then became, and thereafter continued to be, during the time of the commission of the grievances hereafter alleged, such assistant melter and refiner. (5) That during the time said E. B. Zabriskie was the melter and refiner of the United States mint, at Carson City, Nevada, as aforesaid, and during the time said John T. Jones was the assistant melter and refiner of said United States mint at Carson City, Nevada, there came into the keeping, custody, and control of the said E. B. Zabriskie, as such melter and refiner, and there was committed to his charge for the purpose of being coined, certain gold metals belonging to, and which were the property of, plaintiffs, United States of America, which said gold metals were of the amount and of the value of twenty-three thousand dollars, and which said gold metals it was the duty of said E. B. Zabriskie, as such melter and refiner, to melt and refine for the account of said plaintiffs, United States of America, and which it was his duty to account for and turn over to said plaintiffs, United States of America, at the expiration of his term of office. (6) And plaintiffs allege that between the said first day of March, 1890, and the — day of April, 1895, and during the continuance of the said E. B. Zabriskie in the said office of melter and refiner, as aforesaid, and during the time said John T. Jones was the assistant melter and refiner of the mint of the United States, at Carson City, Nevada, the said John T. Jones unlawfully, fraudulently, and feloniously took and embezzled the said gold bullion, of the value of twenty-three thousand dollars, and converted the same to his own use."

The points urged in favor of the demurrer are substantially as follows, to wit: That it does not appear from the complaint that the metals, or any part thereof, were appropriated or converted by the said Zabriskie, or that he committed any act of negligence or carelessness concerning the same; that it affirmatively appears that John T. Jones, who was the assistant melter and refiner of the mint, did wrongfully appropriate and convert the same to his own use; that the assistant melter and refiner is not appointed by the melter and refiner, and cannot be removed by him; that the melter and refiner and the sureties on his bond cannot be held responsible for any theft or embezzlement committed by the assistant melter and refiner; that, if a loss occurred by the theft or embezzlement of a subordinate officer, it cannot be said to have occurred by the carelessness or negligence of the principal; that, a bond having been required of the assistant melter and refiner, the government can only recover upon that bond for any theft or embezzlement committed by him.

Section 3501 of the Revised Statutes provides as follows:

"The superintendent, the assayer, the melter and refiner, and the coiner of each mint, before entering upon the execution of their respective offices, shall become bound to the United States, with one or more sureties, approved by the secretary of the treasury, in the sum of not less than ten nor more than fifty thousand dollars, with condition for the faithful and diligent performance of the duties of his office. Similar bonds may be required of the assistants and clerks, in such sums as the superintendent shall determine, with the approbation of the director of the mint; but the same shall not be construed to relieve the superintendent or other officers from liability to the United States, for acts, omissions, or negligence of their subordinates or employes; and the secretary of the treasury may, at his discretion, increase the bonds of the superintendents."

The complaint in this case does not show that any bond was ever required from the assistant melter and refiner; but it is within the knowledge of the court that such a bond was required of and given by the assistant, in November, 1893. *U. S. v. Jones*, 77 Fed. 718. But it is wholly immaterial whether any bond was required of or given by the assistant, because the statute expressly declares that such a bond, if given, shall not release the liability on the bond given by the principal.

Under the law, and the rules, regulations, and practice of the mint department of the government, the assistant melter and refiner is appointed "upon the recommendation and nomination in writing" by the melter and refiner, subject to the approval of the director of the mint. Rev. St. §§ 3503, 3504. The duties of the melter and refiner are specified in section 3508, as follows:

"The melter and refiner shall execute all the operations which are necessary in order to form ingots of standard silver or gold, and alloys for minor coinage, suitable for the coiner, from the metals legally delivered to him for that purpose; and shall also execute all the operations which are necessary in order to form bars conformable in all respects to the law, from the gold and silver bullion delivered to him for that purpose. He shall keep a careful record of all transactions with the superintendent, noting the weight and character of the bullion, and shall be responsible for all bullion delivered to him until the same is returned to the superintendent and the proper vouchers obtained."

It affirmatively appears from the allegations in the complaint that the melter and refiner failed to account for all bullion delivered to him by the superintendent of the mint, and it necessarily follows that the condition of his bond for the faithful and diligent performance of his duties has not been complied with. The law is well settled that a bond requiring a faithful and diligent performance of official duty is as binding upon the principal and his sureties as if all the statutory duties of the officer were inserted in the bond.

How can the melter and refiner be discharged from his bond? He and his sureties knew the extent of his obligation when he entered upon the duties of his office. The obligation to faithfully and safely keep the bullion, gold, and silver metals, the property of the government, committed to his charge by the superintendent of the mint, is absolute, without any condition whatever; and he cannot relieve himself from this duty until the same "is returned to the superintendent, and the proper voucher obtained," unless, as is held in some cases, the loss thereof was occasioned by the act of God or a public enemy, with whom the government is itself at open war,—

an exception which has no application to this case. In this connection it is deemed proper to state that a certificate or voucher given to an officer before the discovery of any theft or embezzlement, "that his accounts had been examined, found correct, and closed," would not operate to release him or his sureties from liability on his bond. *Moses v. U. S.*, 166 U. S. 571, 17 Sup. Ct. 682.

It is conceded by defendants that, if the bullion and metals in the custody of the melter and refiner had been stolen by a stranger or highway robber, the melter and refiner would be liable for the loss. Such is undoubtedly the law. It was so held in *State v. Nevin*, 19 Nev. 162, 7 Pac. 650. Numerous authorities bearing upon this point are there cited and elaborately reviewed. See, also, 4 Am. & Eng. Enc. Law (2d Ed.) tit. "Bonds," p. 681, and authorities there cited. But counsel argue that there is a distinction between such cases and the present one, in this: That here the complaint affirmatively shows that the theft or embezzlement was committed by an independent officer of the government, to wit, by the assistant melter and refiner of the mint, without any neglect, carelessness, or wrongdoing upon the part of the melter and refiner. To sustain this position, three cases are cited and claimed to be conclusive in favor of the defendants, viz.: *Keenan v. Southworth*, 110 Mass. 474; *Dunlop v. Munroe*, 7 Cranch, 242; *Robertson v. Sichel*, 127 U. S. 507, 8 Sup. Ct. 1286. An examination of these cases will clearly show that they have no application whatever to the facts of this case; that each relates to cases of personal negligence upon the part of a subordinate officer,—an entirely separate and distinct principle from the rule of law applicable to the official duties of public officers, and the liabilities of themselves and of their sureties upon their official bonds.

In *Keenan v. Southworth* it was held that a postmaster was not liable for the loss of a letter occasioned by the negligence of his clerk, without any actual participancy or knowledge on his part. The court, with reference to these facts, said:

"The law is well settled, in England and America, that the postmaster general, the deputy postmaster, and their assistants and clerks, appointed and sworn as required by law, are public officers, each of whom is responsible for his own negligence only, and not for that of any of the others, although selected by him, and subject to his order."

In *Dunlop v. Munroe* it was sought to hold the postmaster responsible in damages for failing to seasonably forward a letter; and the court held that the action could not be maintained without showing that some actual damages had been sustained by the plaintiff, and that in such an action evidence as to the negligence of the assistant postmaster was not permissible.

In *Robertson v. Sichel* the court held that a collector of customs was not personally liable for a tort committed by his subordinate in negligently keeping the trunk of an arriving passenger on the pier, where it was destroyed by fire, it not being shown that the collector was in any wise connected with such wrong.

In all cases of personal negligence of this general character, upon the part of an assistant or subordinate officer, it is undoubtedly true that the principal cannot be held liable in damages without

proof that he was personally guilty of negligence or carelessness. But that is not this case. Here the action is upon a bond, the condition of which, according to the averments of the complaint, has been broken. As a general rule, public officers, with reference to the public funds or property with which by law they are intrusted, become virtually the insurers of such funds and property, and are held accountable for any and all such funds and property, even if stolen from them without any fault, negligence, or carelessness upon their part. The rule upon this subject is clearly and correctly stated in *Board v. Jewell*, 44 Minn. 427, 428, 46 N. W. 914, as follows:

"The great weight of authority in this country will sustain the general propositions, with respect to the liability of such officers and their sureties for the loss of public moneys, that where the statute, in direct terms or from its general tenor, imposes the duty to pay over public moneys received and held as such, and no condition limiting that obligation is discoverable in the statute, the obligation thus imposed upon and assumed by the officer will be deemed to be absolute, and the plea that the money has been stolen or lost without his fault does not constitute a defense to an action for its recovery; that the rule of responsibility of bailees for hire is not applicable in such cases; that where the condition of a bond is that the officer will faithfully discharge the duties of the office, and where the statute, as before stated, imposes the duty of payment or accountability for the money, without condition, the obligors in the bond are subject to the same high degree of responsibility; and that the reasons upon which these propositions rest are to be found both in the unqualified terms of the contract, and in considerations of public policy."

No case has been called to my attention, and it is fair to assume that none can be found, which makes any distinction as to the character of the person who commits the crime of theft or embezzlement, whether it be a sworn deputy or assistant officer under bond, a subordinate clerk or employé of the principal, or a stranger. The law allows the melter and refiner to nominate a person of his own choice for the position of assistant melter and refiner. It would be a startling proposition, fraught with countless evils, to say that the melter and refiner could not be held responsible for the theft or embezzlement of his assistant thus nominated by himself, or escape responsibility from the fact that he had confided in the honesty and integrity of the person selected and nominated by him for the office, and, relying on his efficiency and honesty, had left him in charge of the bullion and metals, and thus afforded him the opportunity to commit the crime for which he has been convicted, and to betray the trust reposed in him by the melter and refiner. If the melter and refiner believed his assistant to be unworthy of the trust, he had the power and it was his duty to have temporarily suspended him, and reported his reasons for so doing to the superintendent of the mint. But there is no charge in the complaint—and, from the known facts, no charge could be made—that the melter and refiner was in any manner cognizant of, connected with, or had knowledge of, the dishonesty of his assistant, or of the theft or embezzlement of the bullion and metals. His personal character is not in any manner involved in that transaction. His liability is fixed by the terms and condition of the contract which he and his sureties made with the government. They are liable because it is

so nominated in the bond, and he cannot avail himself of the defense that he was not negligent or careless in the discharge of his duties, or because the theft was committed without any fault on his part.

In *U. S. v. Bryan*, 82 Fed. 290, the defendant was the postmaster at San Francisco, Cal., and failed to pay over certain moneys upon the money-order account as charged against him by the government. When he and his sureties were sued upon his official bond to recover the deficiency in the money-order account, they set up in their answer, as a defense to the suit, the fact that the sum of money sued for was collected, embezzled, and converted to his own use by one James S. Kennedy, a clerk in the post office, who had taken and held said office under the civil service laws of the United States, and the rules and regulations adopted pursuant to said law governing the appointment, promotion, and tenure of said office; that said Kennedy was subsequently indicted by a United States grand jury for said offense, and was thereafter convicted of said crime; that the said Bryan, as postmaster, used all the diligence and supervisory care over said clerk that a competent, painstaking chief officer could over a subordinate officer, to protect the United States, and to secure the faithful discharge of his duties as such clerk, and had no knowledge or intimidation of the misappropriation of said money-order funds by said Kennedy until after said crime had been consummated. Judge Morrow, upon demurrer to the answer, held that these averments did not constitute any defense to the action. An examination of that case will show that strong reasons were given in favor of the conclusions reached.

In *Bosbyshell v. U. S.*, 23 C. C. A. 581, 77 Fed. 944, in actions brought by the United States upon the official bond of Bosbyshell as superintendent of the United States mint in Philadelphia, and his sureties, to recover certain money for which he had failed to account, the facts were that in the year 1882 there was brought from the assay office in New York to the Philadelphia mint a large lot of gold bullion, which for several years thereafter was weighed at each annual settlement; that at the annual accounting which took place in July, 1887, during the incumbency of the superintendent Fox, the predecessor in office of Mr. Bosbyshell, this bullion was put in a compartment in one of the vaults in the Philadelphia mint, and a wire cage placed around it. Before this was done, the bullion was weighed, and the number of bars counted, in the presence of Robert E. Preston, then a mint examiner. A certificate of the number of bars, their weight and value, was signed by Mr. Preston, and by him affixed to the cage. The door of the cage was fastened by two locks, and it was also sealed by Mr. Fox and by Mr. Preston. Mr. Fox, the superintendent of the mint, took possession of the key of one of the locks, and the key of the other lock was deposited by Mr. Preston in the bureau of the mint at Washington. The cage could not be properly opened without the employment of both keys. This bullion was thus placed in the cage to avoid the trouble of weighing it every year, and to await an order for its coining. On assuming the office of superintendent of the mint, on November 1, 1889, Mr. Bosbyshell gave a written receipt for this bullion to Mr. Fox, the retiring super-

intendent, the amount receipted for being the same as stated in Mr. Preston's certificate affixed to the cage. Mr. Bosbyshell testified that when he entered upon his official duties, and gave that receipt, he knew he had a right to have this bullion counted and weighed; but he waived the right, and the cage was not opened. Subsequently to the giving of this receipt, and down until September, 1893, in his monthly reports and quarterly accounts rendered to the bureau of the mint, Mr. Bosbyshell reported this bullion as in his custody, and charged himself therewith. This cage remained unopened until September, 1893, when, under orders of the treasury department that this bullion be turned over to the melter and refiner for the purpose of coining, the cage was opened. When the door was opened and the bullion was counted, it was found that 30 bars were missing. Of these missing bars, 20 were subsequently found in the ventilator of the vault, outside of the cage. Upon these facts, the judge presiding at the trial gave an instruction which met with the approval and commendation of the court of appeals. Substituting the name "Zabriskie" for "Bosbyshell," it would be directly applicable to the facts of this case, and for that reason is here quoted:

"It is not suggested that Mr. Bosbyshell, a gentleman of the highest character, abstracted this gold. It never has been suggested or suspected but that it was done by one of his subordinates, for whose conduct in this respect he is responsible, to the extent of making good what the government has lost,—a subordinate who is now languishing in jail as a punishment for his offense."

In the course of the opinion, the court of appeals said:

"We come now to the defense raised by the defendant's seventh point, wherein the court was asked to charge that if the jury found from the evidence that the bullion sued for was 'stolen without any fault of the defendant, Bosbyshell, without defendant's knowledge, and not by his neglect, and not by any lack of prudence or caution on his part,' the defendants are not responsible on the bond in suit. The court refused to give this instruction to the jury. The position taken by the defendants at the trial below, and maintained here, is that the bond in suit imposed upon the defendants a liability only for the faithful and diligent performance by Mr. Bosbyshell of the duties of the office of superintendent, and not a liability for a felonious taking of bullion without any fault or negligence on his part. We are not able, however, to give our assent to this proposition, in view of the decisions of the supreme court, especially in the cases of *U. S. v. Prescott*, 3 How. 578, *U. S. v. Dashiell*, 4 Wall. 182, and *Boyden v. U. S.*, 13 Wall. 17. \* \* \* It is conceded that section 3506 of the Revised Statutes, defining the duties of the superintendent of the mint, must be read into the bond; and, as we have already seen, that section enacts that 'the superintendent of each mint, shall receive and safely keep until legally withdrawn' all bullion which shall be for the use of the mint, and 'shall be the keeper of all bullion or coin in the mint, except while the same is legally in the hands of other officers.' But it is contended that the language of the statute simply declares the common-law duty of a bailee to keep in a safe manner, and that the absence of an express contract to deliver relieves the defendants from the stringent rule of responsibility enforced in the cited cases. We think, however, that the words of the statute 'safely keep until legally withdrawn' clearly import an obligation to deliver to the government or according to its orders, and that such a liability must be read into the condition of the bond. But, even if the condition of the bond to 'safely keep' is to be understood in the strictest sense of the language used, still, upon the principle of the adjudged cases referred to, the obligors would be answerable for a loss by larceny, although without fault or negligence on the part of the official, because the obligation to keep safely is without any qualification or exception."

The questions presented by counsel have received the care and attention which the importance of this case demands. They have been discussed at much greater length than was really necessary. If the principles herein announced—which hold the innocent responsible for the acts of the guilty—may to the layman at first blush seem harsh, a moment's thought will dispel the delusion. The ease with which frauds are now committed against the government demands, not only that the perpetrators be promptly punished, but that the safeguards which now protect the government, by requiring good and sufficient bonds for the faithful performance of the statutory duties of all public officers, should not be relaxed. It is substantially the only means to secure redress, and insure the highest degree of care and diligence in the selection of subordinates. Any other rule would open the door to frauds and crimes innumerable, leaving the government without any protection. But, in any event, it is perhaps enough to say that the liability of a public officer is to be measured and decided by the terms of the bond itself, construed, as it must be, in the light of the duties imposed upon him by law, and that the conclusions reached are supported by sound reason, based upon well-settled principles of public policy, and sustained by all of the well-considered cases—both national and state—upon the subject. The demurrer is overruled.

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UNITED STATES v. WALTER SCOTT STAMP CO.

(Circuit Court, S. D. New York. April 15, 1898.)

**POST OFFICE—NEWSPAPER AND PERIODICAL STAMPS—LEGALITY OF SALES.**

Replevin to recover newspaper and periodical stamps as unlawfully in the possession of defendant, the claim being that no government official was ever authorized to part with the possession thereof, and that the stamps were therefore presumptively purloined from the government. The undisputed evidence shows that stamps of the varieties in question were issued by the post-office department pursuant to act of congress of June 23, 1874, requiring prepayment of postage on newspaper matter by adhesive postage stamps to be affixed either to the mail matter or to the memorandum of mailing, or in such other manner as the postmaster general may direct. The postmaster general directed that the stamps should be affixed to the stub of a receipt, showing the amount of money prepaid as postage, and instructed postmasters that no other use of the stamp was permitted. Subsequently, in 1881, the postmaster general expressly prohibited postmasters from selling these stamps to publishers or others. The official reports, however, admit that this rule was frequently violated, either in ignorance or defiance of the regulation. It was also admitted that "newspaper and periodical stamps" were sold as "specimens" by order of the third assistant postmaster general to all persons willing to pay face value therefor, and the sale of stamps as "specimens" was not discontinued until the year 1889. It was further admitted that more than 700 complete sets of all varieties of postage stamps have been exchanged, through the International Bureau of the Postal Union, with the foreign governments who joined in the Universal Postal Convention, and that no control was expressly reserved over the action of such foreign governments in disposing of the stamps thus exchanged. *Held* (1) that the direction of the postmaster general, requiring the stamps to be affixed to the memorandum of mailing rather than to the mail matter, was not even inferentially a prohibition of sale by postmasters; (2) that the sale

of stamps as "specimens" was not unlawful, but, even if irregular, such sales were ratified by the government by its acceptance of the proceeds into its treasury; (3) that the exchange of postage stamps with members of the Postal Union was without reserve, and did not render unlawful the sale or gift of such stamps to private dealers or collectors; (4) that the possession of newspaper and periodical stamps by persons outside of, and unconnected with, the post-office department, is not presumptively unlawful.

Mr. Lloyd opened for the plaintiff.

Mr. Rosenblatt opened for the defense, and read in evidence extracts from Tiffany's History of United States Postage Stamps, tending to show that the postage-stamp system was adopted for the convenience of the public, and to enable all applicants to purchase the same, at wholesale or retail, for prepayment of postage.

The three stipulations are offered in evidence, and are marked, respectively, "Exhibit 1," "Exhibit 2," and "Exhibit 3."

Mr. Rosenblatt: I ask the court to direct a verdict for the defendant.

LACOMBE, Circuit Judge (orally). I am prepared now to dispose of this somewhat extraordinary case. It is an action for replevin in which the plaintiff, the government of the United States, through the post-office department, claims title to a lot of postage stamps,—that is, newspaper and periodical postage stamps,—and the marshal has levied upon them. They are divided into three classes. The first comprises newspaper and periodical stamps, under the act of 1865, or prior to 1865, as to which it is now conceded by the plaintiff that the facts do not warrant a finding in the plaintiff's favor, except as to the one-cent stamps, as to which contention is still made. The second class contains certain stamps which are referred to as "specimen stamps." With regard to these, the situation is this: In 1875, over the signature of the third assistant postmaster general, who is the one that, in the organization of the department, has special charge of stamps, etc., there was a circular issued from the post-office department, Washington, D. C., stating that "the department is prepared to furnish upon application, at face value, specimens of adhesive postage stamps issued under its auspices, as follows." Then follows a list of various stamps, running back as far as 1847, and including the various issues and denominations now in suit. This circular was sent broadcast throughout the community, and was never canceled or repudiated by the postmaster general. Upon the strength of this circular the confiding citizen applies to the post-office department, receives the stamps, pays the money, and the post-office department covers the money into the treasury of the United States, and, having done so, turns round and insists that the same stamps were stolen, embezzled, and purloined from the United States, and are still its property, not because any act of congress has prohibited the sale, but because some years after the circular above quoted from was issued the postmaster general made regulations forbidding postmasters to sell this particular kind of stamp. Comment on such a performance as that would seem to be wholly superfluous. If it

were a transaction between private parties, a well-known phrase of the police court would most properly describe it.

There remains, however, a third class, covering other stamps which are not specimen stamps, and are not within the terms of this circular offering them for sale, and we must look into the situation with regard to those. Except for one lot of six stamps described as "newspaper stamps," 1895, etc., being lot No. 141, all these stamps are issued on or prior to 1875, except two lots, 132 and 134, which seem to have been issued in 1879. The newspaper stamps, so called, are postage stamps undoubtedly,—so conceded. The description of them in the Regulations—indeed, in this circular—is such that it is plain that they are, as one would infer that they were without any evidence, postage stamps. From the time that the government began to print and circulate postage stamps to facilitate the prepayment of postage on letters, the postmaster general or post-office department, or whoever has had them in charge, has been authorized to sell them, to have them distributed at places where persons who needed to use them could purchase them, and in some acts he has been required so to do. I do not find, and I am not referred to, any act of congress prohibiting the sale of this particular kind of stamp. On the contrary, the act of 1874 (section 6), which authorizes the issue of such stamps within the years which we have last referred to, provides that the parcels containing the newspapers and periodicals "shall be weighed in bulk and postage paid thereon by a special adhesive stamp to be devised and furnished by the postmaster general, which shall be affixed to such matter or to the sack containing the same or upon a memorandum of such mailing, or otherwise, as the postmaster may from time to time provide by regulations"; that is to say, the postmaster general is to provide regulations as to how the stamps shall be affixed. But there is nothing at all in the act prohibiting his selling such stamps to an individual who wants to use them to pay his postage with. It is claimed, however, that under the general powers of the postmaster general to make regulations for the government of the service, regulations have been made prohibiting the sale of this kind of stamp. Upon examination of the quotations from the Regulations of the Post Office Department, which form a part of the stipulation, I am unable to find any regulation prohibiting the sale of these stamps to the public prior to that contained in the Postal Guide of 1881. On the contrary, immediately after the passage of the act of 1874 it seems to have been the practice of the post-office department to sell these very stamps to the public. In the report of the postmaster general for the year 1875, referring to the new stamps which were issued under the act of 1874, he says that the new system is working very well, and, describing the method employed, states that the papers to be mailed "are made up in bulk at the publication office, carried to the post office, and there weighed. The postage is computed on the whole issue, and the proper amount in stamps handed to the postmaster," etc., which plainly indicates that the stamps must have been in the possession of the citizen who wanted to use them to prepay upon his package. He could not very well "hand them to the postmaster," unless he had them to hand. It

seems clear, upon the evidence, that the practice under the act of 1874, immediately after its passage, was to sell and deliver these stamps to the public, who, when they wanted their package forwarded, gave stamps for the amount of the proper postage to the postmaster at the office where they turned it in. Now, the record contains no prohibition, prior to that one in the Postal Guide of 1881, against the sale of any of these stamps by postmasters, and inasmuch as, with the exception of lot 141, they are all prior to that date (1881), I reach the conclusion that at the time of the issuance of those stamps there was no statute law of the United States, and no regulation adopted under authority of statute, prohibiting the sale of such stamps to the public, either by the post-office department itself or by such subordinates, postmasters or others, as might have the stamps in charge.

There remains the single lot of six stamps—1, 2, 5, 10, 25, and 50 cents, respectively—of the issue of 1895. It appears that, under the terms of the so-called "Postal Union," over 700 complete sets of stamps have been issued by the government, without reserving any further right or title or control of their disposition, whether to foreign governments, or to delegates of those governments to the Postal Congress, or to the secretary of the congress, or where not, is immaterial. The stamps so issued passed wholly out of the power and control of the federal government, which no longer held any title to them, and the persons to whom they went could have sold them or done anything else that they pleased with them. Under those circumstances, in view of the fact that part of those stamps are of the same kind as those which were sold by the post-office department under the circular issued in 1875, and the money paid to the department and covered into the treasury of the United States; that part of them are of issues which were not prohibited from sale by act of congress, but which, on the contrary, were, when they were first issued, sold by postmasters to the public, and the sale of which has never been prohibited by postal regulations until some years after their issue; and that as to all of them there are 700 sets free to the world, which the post-office department has issued,—I am unable, such being the only evidence in the case, to sustain the averment of the complaint that the stamps in question here were "stolen, embezzled, and purloined" from the plaintiff, and that they are now the "property of the government of the United States." For these reasons I shall direct a verdict in favor of the defendant.

Mr. Lloyd: I except to that part of your honor's charge in which you state that there is no regulation or prohibition of any kind issued by the government prior to 1881.

The Court: There is nothing other than what you call my attention to here, which is inferential. On that date the language is specific. Prior to that it is inferential, because it says they must put them on the stub.

Mr. Lloyd: That is what I contend,—that it is inferential. I ask your honor to charge that, in the absence of any evidence to the contrary, the jury are bound to presume that the 700 sets of stamps de-

livered to the Postal Union under the treaty were issued by the government for the purpose for which they were intended.

The Court: I decline.

A verdict is found as directed.

Mr. Rosenblatt: I move for judgment on the verdict, and that the marshal be directed to return the stamps to the defendant.

Motion granted.

# CENTAUR CO. V. KILLENBERGER.

(Circuit Court, D. New Jersey. May 11, 1898.)

## 1. TRADE-MARKS AND TRADE-NAMES—UNFAIR COMPETITION.

Where complainant's package and label is not exactly imitated by defendant, but is made so near like it in general appearance that one is apt to be mistaken for the other by intending purchasers, and that a close inspection is necessary to distinguish them, the use of the label by the defendant or of one substantially similar thereto will be enjoined.<sup>1</sup>

## 2. SAME—UNFAIR COMPETITION—LABELS USED ON PATENTED ARTICLES.

Distinctive labels long used on patented articles do not become free to the world on the expiration of the patent.<sup>1</sup>

This was a bill in equity by the Centaur Company against Frederick Killenberger for alleged unfair competition in trade. The cause was heard on an application for a preliminary injunction.

Edmund Wetmore, for complainant.

George H. Silzer, for defendant.

KIRKPATRICK, District Judge. This is an application on behalf of the complainant, the Centaur Company, for a preliminary injunction restraining the defendant from putting up and selling "Castoria" in packages, with wrappers and labels which are calculated to deceive the public, and induce them to buy the defendant's goods when they intended to purchase those of the complainant. It appears from the record that "Castoria" is a medicine which was prepared by the complainant under a process patented by one Pitcher, which patent has expired; that while so prepared and sold under said patents, and for many years after the expiration thereof, "Castoria" was put upon the market in the dress now used by the complainant. It is alleged that by the form, size, and shape of the bottle, and by the wrapper incasing it, and the label or distinctive marks upon the wrapper, it has become so well known to the public as to be recognizable at sight as the complainant's preparation.

In *Centaur Co. v. Heinsfurter*, 28 C. C. A. 581, 84 Fed. 955, the United States circuit court of appeals for the Eighth circuit held that the word "Castoria," because it was descriptive of the patented preparation, upon the expiration of the patent, was free to be used by whosoever would. So, while the prayer of the bill is that the defendant may, nevertheless, be enjoined from using said word "Cas-

<sup>1</sup> For elaborate discussion as to "Unfair Competition in Trade," see note to *Scheuer v. Muller*, 20 C. C. A. 165.

toria," the application now made to the court is not so broad, and goes only to the use of the wrapper, with the imprint thereon, in which the bottle is inclosed; and this upon the ground that to permit its use is to encourage unfair competition in trade. While it is true that, upon an actual comparison of the wrappers side by side, substantial differences will be found, and that no one with knowledge would, after such examination, be deceived, still it will be perceived at once by a mere inspection of the packages of the complainant and defendant that they are so much alike in general appearance that the one is apt to be mistaken for the other, and that a close inspection is necessary to distinguish them. If we look at the two wrappers, we find that the color of the paper is the same; that there is a similarity in the type used and their general arrangement, and that their size and peculiar characteristics are changed at similar intervals of space; that upon each wrapper there is affixed a signature in script; and that at the bottom of each there is a dark band, upon which words are printed in white letters. Bearing in mind that the complainant's wrapper was well known to the trade for years before the adoption of that of the defendant, it is impossible, in view of the "accumulated resemblances," to avoid the conclusion that these numerous similarities were not the result of chance, but are chargeable to design, the sole object of which was an intent on the part of the defendant to so imitate the complainant's wrapper as to create confusion in the minds of intending purchasers, to palm off his goods as those of complainant, and thereby unfairly acquire the benefit of complainant's efforts to build up and retain trade. An imitation of complainant's wrapper for the purpose of deception, and with the expectation that by such imitation the defendant's goods may be purchased as those of complainant, constitutes unfair competition in trade, against which the court will grant relief. *Cook & Bernheimer Co. v. Ross*, 73 Fed. 203. "The defendants have no right to dress their goods up in such manner as to deceive intending purchasers, and induce them to believe they are buying those of plaintiff." *Coats v. Thread Co.*, 149 U. S. 562, 13 Sup. Ct. 966.

It is not contended on the part of the defendant that the similarity in the wrappers does not exist, but the right to its use is claimed upon the ground that it had for many years been used upon the patented article "Castoria," and that, when the patent on the article expired, the right to the use of the wrapper became public property. The cases cited by the defendant do not sustain that view. In the case of *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, Mr. Justice White, in rendering the opinion of the court, quotes with approval Poullet, *Brevets d'Invention*, Nos. 327, 329, pp. 278, 279, as follows:

"The expiration of a patent has for its natural effect to permit every one to make and sell the object patented, and it has also for effect to authorize every one to sell it by the designation given it by the inventor, but upon the condition in every case not, in so doing, to carry on unfair competition in business."

In the *Singer Case*, *supra*, while the right of the defendant to use the name "Singer" in relation to sewing machines was established, it was coupled with the restriction that, in so doing, it must be made

clearly and unmistakably to appear that the machines were manufactured by others than the complainants. The right to manufacture Singer sewing machines had become public property by the expiration of the patents, but the right of the original manufacturers to be protected from fraudulent imitation of the indicia by which Singer machines made at their establishment had been known to the trade was upheld, without regard to the fact whether these devices had been adopted during the life of the patent or after its expiration. The same reasoning is applicable here. The right to manufacture "Castoria" according to Pitcher's patented process or formula may be free to the world, also the right to sell the manufactured article by the name "Castoria"; but, in putting it upon the market, the new manufacturer must clearly identify his goods, and not engage in unfair competition, nor do anything which will tend to deceive the public, and induce them to take his goods under the belief that they are those which it has theretofore been accustomed to purchase under the same name.

As the similarity of label to which reference has been made above has that tendency to deceive, and such similarity is evidently the result of design, I am of the opinion that the defendant should be enjoined from the use of the label set out in the bill of complaint, or any one substantially similar thereto which is calculated to deceive the public.

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#### MacCOLL v. KNOWLES LOOM WORKS.

(Circuit Court, D. Massachusetts. April 26, 1898.)

No. 817.

#### 1. PATENTS—NUMEROUS CLAIMS—SUIT ON ONE.

When a suit is based on only one of a large number of claims, care must be taken that the claim in issue does not receive improper breadth and color from those not in issue.

#### 2. SAME—CONSTRUCTION OF CLAIM.

It is settled law that a use not known when a patent is applied for is ordinarily as well protected as one then known, if fairly covered by the claims, but it is equally well settled that a claim cannot be broadened in its proper construction by a function afterwards discovered; and a new use is not protected unless it is inherent in the patent.

#### 3. SAME—LAPPET LOOMS.

The MacColl patent, No. 570,259, for improvements in lappet looms, construed, and held not infringed as to claim 1.

This was a suit in equity by James R. MacColl against the Knowles Loom Works for alleged infringement of claim 1 of letters patent No. 570,259, issued October 27, 1896, to complainant for improvements in lappet looms.

Maynadier & Mitchell, for complainant.

John C. Dewey and Fish, Richardson & Storrow, for defendant.

PUTNAM, Circuit Judge. There are 11 claims in this patent, each for some separate element in a lappet loom. The suit rests on only one of them. Therefore, as was said by the circuit court of appeals for this circuit in *Eppler Welt Mach. Co. v. Campbell Mach. Co.*, 86

Fed. 141, it is necessary "to make sure that the claim in issue does not receive improper breadth and color from those not in issue."

The claim in suit is as follows:

"In a pattern chain for lappet looms, the combination of the bar links, with adjustable pattern screws or pins, the varying positions of which relatively to the bar links govern the form and position of the lappet pattern, substantially as described."

The "substantially as described" refers to the usual drawings and to the following portions of the specification. The letters of reference we have stricken out, as the extracts sufficiently explain themselves without them. The chain is, of course, run over a "sprocket roll" or "sprocket wheel." The specification says:

"The sprockets of the sprocket roll enter the vacant spaces between the parallel bar links of the pattern chain, the said bar links being connected to each other by means of the wire links. The bar links are provided with the screw-threaded split lugs, in which are inserted the pattern screws, the said screws being clamped in their proper position by means of the tightening screws which operate to draw the sides of the split lugs together against the sides of the screws, and the pattern to be formed in the woven web by the action of the needles will be governed by the relative positions of the forward ends of the pattern screws of the chain, the said forward ends coming successively into engagement with the cams and which are connected by means of the rods and with the needle frames."

The following important element was brought into the specification by amendment:

"The rear ends of the bar links being supported against backward movement and held in the same plane by means of the head of the sprocket wheel."

The remaining essential parts of the specification are as follows:

"In weaving lappet patterns on various qualities of goods it is necessary to have the needles capable of such accurate adjustment by the pattern screws or pins that they may be raised with positive certainty through a space equal to the slight distance between the centers of the dents of the reed or an exact multiple thereof; otherwise an imperfect pattern will be produced. Heretofore it has not been deemed practicable to apply the pattern screws or pins which serve to govern the position and form of the lappet pattern to a loosely-driven pattern chain, owing to the apparent looseness and unreliability of the many-jointed construction for such delicate and accurate adjustment as is in the nature of the case required; but the pattern screws or pins have only been applied to the peripheries or sides of rigid disks or wheels, which are adapted by means of closely-fitting shafts and bearings for revolution in a true circle or in a fixed plane without liability of looseness or change therein. \* \* \* My improvement in lappet looms is adapted for application to ordinary cotton and woollen looms already in use, whereby the principle of lappet weaving may be successfully employed in such looms; and it consists in the employment of a pattern chain provided with adjustable pattern screws or pins to govern the form and position of the lappet pattern, and in the improved construction and arrangement of the lappet mechanism, as hereinafter set forth."

These extracts sufficiently show the purpose and nature of the combination covered by the claim in issue. They also admit, what is also clearly proven in the record, that the suggestion of pattern chains in lappet looms was old, and that "pattern screws or pins" were old in the disks or wheels commonly used in lappet looms for the same purpose for which the chain in issue is intended. The proofs show that the "pattern screws or pins," used in wheels or disks, were set perpendicularly to the axis of the wheel, and not par-

allel thereto. The alleged infringer in this suit uses pattern chains and pins, but the pins are set perpendicularly, as in the common wheel or disk; nevertheless the complainant claims that his patent shall be construed so broadly as to cover them.

If the claim in issue were in this respect of a primary character, and could be construed broadly, it would be plain that the use of perpendicular pins would ordinarily be held an equivalent, or a merely colorable subterfuge, and that such use would therefore infringe; but, though we have searched the record carefully, we find nothing in it to sustain such a construction. The claim itself, in connection with the portions of the specification which appertain to it, relates on the face to mere mechanical details. As we said at the opening of this opinion, there is nothing to show that the combination in this claim, independently of the matters covered by the other claims, marked any special advance in the art. The complainant himself, in his own testimony, gives credit to his other improvements, in connection with this one, in language which permits no discrimination in behalf of the latter. Moreover, so far as can be discovered from the specification, the whole merit of the device appears to be that, by placing his pins parallel to the axis of the sprocket wheel, and by the support given by the head of the wheel to the bar links, shown by the matter introduced by amendment, as we have already stated, the alleged looseness of prior constructions was overcome. The complainant refers to this in his evidence, as follows:

"(35) You have stated that it is one distinguishing feature of your lappet chain that it gives equal steadiness and accuracy in the pattern to what can be obtained from any wheel. Will you please point out by what mechanical devices, if any, such steadiness is secured in the pattern chain shown in your patent No. 570,259? Ans. The end of each link of the pattern chain rests upon a fixed abutment, and is pressed against it so that there is no chance of any lack of steadiness or accuracy."

Apparently, the defendant has either failed to overcome this defect, or else has overcome it without arranging the pins parallel to the axis of the sprocket wheel, and thus without using the method of construction devised by the complainant. However this may be, we have seen that the chain, as a mere chain, was an old suggestion, and the application of the pins to it so far involves an analogous art as not to mark such an advance as would entitle it to a construction so broad as to cover every use of them. The circumstances under which an application of an old device to an analogous use entitles a patentee to a broad construction of his patent were carefully explained by the circuit court of appeals for this circuit in *Heap v. Tremont & Suffolk Mills*, 27 C. C. A. 316, 82 Fed. 449, 456, and it is clear the case at bar does not come within those circumstances.

But a function is claimed for complainant's device which we ought not to overlook. The pins, as shown in the drawings, alternate with relatively long and short projections, the effect of which is best explained by complainant's expert, Metcalf, as follows:

"The truth is that, of the various mechanisms which have heretofore been discussed in this suit, some are essentially line-pattern mechanisms, some are essentially solid-pattern mechanisms, and some are equally adapted to both purposes. It is also a fact that, between the solid-pattern mechanisms,

there are differences in mode of operation which need to be thoroughly considered in any examination of the question of what advance in the art of lappet weaving is represented by any one of them. For example, the use of an ordinary cam like that shown in Fig. 6 of *Nomico & Heyes'* British patent is appropriate to the production of a line figure only; the use of a 'lappet wheel' (that is to say, a wheel bearing a groove which is irregularly shaped both as to width and direction), in combination with vibrator mechanism to throw a pin first against one wall of the groove and then against the opposite wall of the groove, is appropriate to the production of a solid figure only; and the use of the MacColl chain is equally appropriate to the production of a line pattern or a solid pattern, or an alternation of line and solid pattern, although the practical importance of using a MacColl chain instead of some other device relates mainly to the production of solid patterns. \* \* \* An alternation of relatively long and short projections, or pins, or surfaces, of the pattern chain, produces such a series of locations of the needle bar at the times of the insertions of the needles into the warp as will arrange lappet stitches crosswise of the general line of the pattern, and thus produce a solid lappet figure, in which the variation in the lengths of successive stitches determines the form of the figure by determining the variations of its width, and the variations in the locations of the successive stitches determine those changes in the position of successive parts of the figure which give it varying direction. The relatively short pins of the pattern chain correspond with the stitch holes of one edge of the pattern in the cloth, and the relatively long pins correspond to the stitch holes at the other edge of the pattern in the cloth; that is to say, they correspond as to their varying distance from a straight line drawn lengthwise of the chain and a straight line drawn lengthwise of the cloth. For this reason, one edge of the figure will be a copy of a line drawn through the operative ends of the short pins, and the other edge of the figure will be a copy of a line drawn through the operative ends of the long pins which alternate with the short pins. This relation of a guiding or locating device to a tool or implement, which produces a figure by variations in its successive positions in what is commonly referred to in speaking of a certain device as a templet, and this templet characteristic of the MacColl chain, is what I have heretofore pointed out as one of the things which distinguish it, as to mode of operation, from those chains of the prior art which most nearly resemble it in construction."

It is claimed that this alternation of relatively long and short pins thus performs a new function, and that defendant's machine also performs the same function by the same variations, and that, therefore, infringement follows. This function is nowhere suggested in the patent.

It is settled law that a use not known when a patent is applied for is ordinarily as well protected as one then known if fairly covered by the claims. It is also equally well settled that a claim cannot be broadened in its proper construction by a function afterwards discovered. *Heap v. Tremont & Suffolk Mills*, 27 C. C. A. 316, 82 Fed. 449, 457, already cited. It must also be the law that a new use is not thus protected unless it is inherent in the patent. The use to which the complainant's expert thus refers, and which has been urged on us with great force by the complainant at the argument at bar, is not thus inherent, because it is plain that claim 1, in issue here, covers every arrangement of pins in lines parallel to the axis of the sprocket wheel; that it is not in any way limited by its terms, or by the specification, to "relatively long and short projections or pins"; and that a chain with parallel pins, supported by the head of the sprocket wheel as shown in the patent, would infringe, whether thus "relatively long and short" or not. Let there be a decree, under rule 21 (21 C. C. A. civ., and 78 Fed. civ.), dismissing the bill, with costs.

## MacCOLL v. CROMPTON LOOM WORKS.

(Circuit Court, D. Massachusetts. April 26, 1898.)

No. 818.

## 1. PATENTS—LAPPET LOOMS.

The MacColl patent, No. 570,259, for improvements in lappet looms, construed, and *held* not infringed as to claims 1 and 6.

## 2. SAME—CONSTRUCTION OF CLAIM.

A patentee of a lappet loom, who was not the first to devise hanging a pattern chain or other pattern device on the loom-frame, is limited, so far as concerns this feature of his patent, to what is an equivalent of the precise device by which he accomplished that result.

## 3. SAME—LAPPET LOOMS.

The MacColl patent, No. 570,260, for improvements in lappet looms, construed as to claims 1 and 2, and *held* not infringed.

This was a suit in equity by James R. MacColl against the Crompton Loom Works for alleged infringement of letters patent Nos. 570,259 and 570,260, both issued October 27, 1896, to the complainant for improvements in lappet looms. Claims 1 and 6 of the former patent and claims 1 and 2 of the latter were in issue.

Maynadier & Mitchell, for complainant.

Frederick L. Emery and Fish, Richardson & Storrow, for defendant.

PUTNAM, Circuit Judge. This suit relates to claims 1 and 6 of the patent in issue in MacColl v. Knowles Loom Works, in which case we this day passed down an opinion (87 Fed. 727), and also to claims 1 and 2 of patent No. 570,260, issued October 27, 1896, for additional improvements in lappet looms. Claim 1 of the first-named patent is set out in the other opinion referred to, and it is conceded that our disposition of it in the other case requires a similar disposition here. Claim 6 of the same patent is as follows:

"In a lappet loom, the combination of a needle bar and pattern-chain mechanism, with intermediate engaging mechanism for causing the desired movement of the needles into the shed, the pattern-chain mechanism being adapted to govern the longitudinal position of the needle bar, and control the operative connection of the needle bar with the engaging mechanism, whereby the said engaging mechanism may be caused to remain inoperative at any desired point in the pattern, substantially as described."

The complainant's expert testifies that the chain embraced in this claim is the same chain covered by claim 1, and it was so maintained by the complainant at the hearing. As our disposition of the other case holds that the defendant does not use the complainant's chain, it results that claim 6 of the first-named patent follows the fate of claim 1.

The claims of patent No. 570,260, in dispute, are as follows:

"(1) In a lappet loom, the combination of the lay, and the needle bar carried by the lay, with the pattern pins or projections and the engaging rod held independently of the lay, and a sliding connection between the needle bar and the engaging rod, substantially as described. (2) In a lappet loom, the combination of the lay, and the needle bar carried by the lay, with the pattern pins or projections and the engaging rod held independently of the lay, means for holding the engaging rod against the pattern pins or projections, and a sliding connection between the needle bar and the engaging rod, substantially as described."

It is conceded that, for the purposes of this suit, these claims are substantially the same, so that we need consider at length only claim 1. The specification contains no description of the principle or purpose of this improvement, and no account of it beyond the annexed drawings and the enumeration of the several parts of the device. The proofs, however, make clear that the purpose was to mount the chain on the frame of the loom, and thus to relieve the lay from carrying its weight. This was a useful purpose, though clearly not new in the art of lappet looms. In order to make this mount, it is necessary to make use of some means for always keeping the elements of the chain, which are to have a fixed position, in proper gear, or in other proper relation, with the needle bar, which is to be constantly oscillating. To make a connection of this nature for the first time required ingenuity.

The method in which the complainant accomplished his purpose was very simple. It was by attaching to his engaging rod a double guide at a right angle to it, of sufficient length to cover the entire swing of the lay. An arm, which is connected with the needle bar, is given by the sides of the guide a motion in lines in prolongation of the pins which lie on the periphery of the chain pattern and parallel to its links, while the arm plays freely in the guide through the full throw of the lay. As pictured in the complainant's drawings, this device adapts itself to a pattern chain constructed according to complainant's peculiar method; but its principle admits of a reconstruction which would adapt it to a pattern chain in which the pins are set perpendicularly, as in the defendant's loom.

There is nothing on the face of the complainant's patent to entitle him to a construction of his claims which would cover anything more than his peculiar guide and the accompanying parts, as described in the specification. Of course, the doctrine of equivalents is to a certain extent a rule of proportions; and if the complainant had been the first to devise hanging a pattern chain, or other pattern device, on the loom frame, he might be entitled to cover by that doctrine almost every known method of bringing the parts into gear. But, as he was not the originator of this generic idea, he is limited to what is an equivalent of the precise device by which he accomplished that result. Looking at this limitation, the defendant's method seems to us radically different. While the complainant makes his connection in the simple manner we have explained, the defendant uses the complex, but well known, method of accomplishing the result through the common axis of motion of the loom frame and the lay. In its loom, the pattern pins being at a right angle to the axis of the sprocket wheel, a lever rests on the pins. From this lever a rod extends down to a horizontal bar, which is pivoted near the axis of the lay, and is connected at its other end with a bell-crank lever, the upper arm of which is attached to the needle bar. Thus, as the first lever rises or falls with the successive links of the pattern chain, the intermediate lever pulls the needle bar from one side to the other, and the pattern chain, which is on the loom frame, is thus in proper connection with the needle bar on the lay. The mechanical laws which control the actuation of the connection made by the complainant's device are

wholly different from these relating to the defendant's. In the latter, there is no guide, nor need of any, as the line of force proceeds continuously from the pattern chain to the needle bar through substantially a common axis of motion.

This case and the complainant's suit against the Knowles Loom Works have compelled much attention from the court, in which it has been very greatly assisted by the counsel on each side; but, as the questions involved are wholly of fact, nothing would be gained by further elaboration of them. On the whole, we think the complainant must rely for his market, as against the defendant, on the simplicity of his mechanical device, and not on his patent. Let there be a decree under rule 21 (21 C. C. A. civ., and 78 Fed. civ.), dismissing the bill, with costs.

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ELECTRIC CAR CO. OF AMERICA et al. v. HARTFORD & W. H. R. CO.  
et al.

(Circuit Court, D. Connecticut. May 19, 1898.)

1. PATENTS—INVENTION—CONTROLLING SWITCH FOR ELECTRIC MOTORS.

The Condict patent, No. 393,323, for a controlling switch for electric motors, the chief feature of which is that in passing from no current, or a very low one, to a higher current, the switch is so arranged as to momentarily introduce dead resistance coils into the circuit, and then cut them out again, so that in passing from one running point to another there is a reduction of energy, by means of which the motors are protected, and sparking, shocks, and other evils resulting from excess of current, prevented, covers a broad invention, and entitles the inventor to the uses thereof as developed in the subsequent development of the art.

2. SAME—INFRINGEMENT.

Claims 27, 28, 29, and 31 of this patent, which cover the broad invention above described, *held* infringed by one who, instead of placing the resistances in a certain definite series, as described in the patent, inserts the series in the place of one of the motors, and then shunts the motors. Claims 20, 21, and 22, which cover certain minor features, also *held* infringed, and other claims *held* not infringed.

This was a suit in equity by the Electric Car Company of America and the Thomson-Houston Electric Company against the Hartford & West Hartford Railroad Company and others for alleged infringement of a patent for a controlling switch, adapted to be applied to electric motors.

Betts, Betts, Sheffield & Betts, for complainants.

Chas. E. Mitchell and Wm. F. Henney, for defendants.

TOWNSEND, District Judge. The patent in suit (No. 393,323, granted to complainants as assignees of George H. Condict) is for a controlling switch, adapted to be applied to electric motors. The issues herein relate to its use in connection with electrically propelled cars on ordinary trolley lines. The particular apparatus under consideration is the cylinder shaped switch or controller located on the ends of such cars. The current of electricity supplied from the generator and delivered to the motor is necessarily of unvarying potential; that is, it must always have a capacity to supply the full

amount of current required at any time. In the practical operation of such cars, however, it is generally unnecessary to use more than a small quantity of such current. Various constructions have been devised to regulate the supply of current according to the requirements of the motor. Originally the supply was regulated by coils of wire, known as "rheostatic" or "resistance" coils. In the first or series arrangement, the total resistance was the sum of the number of coils. In the second or parallel arrangement, the total resistance was decreased in proportion to the number of parallel paths. This method, known as the "rheostatic" or "dead resistance" method, was defective, because of its waste of energy, inasmuch as the potential thus obstructed, and not expended in propelling the car, was converted into heat, and lost. A second method of controlling the current, called the "series parallel control method," consisted in substituting for the rheostatic coils the coils of the motor itself. Inasmuch as the passage of the current through these coils develops energy in the motor, they are called "live resistance coils," as distinguished from the rheostatic or dead resistance coils. By utilizing the motor coils, the objectionable element of loss of energy was almost entirely obviated. These coils were either switched in series into a single-wire circuit carrying the current from generator to motor, or into parallel or multiple wire paths or circuits. This second or series parallel method, while theoretically of great value, for various reasons, not necessary to be here considered, proved to be impracticable, and was abandoned. In the patent in suit the inventor, George H. Condict, describes his invention as follows:

"This invention is particularly useful where the supply of electricity is great,—such, for instance, as when storage batteries or electric accumulators are used on cars, and in which the motors are regulated by varying their internal resistance, which may be done by connecting their coils in different ways. In practice, I have found that switches for regulating the power and speed of electric motors under these conditions were easily burned out, not only causing great annoyance in the operation of the cars or machine, but rendering the operator liable to injury. The trouble is mainly due to the fact that at the time of changing the motor connections the resistance of the motors is more or less cut out, and in making the new connections there is a great danger from sparking, which often short-circuits the connections, with danger of completely destroying the switch and burning out the motors. To overcome these objections, I have constructed my switch so that at the time of changing the connections I insert resistances more or less great according as to the resistance of the motor connections; that is to say, if the motor resistance is great, the auxiliary resistances would be small, and vice versa. I also so arrange the switch that the resistances are all cut out of circuit as soon as the new motor connection is made. Their function is to reduce the current flowing, so that at the time of making the change in the motor connections the current is small compared with what it would be if these resistances were not inserted; and, furthermore, these resistances are gradually cut in and out, so as not to suddenly change the resistance to the current beyond a given amount. Another portion of my invention is the reversing switch, which is arranged in the same frame or case with the controlling switch, and combined with a locking device which is operated by the controlling switch, so that when current is flowing through the motors the reversing switch cannot be moved, but when the controlling switch is turned so that all, or substantially all, of the current is cut out from the motors, then the reversing switch may be moved to reverse the motors."

It appears from the foregoing statement that in changing from no current at all, or a very low current, to a higher current, the inventor so arranged the switch as to momentarily or temporarily introduce dead resistance coils into the circuit, and then cut them out again, so that in passing from one running point, where the current was at a given rate, to another running point, there should be a reduction of energy or current, by means of which the switch and motors were protected, and sparking, shocks, and all evils which would result from an excess of current, were prevented. This is the chief feature of the Condict invention. Three other features thereof will be considered later. Complainants' and defendants' devices cannot be satisfactorily described or compared without the aid of drawings or models. The exhibits introduced upon the hearing clearly show their construction and operation, and the distinctions by reason of which noninfringement is claimed. For these reasons this opinion will not attempt to state mechanical details.

Condict so combined the two opposing systems of resistance already considered as to increase or reduce the amount of current with a saving of waste, and without sparking. In the original statement of his invention, he emphasized, as its chief object, the prevention of sparking, which, in the then state of the art, was perhaps the chief objection to existing methods. Subsequent development of the art necessitated the introduction of other means to prevent sparking in connection with his original device, and modifications thereof to adapt it to greater voltage and other conditions. Neither the complainants nor the defendants now use this patented device to prevent sparking, but both use it to regulate the current. Complainants generate the spark and extinguish it by means of a magnetic blowout. Defendants generate the spark and dissipate it by an arc-spanning appliance. The defendants use complainants' idea, and the elements of its combination, with certain changes borrowed from the existing art, and other improvements covered by Von Zweigbergk's patent. In view of all the facts proved, I find and hold that the invention of Condict is a broad one, that he is entitled to the beneficial uses of his invention as developed in the development of the art, and that defendants, in thus using his combination, infringe the patent. Condict showed in his patent four ways of coupling the coils of the motors, commencing with the first position, in which the circuit is broken, and there is no current on. In the second position the current from the generator passes in series, successively, through two coils of each of two motors, and through the armature of the second motor. In changing from the first position of broken circuit to the second position, which represents the circuit of greatest resistance, and consequent least amount of current, a single dead resistance coil is automatically switched into circuit; and, as soon as the circuit is made, it is cut out again. In the next succeeding position the field coils of each motor are coupled in parallel, instead of series, circuits. In the next the motors, as a whole, are arranged with their circuits in parallel paths. As these successive changes successively cut down the motor circuit resistances, a proportionately greater amount of dead coil or rheostatic resistance is switched in, and then

cut out, in order to obviate the various objections involved in too sudden changes of current. The defendants' apparatus is constructed under patent No. 545,884, granted September 3, 1895, for a controller, to T. Von Zweigbergk. The Von Zweigbergk patent describes a development of an improvement upon the Condict patent. The defendants unquestionably use the elements of complainants' combination, but they use them in connection with a dissipator which does not infringe. Furthermore, between Condict's four positions they interpose notches showing intermediate points where the handle of the controller may be stopped when resistances only have been introduced or cut out without circuit changes. The defendants do not seriously deny patentability, but do deny infringement, and claim that while the Condict device involved invention, and was useful for the purpose for which it was devised, namely, to prevent sparking where there was a low potential, it is utterly impracticable for use in the ordinary trolley of to-day, and is obsolete, and has been discarded both by complainants and defendants. The claim that the original Condict controller is now a useless contrivance is not so far sustained by proof as to be material. The claim that complainants have attempted, by advertising circulars, to crush defendants by unearthing an obsolete patent, was satisfactorily answered at the hearing. The modified form of controllers now used by complainants were constructed by them before the defendant corporation commenced the manufacture of their controllers. Complainants always asserted that they were constructed under the Condict patent, with modifications. The advertising circulars which complainants introduced were not issued until after this suit was brought, and appear to raise merely the question as to the comparative merits of complainants' patent magnetic blowout and defendants' patent dissipator in taking care of the surplus voltage. The Von Zweigbergk patent covers the latter improvement, which comprises an arc-spanning system consisting of strips and contact fingers connected in series before every circuit change, but useful only when the current is reduced. These fingers so engage with said strips, and are so connected with the resistances and motors, that in alternating positions of the switch they may be utilized, after one connection is broken, by the introduction of a resistance, in order to regulate the speed or power of the motor, without shifting the motor connections.

This case was exhaustively argued by eminent counsel, and elaborately illustrated by models and drawings. Some months after the oral argument, further briefs were filed by counsel. Immediately after the close of the hearing, the case was thoroughly examined, and it has now been considered again in the light of the later briefs submitted. These investigations have so confirmed the impression produced at the hearing that the defendants' apparatus is a mere modification of the Condict idea, patterned in part thereon, and in part upon the later improvements introduced by the complainants, and that in defendants' use of a multiple break they have merely improved upon the Condict apparatus, that it has seemed unnecessary to discuss all the details of the case. The statement of complainants' expert Bentley, when read in connection with the exhibits, clearly

shows the difference in construction and operation between the two devices. Condict was the first inventor of a practical embodiment of this system of co-operating resistances. His invention has been modified and developed to meet the exigencies of greater voltage, and other inventions in the railway trolley art. Defendants strenuously contend that inasmuch as they use successive resistances, and do not use any resistances at running notches, they do not infringe Condict's system, which includes simultaneous resistances, and ad interim resistances to cut down the current in going from one position to the other. But Condict, in his specification, distinctly pointed out the feature of his invention which defendants have appropriated, in the following language:

"It is evident that, while only four ways of coupling up the coils of the motor are shown, a large variety of connections might be made, embodying the same general principles. It is also evident that, while the motors are coupled in a given manner, a slight movement of the switch will have the effect of cutting in or out one or more of the resistances, Y, and thereby provide an additional means of regulation where slight variations in the speed or power of the motors is required."

It cannot be said that this is an afterthought of the scrivener, in view of the admissions of defendants' experts that said language described the application to his invention of a well-known means of secondary rheostatic regulation, such as defendants now use, and that the insertion of notches to indicate such running points was merely a matter of mechanical skill. The position may fairly be stated as follows: Condict described a device calculated to obviate the evils of sparking. In his specification he emphasized the advantages of the use of such great interposed resistances as would cut the current down to a condition in which there should be no sparking whatever. But, when he comes to describe his apparatus, the description and claims cover devices capable not only of cutting down the current so as to prevent all sparking, but also of regulating it, without entirely cutting it off, by merely reducing by his combination of resistances the flow of current so as to produce variations of resistance. Thus, he states that he does not limit himself to the "particular details of construction, as they are of secondary importance," and "may be modified in various ways without departing from my invention," and, as to the resistances, that "their function is to reduce the current flowing, so that at the time of making the change in the motor connections the current is small, compared with what it would be if these resistances were not inserted." He describes the automatic insertion of these resistances in making the four principal changes already considered, showing how the amount of resistance introduced is to be proportioned to the varying changes in the motor resistances, stating the purpose of such object "to avoid throwing too strong a current," and "to soften the shock involved," and then concludes with language above quoted. Defendants use a noninfringing dissipator, but, in order to utilize it at the time when it shunts from one running point to another (that is, during the time when the circuit is broken and rearranged), they use the resistances of the complainants' patent, in order to reduce the current. By a practical

demonstration in court, counsel for complainants showed that while, in certain positions, the defendants did not use the complainants' invention in the manner contemplated by the inventor for reducing resistances to nonsparking conditions, yet that their controller was capable, in practical operation, of being so used (provided the motor-man saw fit to jump over certain intermediate positions), and in such a way that it would infringe the complainants' patent, upon defendants' own theory as to the operation of their controller. Defendants attempt to meet this contention by saying that such operation is not intended, and would cause waste of energy. I do not think, in view of the capacity of the machine in its ordinary operation for such an infringing operation, that this is a sufficient defense. But, irrespective of this consideration, it clearly appears from the patent itself that Condict contemplated such intermediate resistances as are admittedly availed of by defendants, and some of the claims are sufficiently broad to cover this operation. Claim 31, for example, is for a mechanical combination of parts, including "a switch to insert the resistance when the motor switch is being shifted"; that is, which exercises the function of vitalizing that part with reference to its operation in said combination. Inasmuch as defendants do insert resistances at the time of shifting circuits, by substantially the same means, they infringe this claim, and the extent or degree of appropriation is immaterial. The Von Zweigbergk specification repeatedly says that the current must be reduced in order to break and rearrange the circuit, and that then, and then only,—when the Condict invention has necessarily been availed of,—can the arc-spanning device be used.

The defendants further contend that, even if they should be held to use the elements of complainants' combination, yet they do not infringe, because they use them in connection with another element, namely, the noninfringing patented dissipator, in such a way that the co-operative law of defendants' machine differs from that of complainants. This contention is not proved. The broad principle of mixed controllers, as applied to electric motors, was invented, or at least practically developed, by Condict. Whether he be limited, as claimed by defendants, to ad interim resistances (that is, resistances interposed between running points), or whether he be permitted to avail himself of the broad principle of combined resistance and series parallel controllers, the defendants use the same resistance in the same way; the difference being that, while Condict described such resistances as being in a certain definite series, defendants have inserted the series in the place of one of his motors, and shunted the motors. Defendants do not cut the resistance out, nor do they arrange the motors and coils in exactly the same relative positions; but they do use and must use the combination upon the same theory, and for the same purposes, in order to avail themselves of the independent, noninfringing, patented arc-spanning dissipator.

Claims 23 and 30 cover the main invention, with an independent switch to cut one of the circuits. This switch is not co-operatively combined with the patented controller, but is an entirely independent device added to it. The defendants do not use the cut-out switch de-

scribed by Condict. Claim 24 covers a reversing switch; and claims 1, 2, 7, and 10, a locking device therefor,—both in combination with the main controller. Claim 10 (the broadest of these claims) is as follows:

"(10) The combination of a movable controlling switch for varying the power of the motors, having a cam surface, a reversing switch having holes or openings, and a bolt actuated by the cam surface of the controlling switch, and adapted to be projected through the holes or openings in the reversing switch to lock it against movement when said controlling switch is moved."

The defendants do not use this Condict combination, but use a different combination of the same elements, or their equivalents. In view of the prior art shown in the Field, Curtis & Crocker and Reckenzaun patents, I think the complainants are limited to the details of construction stated in the specification of the patent in suit, as to these minor features of the main invention, and that defendants do not infringe said claims, as thus limited.

Claims 27, 28, 29, and 31 are as follows:

"(27) The combination of an electric motor, a source of electric power, a motor circuit, a motor switch to vary the power of the motor, two or more resistances, a resistance switch to cut said resistances gradually into or out of the motor circuit, and a connection between the said switches, whereby a movement of the motor switch will first cut in one or more of the resistances, and, after changing the power of the motor, automatically cut the resistances out of circuit again. (28) The combination of a motor having separate coils, a motor circuit, a motor switch for coupling up said coils so as to vary the internal resistance of the motor, a resistance, and a resistance switch to cut in and out the said resistance, upon shifting the motor switch, to vary the coupling of the motor coils. (29) The combination of a motor having separate coils, a motor circuit, a motor switch for coupling up said coils so as to vary the internal resistance of the motor, a resistance, a resistance switch to cut in and out the said resistance upon shifting the motor switch to vary the coupling of the motor coils, and means controlled by the motor switch for operating the resistance switch." "(31) The combination of two motors, a source of electric power, a motor circuit, a switch for coupling the coils of the motors in series or multiple to vary their internal resistance, a resistance, a switch to insert the resistance when the motor switch is being shifted, and a connection between said switches to operate both simultaneously."

These broad claims cover the main combination of the patent, and are infringed by defendants.

Claims 20, 21, and 22 are as follows:

"(20) The combination of a source of electric energy, the coils of one or more electric motors, a switch for connecting said coils in different ways to vary the motor resistance, one or more resistances, and a switch to put said resistances into or out of the motor circuit, without changing the motor connections, to vary the power of the current flowing through the motors. (21) The combination of a source of electric energy, the coils of one or more electric motors, a switch for connecting said coils in different ways to vary the motor resistance, and one or more resistances; said switch being adapted to put said resistances in succession into or out of the motor circuit, without changing the motor connections, to vary the power of the current flowing through the motors. (22) The combination of a source of electric supply, a switch for coupling up the coils of a motor or motors in a predetermined order, a series of resistances, a contact block on said switch in circuit with the motor and resistances, and having contact edges for cutting in or out the resistances one at a time, contact brushes from said resistances, and connected to the source of electric supply, and resting on the contact block,

and adapted to be brought into or out of contact with it in succession, whereby the resistances may be cut into or out of the motor circuit without varying the connection of the motor coils."

The minor feature of the invention covered by these claims has been unquestionably appropriated by defendants. It is the feature of temporary use of supplementary resistances, not necessarily during circuit changes, already fully discussed. Claims 15 and 16 are not infringed. Let a decree be entered for an injunction and an accounting as to claims 20, 21, 22, 27, 28, 29, and 31.

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EARLE et al. v. WANAMAKER et al.

(Circuit Court, E. D. Pennsylvania. May 23, 1898.)

1. PATENTS—PRESUMPTION FROM ISSUANCE.

While ordinarily the presumption of validity from the issuance of a patent is entitled to some weight, yet very little, if any, effect should be given to it where the application was repeatedly rejected as exhibiting nothing new, and was finally obtained apparently by mere persistence of the applicant, and without any reason given for a change of views by the patent office.

2. SAME—IMPROVEMENTS IN CUFFS.

The Earle patent, No. 533,408, for improvements in cuffs, consisting in overlapping the band by the body portion along its connecting edge, whereby the band is alleged to stiffen the body portion, and hold the ends in firm and even relation to each other, is void for want of novelty and invention.

This was a suit in equity for alleged infringement of a patent for an improvement in cuffs.

Dickerson & Brown, for complainants.

Strawbridge & Taylor, for respondents.

BUTLER, District Judge. The suit is for infringement of letters patent No. 533,408, for improvement in cuffs, dated January 29, 1895. The invention and claim are stated as follows:

My invention relates to cuffs, and has for its object to improve the construction thereof, and especially that class of cuffs which are adapted to be used in connection with link buttons, and it consists in a cuff having the features of construction hereinafter set forth.

I have ascertained by experiment that the ends of the cuff (especially where they are joined together by link buttons) will lose a portion of the support of the band, when the contact between the connecting edges of the band and body portion of the cuff is thus broken, and to remedy this fault I overlap the band by the body portion, along its connecting edge where such contact is broken. In this way the overlapped edges abutting against the band prevent the ends from bending inward, while the band acts to stiffen that portion of the body portion and to hold the ends in firm, even relation to each other. It is also evident in all cases that the width of the band will not encroach upon the width of the body portion at its ends. Therefore without narrowing the body portion at its ends, a wide band may be used, which is a very desirable feature, as it aids in holding firmly the cuff on the wrist-band. The cuff will also present a more attractive appearance than when there is a space between the band and the body portion of the cuff, as must occur where the body portion does not overlap the band.

In the accompanying drawings, Figure 1 is a front view of the cuff em-

bodying my invention; Figs. 2 and 3, side and bottom views respectively of the same, and Fig. 4 an inside view of the same in a reversible cuff.

Similar letters of reference designate corresponding parts in all the figures.

A designates the bottom portion or band of the cuff; B, the body portion or remaining portion of the cuff; CC, points on the body portion of the cuff where its attachment to the band ceases; D, that portion of the body portion of the cuff overlapping but not connected to the band.

What I claim as my invention, and desire to secure by letters patent is—

A cuff comprising a body portion and a band portion, one edge of the body portion overlapping the band portion throughout the length of the body portion, and the band portion projecting beyond the body portion and being secured thereto except for a short distance at each end, substantially as described.

In testimony whereof I have signed my name to this specification in the presence of two subscribing witnesses.

Cuffs and collars are nearly related as articles of merchandise, are of the same character, constitute a single class of manufacture, and should therefore be treated as belonging to the same art.

At the date of the patent, cuffs and collars of nearly every conceivable shape and description were in common use.

After a careful examination of the subject, and comparison of the complainants' cuffs with those in prior use, I am satisfied that the claim of their patent does not embrace anything substantially new, and that their cuffs do not differ materially, even in form from those previously in use.

I will not discuss the subject, but will refer to the testimony of the respondents' expert, Mr. Brown, for a comparison of the cuffs in question with those formerly made and worn. I would but waste time by restating or enlarging on what he has said. It is urged that these cuffs have supplanted all others of their kind; that they have had great success in the market; while the others have not. There is however, no evidence of such supplanting. There is evidence that these cuffs have been sold extensively, but no evidence that the others have not. If they have not, the duty of showing it rested on the complainants; certainly as much as it did upon the respondents to show the contrary. The success, and extent of sales, of such articles depends however, so much on the efforts and enterprise of those interested in and managing the business, that the measure of success and extent of sales is not always a reliable test of merit.

Some weight should ordinarily be given to the action of the patent office in granting letters. In this instance however, very little if any should be accorded.

The application was repeatedly rejected on the ground that it exhibited nothing new; and the patent was finally obtained, apparently, through mere persistence of the applicant, and his attorneys.

The following letters taken from the file-wrapper, show the judgment of the office after repeated examinations:

The ordinary link cuff has its button-hole tabs, or in other words, the tabs by means of which it is secured to the shirt of the wearer, separated from the body of the cuff by means of slits, angled or otherwise. In view of this state of the art there is no invention disclosed in this application, especially in view of the fact that it is common to secure the body portion of a collar to its band by overlapping and sewing, see patent to Wilson, 8, 169, Reiss. Apr. 9, 1878, collars & cuffs.

The claims are therefore rejected.

Chapman.

The claims of this application have been further considered in connection with the communication of the 3rd instant.

The claims, however, are a second time rejected upon the references of record and for the reasons given in last office letter. Chapman.

Replying to applicant's communication of the 17th instant it is observed that the link cuff referred to in the previous office letters as anticipating applicant's invention comprises a body portion and a band portion secured together, the band portion having projecting button-hole tabs to engage a button on the wrist-band. The body portion and the band portion are separated at their juncture, the body portion being cut away and for a short distance along the upper edge of the band being free therefrom, or in other words, not stitched thereto, whereby there is a space for the link button at the adjoining edges of the body portion. This is the ordinary link cuff of commerce and such cuffs have been worn by the assistant examiner in charge of this application for the past four years.

P. B. Pierce, Examiner.

Chapman, Asst. Exr.

Applicant's communication of the 3rd instant has been incorporated. It is observed that the said communication is directed to the cuff shown. The claims, however, which have been a second time rejected, are broad in terms and are fully anticipated in the state of the art of record.

In this connection applicant's attention is invited to the following patents:

Norton, 253,750, Feb. 14, 1882, collars and cuffs.

Averill, 186,517, Jan. 23, 1877, collars and cuffs.

These patents show a body portion and a band portion, the same being overlapped and the band portion having projecting tabs. These references are merely cumulative to the state of the art already of record. Chapman.

No reason is assigned for the subsequent change of judgment. The applicants urged very strenuously, that the ends of their cuffs are supported by the band, the cuff stiffened and its ends held in relation to each other, more effectually, than in any cuffs previously made; and the statement was very earnestly urged upon me. I do not understand why the office should have accorded it more weight at the end of the struggle than at the beginning. It does not appear to me to be entitled to any weight—First because it does not seem to be (materially) true, and second because if true the trifling structural change necessary to secure the alleged stiffening and support, referred to, would not involve the exercise of inventive genius, of even the lowest order.

The bill must be dismissed with costs, and a decree may be prepared accordingly.

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TRUMAN v. HOLMES et al.

(Circuit Court of Appeals, Ninth Circuit. February 21, 1898.)

No. 376.

**PATENTS—EFFECT OF WITHDRAWAL OF ORIGINAL SPECIFICATIONS.**

In Putnam's patent, No. 232,207, for breaking-carts, the effect of the withdrawal of the original specifications after the application was rejected is to limit his patent to the specific invention described in his amended specifications, to wit, the construction of carts where the central portion of the straps extends "beneath the axle." 80 Fed. 109, affirmed.

Appeal from the Circuit Court of the United States for the Northern District of California.

John L. Boone, for appellant.

M. A. Dorn, D. S. Dorn, and Chas. E. Nougés, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is a suit in equity for the infringement of letters patent No. 232,207, granted to De Witt C. Putnam on September 14, 1880, for breaking-carts. Appellant claims that the right, title, and interest in said invention and letters patent have been assigned to him in the territory named, and that by virtue thereof he is entitled to sue for and recover all damages and claims for past infringements. He prays for an injunction, and for such other and further relief as in equity he may be entitled to. It appears from the record that on July 16, 1886, Putnam sold and assigned to Truman, Isham, and Hooker all his right, title, and interest in and to the patent for the territory "known and described as 'San Francisco County, State of California,' and no other place or places"; that on February 28, 1893, Truman, Isham, and Hooker assigned said patent to Truman, Hooker & Co., including "all past damages for infringements, royalties, or profits"; that on March 30, 1893, Truman, Hooker & Co., as plaintiffs, commenced an action at law in the circuit court of the United States for the Northern district of California against Henry E. Holmes and M. P. Holmes, doing business under the firm name of H. E. Holmes & Co. (appellees herein), to recover the sum of \$20,000, as damages for alleged infringements of the patent; that the trial of that suit resulted in a verdict in favor of the plaintiffs therein in the sum of \$150 and costs; that a writ of error was thereafter duly taken from said judgment to the circuit court of appeals, and was there affirmed (Holmes v. Truman, 14 C. C. A. 517, 67 Fed. 542); that on May 28, 1895, Truman, Hooker & Co. assigned said patent to I. J. Truman (appellant herein), together with "all claims and demands against past infringements." This suit was commenced on March 10, 1896. The circuit court (Judge McKenna presiding) dismissed the bill upon the ground that the construction of the patent confines it to a cart with straps beneath the axle, and that the respondents' carts, not being of that construction, do not infringe. But he afterwards set the decree aside "because, in addition to the points decided, there are other points in the brief, which, by inadvertence, did not receive the deliberate consideration and judgment of the court." The order of submission was therefore vacated, and the case came up regularly before Judge Morrow, and a decree was entered dismissing the bill. This appeal is from the last decree.

It is argued by appellees that the order of the circuit court dismissing the bill should be sustained upon various grounds, and a dozen or more reasons are given, each of which is claimed to be a complete defense to this suit. It is insisted, among other things, that the only object of bringing this suit is for the purpose of obtaining an accounting for the past infringements which were involved in the case at law, previously heard, determined, and settled. If this be true, it necessarily follows that this suit was properly dismissed. Section 723 of the Revised Statutes of the United States provides that

"suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law." A court of equity takes cognizance of a suit for the infringement of a patent when the complainant is entitled to relief by injunction; but, in order to sustain a suit of this character, it must affirmatively appear that some ground of equitable jurisdiction exists, or that the complainant has no plain, speedy, or adequate remedy at law. Equity will not entertain a suit which simply involves the ascertainment of damages and profits for past infringements. *Root v. Railway Co.*, 105 U. S. 189, 215; *Hayward v. Andrews*, 106 U. S. 672, 1 Sup. Ct. 544; *Clark v. Wooster*, 119 U. S. 325, 7 Sup. Ct. 217; 3 Rob. Pat. § 1086; Walk. Pat. § 572. Appellant, however, contends that the evidence shows that appellees had been engaged in the manufacture of carts of the same general construction since the judgment was rendered in the action at law, as before, and that, this court in that case having held that they were guilty of infringing appellant's patent, the decree dismissing the bill in this case is erroneous. In *Holmes v. Truman*, 14 C. C. A. 517, 67 Fed. 542, the direct question here involved was not presented. In that case the defendants admitted that they constructed a cart differing from that of the plaintiffs only in the fact that the forward ends of the straps, instead of being attached directly to the shafts, are attached to a crosspiece which connects the two shafts in front of the seat, and that, instead of being continuous straps, they were formed of two pieces fastened together by nut and screw at the angle underneath and behind the axle. It was upon these facts that the contention was there made that the plaintiffs must be held to the specific construction described in their letters patent, and it was in reply to this contention that the court said:

"We do not so construe the patent. The crossbar between the shafts is substantially a part of the shafts. It makes no difference, so far as the function of the straps is concerned, whether they are attached to the shafts, or attached to a crossbar which connects the shafts; and it makes no difference whether the straps are one continuous piece, or composed of two. It is true that the plaintiffs' patent does not cover any arrangement by which the seat and the footboard may be made to move in unison. Those results were obtained in the butcher's cart. But it is a fair interpretation of the plaintiffs' patent to say that they are protected in the use of a cart in which the shafts are placed directly upon the springs, and the footboard is sustained beneath the axle by straps; and it is unimportant whether the straps are attached to any particular place along the shafts, or to a crossbar between the shafts, or whether they are made of one piece, or of two or three pieces."

The only testimony cited by the appellant in support of his contention that the facts in this case are substantially the same is that of M. P. Holmes, in reply to certain questions propounded to him by appellants' counsel, as follows:

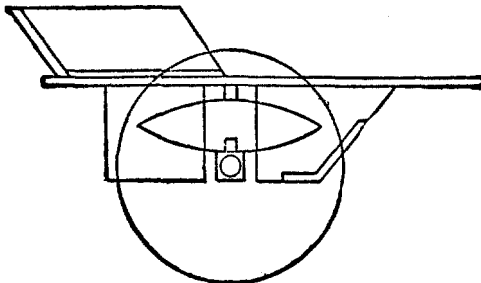
"Q. Have you since 1894 manufactured any carts having straps that supported the footboard? A. Yes, sir; a strap that supports the footboard. It must have something to support it. Q. What was the front end of such straps attached to? A. To a crossbar that is connected with the shaft. Q. What was the rear end of the strap attached to? A. Some of them came back here to the rear. The footboard came up in front of the axle, and they were attached to the seat. Those carts that had a rack behind were made in that way. They did not extend back of the seat or axle at all. Others

we have made for the purpose of putting a footboard on them. We have put two rods from the shaft down through a short piece of iron that holds that footboard on that rack. We made them in that way."

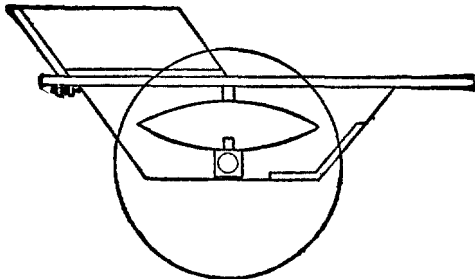
When this witness answered, with reference to the straps, that "some of them came back here to the rear," it is evident that he was illustrating his evidence by pointing out, upon a model, drawing, or exhibit, some point in front of the axle, because in the same answer he says, "They did not extend back of the seat or axle at all." This is made clear by a reference to his entire testimony relating to the kind of carts manufactured by him after the decision of this court in the action at law, and is plainly shown by his answer to a question asked him upon cross-examination, as follows:

"Q. Have you ever manufactured, sold, or used any carts in which the braces or straps have their ends secured to shafts before and behind the axle, while the central portion extended beneath the axle, and parallel with the shaft, and is adapted to support the transverse footboard? A. No, sir."

In *Truman v. Implement Co.*, 87 Fed. 1006, which is in all essential particulars similar to this, and is treated in the briefs of counsel as a "companion case," because it involves substantially the same principles, appellant's counsel has made drawings which clearly illustrate the difference in the construction of the carts, after the former suit, from the carts which were held to be an infringement of the appellant's patent in the former suit. These drawings are as follows:



**Cart Made and Sold by Respondent.**



**Cart Adjudged by This Court, in *Truman et al. v. Holmes et al.*, to be an Infringement.**

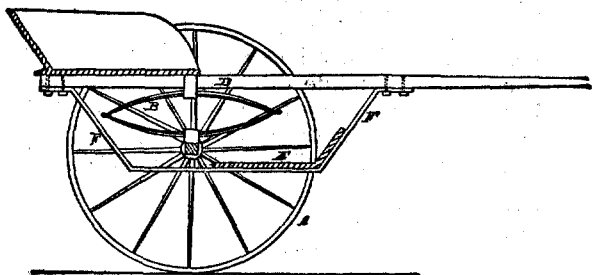
The case, upon its merits, depends upon the question whether a cart constructed without the straps passing beneath the axle consti-

tutes an infringement of the patent. This must be answered by a construction of the language used in the claim of the patent. The original claim of Putnam, as first presented to the patent office, reads as follows:

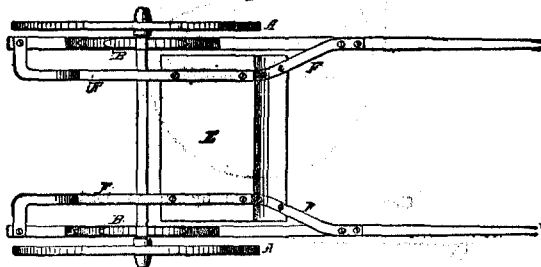
"The improvement in breaking-carts, consisting in suspending the footboard, E, by means of straps or hangers, F, from the shafts, seat, or that portion of the vehicle connected with the springs alone, whereby the seat and footboard having a common vertical movement, substantially as and for the purpose herein described."

This claim was rejected upon the ground that "the patent of Jesse Winecoff, Oct. 17, 1871, No. 119,956 (sulkies), substantially answers the claim." The applicant thereupon amended "by erasing the entire specification, and substituting" a new one. Figs. 1 and 2, referred to in the amended specification, are as follows:

*Fig. 1.*



*Fig. 2.*



The amended specifications and claim read as follows:

"My invention relates to certain improvements in that class of vehicles known as 'breaking-carts,' in which young colts are broken to harness. Carts of this description are usually provided with very long shafts, and the seat is placed on springs immediately over the axle, or at such a distance back that the driver is not in danger of being kicked by a fractious animal. In this class of vehicles the footboard is usually secured to the axle, while the seat is on springs; and it is therefore uncomfortable to ride upon, since, while the body of the occupant may move up and down, his feet must remain stationary. My improvements consist in so attaching the footboard to the vehicle that it shall move in unison with the seat; the same spring which supports the seat serving as a spring for the footboard, as is more fully described in the accompanying drawings, in which Fig. 1 is a longitudinal section of my device; Fig. 2 is a bottom view. Breaking-carts usually have two wheels, A, only, and the springs, B, are secured both to the axle, C, and

the shafts, D; said shafts being secured on the springs in the manner shown. In order to attach the footboard, E, to the vehicle, I place metallic straps or bands, F, in a proper position to hold the footboard; connecting these straps with the shafts and seat, and not with the axle. I have shown the straps connected with the shafts at the rear ends of, and forward of, the whiffletree bar. It will be seen, by this construction, that the rear ends of the shafts and the seat are supported upon the springs, B, while the straps, F, pass beneath the axle, and are bent up so that their rear and their front ends are secured to the shafts at points behind and in front of the axle, while the central portion does not touch it at all. The footboard, E, with its turned-up front portion, is then secured upon the bottom and front portions of the straps, F. Being thus entirely independent of any direct connection with the axle, it will have the same movement imparted to it by the action of the spring that the shafts have, and it will have none of the unpleasant jar that a stationary footboard, or one supported from the axle, will have, while the arrangement of the straps parallel with the shafts facilitates the attachment of the transverse footboard, and makes a strong construction. Having thus described my invention, what I claim as new, and desire to secure by letters patent, is the braces or straps, F, having their ends secured to the shafts before and behind the axle, while the central portion extends beneath the axle, and parallel with the shafts, and is adapted to support the transverse footboard, E, substantially as and for the purpose herein described."

We are of opinion that the effect of the withdrawal of his original specifications and claim was to limit his patent to the specific invention as described in the claim of his amended specifications, to wit, to the construction of carts where the central portion of the straps "extends beneath the axle." The contention of the appellant that he should not be restricted, in the construction of the carts, to braces or straps which extend beneath the axle, as described in his amended claim, is fully met and answered by the decisions of the supreme court of the United States. In *Roemer v. Peddie*, 132 U. S. 313, 317, 10 Sup. Ct. 98, the court said:

"This court has often held that when a patentee, on the rejection of his application, inserts in his specification, in consequence, limitations and restrictions for the purpose of obtaining his patent, he cannot, after he has obtained it, claim that it shall be construed as it would have been construed if such limitations and restrictions were not contained in it. *Leggett v. Avery*, 101 U. S. 256; *Vulcanite Co. v. Davis*, 102 U. S. 222, 228; *Fay v. Cordesman*, 109 U. S. 408, 3 Sup. Ct. 236; *Mahn v. Harwood*, 112 U. S. 354, 359, 5 Sup. Ct. 174, and 6 Sup. Ct. 451; *Union Metallic Cartridge Co. v. United States Cartridge Co.*, 112 U. S. 624, 644, 5 Sup. Ct. 475; *Sargent v. Lock Co.*, 114 U. S. 63, 5 Sup. Ct. 1021; *Shepard v. Carrigan*, 116 U. S. 593, 597, 6 Sup. Ct. 493; *White v. Dunbar*, 119 U. S. 47, 7 Sup. Ct. 72; *Sutter v. Robinson*, 119 U. S. 530, 7 Sup. Ct. 376; *Bragg v. Fitch*, 121 U. S. 478, 7 Sup. Ct. 978; *Snow v. Railway Co.*, 121 U. S. 617, 7 Sup. Ct. 1343; *Crawford v. Heysinger*, 123 U. S. 589, 606, 607, 8 Sup. Ct. 399."

In *Morgan Envelope Co. v. Albany Perforated Wrapping-Paper Co.*, 152 U. S. 425, 429, 14 Sup. Ct. 629, the court said:

"It is insisted in this connection, however, that, under the words 'substantially as described,' the patentee is entitled to claim a band of oval or oblong shape, and that, looking at his specification and drawing in connection with the claim, it is obvious that the latter should be so limited. But the patentee having once presented his claim in that form, and the patent office having rejected it, and he having acquiesced in such rejection, he is, under the repeated decisions of this court, now estopped to claim the benefit of his rejected claim, or such a construction of his present claim as would be equivalent thereto. *Leggett v. Avery*, 101 U. S. 256; *Shepard v. Carrigan*, 116 U. S. 593, 6 Sup. Ct. 493; *Crawford v. Heysinger*, 123 U. S. 589, 606, 8 Sup. Ct.

399; *Union Metallic Cartridge Co. v. United States Cartridge Co.*, 112 U. S. 624, 5 Sup. Ct. 475."

The views herein expressed are conclusive of this case, and render it unnecessary to examine any of the other questions elaborately argued by counsel. The judgment of the circuit court is affirmed, with costs.

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WESLEY MFG. CO. v. BENSON.

(Circuit Court, W. D. Pennsylvania. February 25, 1898.)

PATENTS—INFRINGEMENT—CHECK PROTECTORS.

The Ongley patent, No. 584,518, for improvements in check protectors, *held* infringed, as to the fourth claim, by a device consisting of the same combination of parts, and accomplishing the same result by the same method of operation, notwithstanding certain slight and colorable alterations.

This was a suit in equity by the Wesley Manufacturing Company against John B. Benson, trading as the Benson Manufacturing & Novelty Company, for alleged infringement of a patent. The cause was heard on motion for a preliminary injunction.

Bakewell & Bakewell, for complainant.

James C. Boyce, for defendant.

ACHESON, Circuit Judge. The plaintiff, to whom, as assignee of C. E. Ongley, letters patent No. 584,518, dated June 15, 1897, for improvements in check protectors, were granted, seeks a preliminary injunction to restrain infringement by the defendant. It is alleged that the defendant has been selling a check protector which infringed the second, fourth, and fifth claims of the patent. For the present purpose it is sufficient to quote a single one of these claims, namely, the fourth claim, which is perhaps the broadest of all. That claim reads thus:

"(4) In a check protector, the combination with a rotary head, carrying perforating needles, and capable of vertical movement, of a feeding device consisting of a ratchet wheel and a pivoted arm capable of lateral and vertical motion to engage and disengage the ratchet teeth, and a spring for drawing the arm into engagement with the ratchet teeth, said arm being actuated directly by the rotary head to rotate the feed wheel, substantially as set forth."

Before the filing of the present bill the circuit court of the United States for the Eastern district of New York, in a suit brought upon this patent by the Wesley Manufacturing Company (the present plaintiff) against William J. Coulson, granted a preliminary injunction against the latter to restrain infringement of the patent. The check protectors here complained of as sold by the defendant were manufactured by William J. Coulson, and since he was put under injunction were furnished by him to the defendant, who has acted throughout with knowledge of the injunction in the Second circuit. In the form in which these check protectors were originally made, they undoubtedly infringed the fourth claim of the patent; and this

is not denied. It appears, however, that Coulson has since made a slight alteration in the feeding device; and this alteration, it is claimed, takes his protector out of the plaintiff's patent, and avoids infringement. The change so made is this: Coulson has chipped the rear end of the lever or arm, through which a pivotal connection with the underside of the base of the protector was effected, and has pivotally connected the lever or arm to the lower end of the stem of the rotary head. This alteration, however, leaves the lever or arm still capable of sufficient lateral play to engage and disengage the ratchet teeth. The lateral motion of which the arm is capable in its changed position is enough to secure the desired end, even if it be less free than in the Ongley check protector. We find, then, in the check protector sold by the defendant, the precise combination of parts specified in, and covered by, the fourth claim of the patent. Moreover, in method of operation and in result Coulson's changed device is identical with the device described in the specification of the patent, and illustrated by the annexed drawings. In principle, there is no difference whatever. The alteration which Coulson has made is formal and immaterial. He has simply changed the point of pivotal connection of the lever or arm from the underside of the base proper to the lower end of the stem, without any change whatever either in function, mode of action, or result. The change is colorable, and ineffectual to evade the patent. Coulson's apparatus, in its altered state, is as clearly within the scope of the fourth claim of the patent as it was before the change was made. On behalf of the defendant, indeed, much is said about the statement, "the lever being operated vertically by gravity." But this statement is found in the first claim of the patent, and not elsewhere. The specification itself describes the vertical operation to move the lever or arm downward as effected by pressure applied to the knob of the stem. If the action of gravity is present as an aid to downward movement in the Ongley apparatus, it is also present in Coulson's changed device. Vertical drop by gravity, however, is not an essential or material feature of the invention, and certainly it does not at all enter into the fourth claim of the patent. I have examined with care the prior patents recited in the defendant's affidavit, and relied on by him to defeat this motion. I do not find the Ongley invention in any of them. It was original with Ongley to move the ratchet wheel by a single arm or lever actuated directly by the rotary head; the arm or lever having both a vertical and lateral motion. That the fourth claim of the patent is valid, and that it is infringed by the check protector which the defendant has been selling, seem to me to be entirely clear. A preliminary injunction will therefore be granted.

## In re CHICAGO SUGAR-REFINING CO.

(Circuit Court of Appeals, Seventh Circuit. June 3, 1898.)

No. 521, Original.

**APPEALS IN PATENT CASES—REVERSAL—PRELIMINARY INJUNCTION.**

When an appellate court declares a patent valid and infringed, reverses the decree below, and remands the cause for further proceedings not inconsistent with its opinion, it does not follow as a matter of course that an injunction pendente shall issue; but, in the absence of any directions in regard thereto in the opinion or mandate, the matter rests in the discretion of the trial judge.

C. K. Offield, for petitioner.

Before WOODS and SHOWALTER, Circuit Judges, and BAKER, District Judge.

WOODS, Circuit Judge. This is a petition for a writ of mandamus to compel the modification of a decree entered on the 10th of May, 1898, in the case of the Chicago Sugar-Refining Co. v. Charles Pope Glucose Co., pending in the circuit court of the United States for the Northern district of Illinois, on the ground that as entered the decree is inconsistent with the mandate of this court sent down upon reversing the decree of the circuit court on the appeal reported in Chicago Sugar-Refining Co. v. Charles Pope Glucose Co., 28 C. C. A. 594, 84 Fed. 977. The questions involved in the appeal were of the validity and infringement of letters patent for inventions. The circuit court, having found the patents invalid, dismissed the bill. This court, having reached the conclusion that one of the patents was valid and had been infringed, ordered that the decree below be "reversed, and the cause remanded for further proceedings not inconsistent with this opinion." The petition now presented, without setting out the terms of the mandate or alleging the substance thereof, shows that the opinion of this court was filed on the 5th day of February, 1898; that the mandate was issued on the ensuing May 5th, and filed on the same day in the circuit court, and that at the same time the complainant's counsel presented to the court a form of decree, a copy of which is set out, conforming, it is alleged, to the opinion and mandate of this court, ordering, among other things, that the defendants, their agents, officers, and servants, "do absolutely desist and refrain from directly or indirectly employing the processes or practicing the inventions of said letters patent," and that a writ of injunction issue accordingly, and referring the case to a master to take an accounting of gains and profits; that to the decree so presented the court, the Honorable Peter S. Grosscup, who had rendered the original decree, presiding, added the following clause: "The injunctive part of this decree is stayed for thirty days upon the defendant's giving bond by May 12, 1898, in the sum of twenty thousand dollars, to be approved by the clerk of this court, to respond for all damages and profits suffered by reason of such infringement;" and that the bond required was given and the injunction stayed. The petitioner further alleges the belief that it was

"without the power, volition, or jurisdiction of the circuit judge, under the opinion and mandate as filed in this case, to change, add to, or amend the decree," as was done; that the amendment should be stricken out; "that all the foregoing matters, conditions, and things set forth in the petition are fully shown, identified, and described in a certified copy of the case and proceedings filed herein," to which reference is made. The prayer is for "a writ of mandamus commanding the judges, and each of them, of the circuit court of the United States for the Northern district of Illinois, to set aside and strike from the decree the amendment and addition thereto as herein complained of, entered upon the 10th day of May, 1898." No copy of the record of the case in the circuit court in fact accompanies the petition, and the alleged reference is supposed to be to a transcript of that record filed with the clerk of this court before this petition was filed, showing an appeal of the petitioner from the decree of May 10th, which it is now sought to correct by the writ of mandamus. That appeal is still pending. and the objection is made by counsel for the appellees that, pending that appeal, which, it is urged, has removed the record of the case from the circuit court to this court, a petition for the writ of mandamus cannot be entertained, and that, if the petitioner is entitled to relief, it must be obtained by means of the appeal.

Disregarding this and other technical objections to the petition, we are of opinion that the rule to show cause should not issue. There is nothing in the opinion or mandate of this court which in terms required the court below to grant an injunction, and we cannot agree with the proposition of counsel that once this court had declared the validity and infringement of the letters patent, and remanded the case for further proceedings not inconsistent with its opinion, the right to an injunction followed as a matter of course, and that the circuit court was without discretion in the premises. No ruling to that effect has been cited, and, instead of there being no authority to the contrary, as asserted by counsel for the petitioner, there are many cases at circuit in which such discretion has been exercised. See the following collected upon a few minutes' search: *Brake Co. v. Carpenter*, 32 Fed. 545; *Mill Co. v. Coombs*, 39 Fed. 803; *Whitcomb v. Coal Co.*, 47 Fed. 315; *Campbell Printing-Press & Mfg. Co. v. Manhattan Ry. Co.*, Id. 663, 49 Fed. 930; *Carter & Co. v. Wollschlaeger*, 53 Fed. 573; *Brush Electric Co. v. Accumulator Co.*, Id. 804; *Ney Mfg. Co. v. Superior Drill Co.*, 56 Fed. 152; *Palmer v. Mills*, 57 Fed. 221; *Norton v. Can Co.*, Id. 929; *American Bell Tel. Co. v. Western Tel. Const. Co.*, 58 Fed. 410.

The general rule recognized in the text-books is that it is a matter of discretion whether an injunction pendente lite shall issue. "So far as preliminary injunctions are concerned," said Judge Brown, in *Mill Co. v. Coombs*, *supra*, "it is entirely well settled that, while the patent may be adjudged valid and the defendant an infringer, the award of an injunction is purely a matter of discretion, and courts are constantly in the habit of withholding it upon such terms, as the giving of a bond and the like, as may seem just and equitable, having regard to the comparative injury that will result to the par-

ties by granting or withholding it." The question in that case was "whether, after an adjudication adverse to the defendant upon the merits of a patent case, [the court] ought to stay the issue of an injunction until the final decree"; and on a full discussion of the question, upon principle and upon authority, the injunction was granted, but with a stay of 20 days to enable the defendant to make necessary changes in the machinery of his mill to avoid infringement. In *Campbell Printing-Press & Mfg. Co. v. Manhattan Ry. Co.*, supra, a decree "for account and injunction" was ordered, but with the qualification that the terms of the injunction be so settled as to provide from how many cars and locomotives the infringing couplings should be removed each week. Whether in this case, or in any case, there has been an abuse of discretion, is not a question which can be determined upon an application for a writ of mandamus.

The rule to show cause is denied, and the petition dismissed, at the costs of the petitioner.

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### THE LAMINGTON.

#### PETERSEN v. THE LAMINGTON.

(District Court, E. D. New York. June 6, 1898.)

#### 1. MARITIME LAW — TORT COMMITTED ON FOREIGN VESSEL—WHAT LAW GOVERNS.

When a person employed as a seaman on a British vessel is injured on the high seas by the alleged negligence of the owner to provide ropes for the gear of the ship, or, if such ropes be provided, by the negligence of the master to replace faulty ropes with proper ropes thus supplied, and such seaman files a libel in rem in a district court of the United States to recover damages for such injury, the liability is measured by the British law. For such cause of action the British law does not confer the right to an action in rem.

#### 2. SAME—JURISDICTION.

For a tort committed within the exclusive jurisdiction of a foreign country an action cannot be maintained in this country, unless the action would be maintainable by the laws of both countries.

This was a libel in rem, by John Petersen against the British steamship *Lamington*, George W. Duff, claimant, to recover damages for personal injuries.

Cowen, Wing, Putnam & Burlingham, for libellant.

Convers & Kirlin, for claimant.

THOMAS, District Judge. In January, 1893, John Petersen, the libellant, a Norwegian, shipped as an able seaman on board the British ship *Lamington*, at Buenos Ayres. On the 7th day of March, 1893, the vessel was off Cape Hatteras, and the libellant, while attempting to furl sail, fell to the deck, and received serious injuries. The *Lamington* was a two-masted schooner-rigged vessel, with a cross-foreyard. The fore-trysail was a fore and aft sail, rigged on standing spars. While the crew were brailing in the fore-trysail, one or more of the brails broke. Thereupon the libellant went up the

rigging to the foot rope, extending to the mast, and upon reaching the mast attempted to gather the sail in, and pass the gasket around it, when, as he claims, the gasket and foot rope parted, and he fell to the deck. The libelant testified that the brails, gasket, and foot rope were old and shriveled, and that he had been to the peak of the ship where the supplies were kept, but that no good or new ropes were there. The officers of the vessel, however, testified that there was an abundance of sufficient rope to replace any that became too much impaired. The captain and the second mate testified that after the libelant's fall they examined the ropes, and that none were gone, but that all were in good condition. This testimony as to this fact, however, must be rejected, as the log contains an entry tending to show that the rope and gear of the fore-trysail and the ropes and gear of the foremast were not all in good condition, and that the witnesses for the claimant did not tell the truth in their efforts to shield themselves or the claimant from condemnation. It must be held, therefore, that the libelant's statement as to the condition of the ropes and as to the cause of the accident is preferable. It would seem that the officers had a better opportunity to know whether there was a proper supply of new rope, but the suspicion as to their veracity, already excited, may be extended justly to this question.

The court concludes that the accident was caused by a defective rope, and that there was not a sufficient supply of rope to replace the same. What law shall govern the facts thus found? Where a person employed as a seaman on a British vessel is injured on the high seas by the alleged negligence of the owner to provide proper ropes for the gear of the ship, or, if such ropes be provided, by the negligence of the master to replace faulty ropes with proper ropes thus supplied, and such seaman files a libel in rem in a district court of the United States to recover damages for such injury, should the question of liability be governed by the English law, or by the law of the United States? The action is founded in tort; hence the liability must be determined by the law of the place where the alleged tortious act was committed or suffered. *Sherlock v. Alling*, 93 U. S. 99; *The Scotia*, 14 Wall. 170, 184; *McDonald v. Mallory*, 77 N. Y. 546, 550, 551; *The Egyptian Monarch*, 36 Fed. 773; *The Scotland*, 105 U. S. 24, 29; *Chartered Mercantile Bank v. Netherlands India Steam Nav. Co.*, 10 Q. B. Div. 521, 536; *The M. Moxham*, 1 Prob. Div. 107; *Phillips v. Eyre*, L. R. 4 Q. B. 225, 238; *Hart v. Gumpach*, L. R. 4 P. C. 439; 1 *Martens* (French Trans. of Leo) 496; 1 *Calvo*, 552. From the above rule it follows that when a tort is committed in a foreign country, and within its own exclusive jurisdiction, an action of tort cannot be maintained in the courts of another country, unless the cause of action be maintainable in both countries. *Whitford v. Railroad Co.*, 23 N. Y. 465; *McDonald v. Mallory*, 77 N. Y. 546; *Leonard v. Navigation Co.*, 84 N. Y. 48; *Wooden v. Railroad Co.*, 126 N. Y. 10, 26 N. E. 1050; *Geoghegan v. Steamship Co.*, 3 Misc. Rep. 224, 22 N. Y. Supp. 749, affirmed 146 N. Y. 369, 40 N. E. 507; *Chartered Mercantile Bank v. Netherlands India Steam Nav. Co.*, 10 Q. B. Div. 521, 536; *Phillips*

v. Eyre, L. R. 6 Q. B. 1, 28; The M. Moxham, 1 Prob. Div. 107. In the present case the tort on which the action is based arises from a contractual relation, as the relation of master and servant arises only from contract, expressed or implied. *Stevens v. Armstrong*, 6 N. Y. 442; *Farwell v. Railroad*, 4 Metc. (Mass.) 49; *Ross v. Railroad Co.*, 5 Hun, 493; *Bailey, Mast. & Serv.* 1. The contract was made on a British ship, in a foreign port; the service was to be performed on such ship; and the alleged breach of duty on the part of the master happened on the high seas. Where persons on British soil enter into such relation, they presumptively stipulate that such duties shall be observed by the master as the British laws impose upon him, and, by implication, the obligation of such duties becomes a part of the contract of hiring. *The Belgenland*, 114 U. S. 355, 364, 367, 5 Sup. Ct. 860; *The Egyptian Monarch*, 36 Fed. 773; *The Maud Carter*, 29 Fed. 156. If A. and B. enter into a contract, by which B., as a servant, agrees to render personal services to A., on English territory, it would not be presumed that the master impliedly agreed that, in providing a safe place to work, or machinery, or appliances, he would do whatever might be required by the laws of some other country; and that the contractual relation implied and imposed by a foreign jurisdiction should be regarded as a part of the stipulation in case the courts of such jurisdiction should assume to make reparation for an alleged breach of the contract. This is not a case where the contract was made to be performed in the country where the remedy was sought, nor where the alleged breach of duty happened within the territorial limits of such country, nor where the peace of a foreign port has been disturbed, nor where public policy or the due maintenance of police regulations requires interference by the courts of the United States. The locus in quo is the high seas, on a British ship, and the contention is solely between citizens of other countries, whose rights were stipulated on a British ship, and whose duties were to be performed on such ship, and there alone. It is unnecessary, in such case, to consider whether there should be any modification of the rule hereinafter stated in case the accident had happened under other conditions. It will be sufficient to decide the precise case at bar with sole reference to the facts presented.

The first question is this: Did the accident occur on British territory? Every vessel outside the jurisdiction of a foreign power is a detached, floating portion of the territory of the country whose flag it flies, and under whose laws it is registered. *The Scotia*, 14 Wall. 170, 184; *Crapo v. Kelly*, 16 Wall. 610, 624; *Wilson v. McNamee*, 102 U. S. 572, 574; *In re Moncan*, 14 Fed. 44; *In re Ah Sing*, 13 Fed. 286; *U. S. v. Bennett*, 3 Hughes, 466. Fed. Cas. No. 14,574; *McDonald v. Mallory*, 77 N. Y. 546, 551, 553; *Wheat. Int. Law* (Dana's Ed.) § 106; 3 *Whart. Int. Law Dig.* 228; *Whart. Conf. Laws*, § 356; 1 *Kent, Comm.* 26; *Vatt. Law Nat.* bk. 1, c. 19, § 216; 1 *Calvo*, 552; *Bluntschli*, § 317; 1 *Martens* (French Trans. of Leo) 496; *Seagrove v. Parks*, 1 Q. B. Div. 551. The authorities noted so perfectly maintain the doctrine stated that quotation, amplification, or illustration is unnecessary. The broad and funda-

mental principle is that the sovereignty of a nation extends to its private ships, and this dominion is never shared by a foreign power where the internal affairs of the vessel are alone involved, and where it is not within the territorial domain of such power. It results from the foregoing: (1) That tortious acts are governed by the law of the place where they are done. (2) That a foreign tribunal will never afford reparation for such acts, unless they are unjustified both by the law of the place where they occurred and by the law of the forum. (3) That a contract creating the relation of master and servant, made in a country for a service to be rendered in such country, imposes only such obligations, and confers only such rights, as the terms of the contract stipulate, and the laws of such country imply. (4) That the vessels of such country are, even upon the high seas, a detached, floating portion of its territory, and exclusively within the influence of its laws, so far as the internal economy of the vessel is concerned.

It now becomes necessary to determine whether the British laws permit a lien, and hence an action in rem, for an injury to a servant through the breach of the duty owing by a master to a servant. The evidence of James Mackenzie, a distinguished jurist of Glasgow, Scotland, produced by the claimant, is to the effect that such lien is not permitted, and he justifies his opinion by the rules of common law (Mayne, Dam.; Guthrie Smith, Dam.; Glegg, Reparation), and points out that the merchant shipping act of 1894 (section 558), which is a consolidation of previous acts, gives a personal remedy against the shipowner, but does not confer a right of action in rem. The advocate for the claimant also cites *The Vera Cruz*, 5 Asp. 270, 386, and *The Theta* [1894] Prob. Div. 280, which illustrate to some extent the correctness of Mr. Mackenzie's opinion. If, now, the law of Great Britain does not permit an action in rem, the present action must fail, unless it appear that such action is not of the substantive law of the country, but is a form of procedure or process of the court of the country whose jurisdiction is invoked. There is no doubt that a lien, if it exists at all, must inhere in some right of the injured person, that it remains inchoate until the right has been invaded, and thereupon matures. No process nor procedure of the court gives life to the lien, but the lien, of its own force, justifies the procedure in rem. Hence, if the lien have no existence, the procedure in rem can give it none.

In the case of *The Bold Buccleugh*, 7 Moore, P. C. 267, Sir John Jervis, delivering the opinion, says:

"A maritime lien is well defined by Lord Tenterden to mean a claim or privilege upon the thing to be carried into effect by legal process, and Mr. Justice Story (*The Nestor*, 1 Sumn. 78, Fed. Cas. No. 10,126) explains that process to be a proceeding in rem, and adds that wherever a lien or claim is given upon the thing then the admiralty enforces it by a proceeding in rem, and, indeed, is the only court competent to enforce it. A maritime lien is the foundation of the proceeding in rem,—a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien exists a proceeding in rem may be had, it will be found to be equally true that in all cases where a proceeding in rem is the proper course, there a maritime lien exists which gives a privilege or claim upon the thing to be carried into effect by legal process."

In *The Avon*, 2 Fed. Cas. 255, it is said:

"The ship being Canadian, and at the time of the sale in Canadian waters, and the parties Canadians, bring the case so clearly within the principles which apply the *lex rei citæ* that any analysis of judgments is unnecessary to show that the local law will regulate rights unless the maritime is made to apply. Whart. Priv. Int. Law, tit. '*Lex Rei Citæ*,' discusses with special fullness this subject, and, so far as the facts of this case are concerned, his criticism is approved. It is familiar law in the federal courts. The municipal *lex loci delicti* will equally control if the conditions of this navigation are not such as to make applicable the principles governing collisions upon the sea. See Story, Conf. Law, §§ 423b, 423g; Whart. Priv. Int. Law, §§ 477, 480; Id. § 707, and notes; *Whitford v. Railroad Co.*, 23 N. Y. 467, 475, 482; *Rafael v. Verelst*, 2 W. Bl. 1055; *Mostyn v. Fabrigas*, Cowp. 161, and notes in 1 Smith, Lead. Cas. 1024; *The Halley*, L. R. 2 Adm. & Ecc. 17-19, 22. This well-understood rule is, of course, not intentionally interfered with. That an act lawful by the law of the place where it takes place is so everywhere is but a truism. That no court can create a lien by its judgment upon property without its territorial jurisdiction, or assume to administer its own municipal law to create one over things not subject to its provisions, when and where the transactions occurred out of which it is asserted the right in *rem* springs, is also in its broadest sense admitted. Whart. Priv. Int. Law, § 828; Story, Conf. Law, §§ 322b, 401, 402a. Not only do we decide as we do in the light of such rule, but say with confidence we should dissent from the qualifications asserted by courts of great respectability. We should have decided differently *The Milford*, Swab. 362; *The Jonathan Goodhue*, Id. 526,—in which, by virtue of an English statute, Dr. Lushington gave an American master a lien not authorized by the law of his own country, and in reference to which his contract was made. They are justly criticised in *The Halley*, L. R. 2 Adm. & Ecc. 12. This proceeding in *rem* is not process. In no sense is it remedy only, or a part of the *lex fori*. It is the enforcement of a proprietary interest, and can no more be resorted to when that by the law of the place of the contract or of the act does not exist than a suit for possession can be maintained without a title to support it. Although there are some judgments in the supreme court which seem so to treat it, that the history of the 12th admiralty rule would authorize a different doctrine the late tendencies there, and its numerous other decisions, ably drawing the line between the law of contracts and of property and mere remedies, show clearly there is not authority in that high tribunal for sustaining this libel upon the notion that the proceeding is but a remedial form. In *Vandewater v. Mills*, 19 How. 82, the court, by Grier, J., comments upon the looseness of likening it to attachments in personam. The late case of *Harmer v. Bell*, 22 Eng. Law & Eq. 62, 7 Moore, P. C. 267, which is often approved in the supreme court, in discussing the nature of this proceeding, points out clearly the broad difference between process and remedies on the one hand, and the enforcement specifically of an interest in the thing on the other. Unless, therefore, a lien, by virtue of some law applicable to the act, was created by this collision when and where it occurred, there is no standing here by the libellant. We sustain the libel only because it is believed the maritime law affords the measure of right."

A discussion of some value on this subject will be found in *Carv. Carr. by Sea* (2d Ed.) 719-721. In addition, it may be remarked that damages for loss of life under Lord Campbell's act are not recoverable in proceedings in *rem* (*The Bernina* No. 2, 13 App. Cas. 1; *The Theta* [1894] Prob. Div. 280); and it has been held in Canada that the vice admiralty's court act of 1863 (26 & 27 Vict. c. 24 (§ 10), does not give the admiralty jurisdiction in case of personal injury (*Mars. Mar. Coll.* 136, 137).

The claimant suggests that the court should decline jurisdiction of the issues involved in this action. Such question is entitled to priority of decision, but it has been made secondary in this instance, and

need not now be considered at length, as the foregoing finding must result in a dismissal of the libel. However, it may be observed that this court may, in its discretion, entertain jurisdiction of actions for damages for collisions on the high seas between foreign vessels, or vessels of different nationality, or in cases of controversy arising under the common law of nations (*The Belgenland*, 114 U. S. 355, 365, 5 Sup. Ct. 860; *The Scotland*, 105 U. S. 29), or in cases of injury to a seaman on a foreign ship, happening by reason of some breach of duty of the employer (*The Bark Kate Cann*, 2 Fed. 241, affirmed 8 Fed. 719). But, although jurisdiction be entertained, it by no means follows that the law of the forum must be applied, although presumptively it might be applicable. What law shall govern? That may depend upon (1) a diversity in the nationality of the ships, and a diversity in the administration of law by the several nations to which the ships belong, (2) the obedience of any vessel to the laws prescribed by her own country, (3) whether the matters involved affect only parties to a particular vessel, (4) whether the cause of action arose within the limits of a particular country or on the high seas, (5) the nature of the duty for a breach of which the action is brought. *The Belgenland*, 114 U. S. 355, 5 Sup. Ct. 860. There may be other considerations, but these have special prominence. In every case, if a party claim that the law of a particular nation or nations should govern, he should show that such law differs from the law of the forum, otherwise the law of the forum will be applied. It has been shown in the present case that the jurisdiction of this court has been invoked for matters which affect only parties to a single vessel which is a part of British territory, and that the duty for a breach of which this action is brought arose from a contract made on such ship, that the duty was to be discharged on such ship, and that the breach occurred on the high seas. Hence the controversy must be determined by the laws of the country to which the vessel belongs. Let a decree be entered dismissing the libel.

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THE MIAMI.

(District Court, E. D. New York. May 2, 1898.)

**1. INJURY TO SEAMAN—NEGLIGENCE.**

In attempting to lower the topmast of a vessel, the boatswain wrapped the chain five times around the drum, and climbed the foremast to remove the fid holding the topmast, the end of the chain being held by two seamen. The mate of the vessel took the chain from the seamen, and removed one wrap from the drum, and then released the chain before the seamen had secured firm hold again. The mast fell and injured the boatswain. *Held*, that the mate was negligent.

**2. MASTER AND SERVANT—FELLOW SERVANTS.**

Where a boatswain is engaged, with a detail of seamen, in lowering a mast, and the mate of the ship participates, and, in assisting to do the work, causes the injury of the boatswain by his negligence, the act of the mate is that of an operative, and the boatswain cannot recover.<sup>1</sup>

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<sup>1</sup> For a full collection of the cases on the question as to "Who are Fellow Servants," see note to *Railroad Co. v. Smith*, 8 C. C. A. 668, and supplementary note to *Railway Co. v. Johnston*, 9 C. C. A. 596.

Libel by Thomas Ashton against the steamship Miami, James Lewis, claimant, to recover damages for personal injuries.

Cowen, Wing, Putnam & Burlingham, for libellant.

Convers & Kirlin, for claimant.

THOMAS, District Judge. Thomas Ashton, the libellant, an experienced seaman, was boatswain on the steamship Miami, on her passage from Hamburg to Baltimore. On January 19, 1897, the libellant, having been ordered so to do by the first mate, undertook, with the aid of three seamen, to lower the fore topmast into the hollow foremast. The topmast when raised is held in position by an iron fid or bar, which passes through the foremast and also the lower end of the topmast. A chain is fastened by its upper end to an iron shackle. This shackle has eyes at its two ends, through which a bolt passes, fastening it firmly to a staple riveted to the foremast. The chain is from the shackle carried under the lower end of the topmast; thence upward over a pulley on the foremast; thence downward, and wound several times around a drum, connected with a winch on the deck; and the free end of the chain extends on the deck, where it is intended to be handled in the manner following: When it is desired to lower the topmast, the winch is set in operation and the topmast slowly raised, so as to relieve the fid from its weight, and the fid is then withdrawn. Thereupon the weight of the topmast rests upon the chain alone, and this weight would cause the chain to unwind from the drum, unless prevented by some counteracting force applied to the chain. For this purpose the free end of the chain is held by two or more seamen delegated for that purpose. On the occasion in question the libellant wound the chain five times around the drum, as he says (the mate says six times), and then took his position on the cap of the mast and assisted in the removal of the fid, the topmast being slightly raised to allow this removal to be effected. After the removal of the fid the topmast rested on the chain alone, which was prevented from unwinding by the force applied by two seamen holding the free end on the deck. The seamen slightly relaxed the chain, to allow the topmast to descend, which, however, it did not do at once. The first mate, seeing that the topmast did not readily descend, stated that there were too many turns of the chain around the drum to permit the chain to render or pay out. Thereupon he took the chain from the hands of the seamen, unwound one turn thereof from the drum, meanwhile preventing the chain from rendering by pressing down on the chain on the drum with his hand. He then undertook to leave the chain and the holding thereof to the seamen, while he himself stepped aside. The seamen at this time had no hold, or no sufficient hold, of the chain, to prevent it from running or slipping around the drum too rapidly. The result was that the seamen could not hold the chain, and it rendered so rapidly that they finally abandoned it, whereupon the topmast fell with great rapidity. The ropes, stays, and other rigging fell swiftly and violently upon the boatswain, who was still on the mast, hurling him upon the deck, and injuring him to a very serious extent.

It is claimed on the part of the libelant that the removal of one loop from the drum was a contributing cause of the accident, as it made it impossible for the seaman to restrain the too rapid rendering of the chain.

It will be noticed that, after the chief officer had taken off one loop, but four remained on the drum, although the claimant's evidence tends to show that five turns of the chain remained.

The claimant offers evidence of experiments with the same apparatus, thereafter made while the ship was in port, tending to show that four rounds on the drum would be sufficient to enable two men to safely lower the mast. This is entirely credible. However, when the ship is at rest, and effort is being made for the very purpose of ascertaining to what extent the aid of the drum in lowering the mast is absolutely necessary, probably the experiment would be attended with greater success than if undertaken in the usual course of business, on a cold day in winter, and with the ocean disturbed. All the conditions of an experiment in port are favorable. Those attempting it are alert and forewarned of the precise danger. However, the experiments and evidence illustrate that, if the mate left but four rounds on the drum, he left enough to make a safe descent of the topmast possible, if not probable. But to render safe such descent, under such circumstances, very great care in surging and paying out the chain would be required. It seems that care sufficient in law was not exercised on the occasion in question. But the fault cannot be attributed to the seamen; at least, not to them alone. There was a fault in putting the seamen again in proper possession of the chain after the mate had taken it from them and taken possession of it for the purpose of taking off a loop. Before the mate stepped aside and released his hold upon the chain he should have seen to it that the seamen had regained their full possession of the chain, and were in proper attitude and at a proper advantage to meet and check the sudden rendering of the chain that would result from the mate's discontinuing his pressure of the chain down upon the drum and from the removal of the loop from the drum. To this point the holding must be this: That, in removing one and leaving but four rounds on the drum, the mate had reached the extreme limit of prudent operation; and that even this condition was not prudent, unless the men whose duty it was to hold the chain were in full possession thereof, and using great care to pay out the chain very gradually; that the mate disconnected himself from the chain, and left its operation to the seamen, without sufficient care to discover whether they were in the necessary repossession of the chain. Therefore the mate was negligent, and the claimant is liable for the injury, even though the seamen were also negligent, providing the act undertaken and done negligently by the mate was the act of the master, and not the act of an operative.

Under the decisions of the federal courts and of the courts of New York, the act of the mate must be regarded as the act of an operative, and it must be held that the mate was not attempting to execute a duty owing from the master to the seamen. The simple question is whether the mate was, in taking the loop from the drum, and for that

purpose temporarily withdrawing the chain from the custody and control of the seamen, performing an act that it was the primary duty of the master to do, or whether the act was a part of the routine work pertaining to the operation of the ship. It is not important that the offending person was the mate, and the injured person was the boatswain. The boatswain had immediate charge of the work and the three sailors detailed to do it, and, in connection with such charge, was lending manual aid. The mate was superintending the work from a somewhat higher post of command, and he also chose to participate in the actual work, to the extent above described. But the superintendence of both mate and boatswain was quite as much a matter of operation as the manual work that both undertook to do; or, if it were otherwise, the accident was caused by the mate undertaking an operative's work. Under such a state of facts, the libelant may not recover. *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914; *Railroad Co. v. Keegan*, 160 U. S. 259, 16 Sup. Ct. 269; *Railroad Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843; *Railroad Co. v. Charless*, 162 U. S. 359, 16 Sup. Ct. 848; *Mining Co. v. Whelan*, 168 U. S. 86, 18 Sup. Ct. 40; *Crispin v. Babbitt*, 81 N. Y. 522.

After the accident it was discovered that the shackle was broken, and it is alleged that this shows negligence on the part of the employer in furnishing a defective appliance. There is no sufficient evidence that the shackle broke and caused the accident. The evidence more convincingly shows that the broken shackle resulted from the accident. The libelant invokes the doctrine of *res ipsa loquitur*, but the rule is not here applicable.

The facts of the case are reasonably clear, the libelant's injuries undoubted, and stated with an honesty that is worthy of mention; but the law is clearly adverse to his recovery, and the libel must be dismissed.

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#### STEAM DREDGE NO. 1.

(District Court, D. New Jersey. June 8, 1898.)

##### 1. CORPORATIONS—OFFICERS—COMPENSATION.

The by-laws of a corporation provided that the chief engineer should receive such salary as the directors might fix. The salary was fixed in the manner prescribed, and one of the directors appointed to the office, but subsequently, with the consent of the appointee, the resolution fixing the salary was reconsidered, and all considerations of the matter indefinitely postponed. *Held*, that the chief engineer was not entitled to compensation for his services as such.

##### 2. MASTER AND SERVANT—MONTHLY HIRING—EXTRA TIME.

A superintendent employed by a corporation at a monthly salary cannot claim allowances for working overtime.

##### 3. MARITIME LIENS—WHO MAY CLAIM—SUPERINTENDENT OF STEAM DREDGE.

The superintendent employed on board a steam dredge, not as her master, but as foreman in charge of the working crew, is entitled to a maritime lien upon the dredge or her proceeds for his agreed compensation.

This was a petition by Levi Hussey claiming payment, for services rendered, out of the proceeds, surplus, and remnants arising from the sale of the steam dredge No. 1.

Hyland & Zabriskie, for petitioner.  
Sullivan & Cromwell, for claimant.

KIRKPATRICK, District Judge. It appears from the record in this case that dredge No. 1 was libeled for seamen's wages, and that such proceedings were had that she was sold under a decree of this court, and that after the payment of several claims for wages, and the costs and expenses of several suits relating thereto, there still remains in the registry of this court a surplus from the proceeds of such sale. From this surplus the petitioner, Levi Hussey, asks the court to direct the payment to him of the amount of his claim against said dredge No. 1, together with interest and costs. The service of the petitioner on which his claim is founded may be divided into two classes: First, the services rendered as engineer in chief of the company constructing, owning, and operating the dredge; and, second, for services as superintendent of the dredge while it was actually employed in the work for which it was built. The petitioner was appointed engineer in chief by the board of directors of the company owning the dredge, the by-laws of the corporation providing that said officer should receive such compensation as might be fixed by the board of directors.

The petitioner bases his right to compensation for services rendered and work done as engineer in chief upon the resolutions of the board of directors. He cannot recover on a quantum meruit. At a meeting of the board of directors held August 2, 1894, it was "resolved that the salaries of the vice president, secretary, chief engineer, and general manager be, and are hereby, fixed at \$2,500 a year from August 1, 1894." At the next meeting of the same board, held September 4, 1894, the minutes show that "on motion of S. W. Thompson, seconded by Warren Roosevelt, a reconsideration of the resolution fixing salaries passed August 2, 1894, was agreed to." And at the same meeting it was resolved that "the subject of salaries to the officers, general manager, and engineer in chief be postponed until such time as the dredge will have been built, is at work, and a net profit accrued from its earnings." The record discloses the fact that the petitioner was one of the directors of the said company, and voted in favor of said resolution, and may therefore be considered as having assented thereto.

The effect of the foregoing resolutions, taken together, was to leave the matter of the compensation of the engineer in chief suspended. The reconsideration of the resolution of August 2, 1894, at the next meeting of the board of directors, in September, 1894, rendered it nugatory, and of no effect, while the postponement of the whole subject to a future day left the question of salaries in the same position as if no action had ever been taken by the directors in relation thereto. That this was the understanding of the parties is apparent from the fact that upon the resignation of the secretary (presented at the meeting of December, 1894), whose salary had by the resolution of August, 1894, been fixed at \$2,500 a year, he made no claim for compensation under the resolution, but asked that he might be paid the sum of \$1,000, and was by the board awarded \$500,

subject to certain restrictions. This view is strengthened by the failure of the petitioner to demand any compensation for his services as engineer in chief from August 1, 1894, as the resolution provided, until the bringing of this suit.

In the absence of any agreement on the part of the company to pay a salary to the engineer in chief for any services he may have rendered as such, it is unnecessary to determine whether, if entitled thereto under the New Jersey statute, he could have been paid the same out of the proceeds of the sale of the dredge, or consider the interpretation put on the statute in *Baeder v. Carnie*, 44 N. J. Law, 208. I am of the opinion that the petitioner has not shown that he is entitled to have computed, as a part of the amount due him at this time, any salary as engineer in chief which can be paid him out of the proceeds of sale of the dredge now in the registry of the court.

On February 11, 1895, the executive committee of the directors of the Mining & Dredging Company, the owners of said dredge No. 1 in question, reported to the board that, in accordance with authority given them to hire a crew for dredge No. 1, among other things they had hired a superintendent at a salary of \$208.33 per month, with board at 50 cents a day allowed the steward, which report was accepted and the minutes approved by the full board. The petitioner was appointed such superintendent, and, as appears from his testimony, entered on the duties of such position March 1, 1895, and continued to perform said duties, with several intermissions, until June 25, 1897.

The superintendent was hired at a salary of \$208.33 per month, and I fail to see how, under such an engagement, there can be any allowance for "extra time." If he had been hired by the day, which is understood to mean a certain number of working hours out of each 24, or for "tide work," as were others of the crew, it is easy to understand how, when the prescribed number of hours' work in each day have been worked, demand may be made for proportionate payment for the time worked in excess of the requirement, but no such claim can be presented when one's whole time is paid for by the month or by the year. There should not be any allowance for "overtime." If the petitioner's claim to compensation as superintendent rested alone upon the resolution of February 11, 1895, the amount to which he would be entitled would be a salary at the rate of \$208.33 per month from March 1, 1895, to July 25, 1897, less such sums as have been paid him, with proper allowance for interest; but it appears from the testimony of Mr. Stuyvesant that, when the dredge was lying idle, Mr. Hussey voluntarily resigned his position, and did not expect any salary as superintendent; and the testimony of the petitioner himself is to the same effect, that, "when the dredge was not working and earning money, I was not to make a demand for my services." The petitioner has made no demand for compensation for services as superintendent while the dredge was idle. The record shows by the testimony of petitioner that for his services as superintendent he has been paid for all the time he rendered service, except 62½ days. For these, at the rate of \$208.33 per month, he is entitled to be paid.

The dredge upon which the petitioner's service was rendered was

adapted to be used in the deepening of harbors and channels, and it was actually engaged during petitioner's service in digging a channel or approach to a dock at which other vessels might land passengers or cargoes of freight. The dredge had within itself the means to propel itself from place to place upon the water, where only it could be used, and had also upon it accommodations for the crew. It was capable of being used as a means of transportation, and did actually transport machinery and a crew from Jersey City, N. J., to Rye, N. Y., as well as between other places. "It is for these reasons the court have held them [dredges] to be subject to admiralty jurisdiction and to the laws of navigation." *The International*, 83 Fed. 840.

The petitioner's duties as superintendent were to lay out and direct the work of the dredge, and to supervise the men. He was not the master of the vessel; simply a foreman in charge of the working crew. There was also upon the dredge an engineer who looked after the machinery, and a captain who had charge of the movements of the dredge when it was required to swing from place to place. When there was no work to be laid out for the dredge, and no supervision of the men necessary, the duties of the superintendent were suspended. He had no charge of the dredge when idle. In *Re Minna*, 11 Fed. 759, Judge Brown says: "All hands employed upon a vessel except the master are entitled to a lien if their services are in furtherance of the main object of the enterprise." To the same effect is the case of *Laurence v. Flatboat*, 84 Fed. 200; while in the case of *McRae v. Bowers*, 86 Fed. 344, the court goes still further, and holds that "the services of engineer, fireman, deckhands, and captain who work on board a dredging vessel \* \* \* are required in the work in which the vessel is employed and have maritime liens for wages." For the services rendered as superintendent I am of the opinion the petitioner acquired a lien upon the dredge for his wages. Having, then, a lien upon the vessel, he is entitled to share in the proceeds of sale, and may apply by petition for the protection of his interests, under the forty-third rule of the supreme court in admiralty. *The Unadilla*, 73 Fed. 350; *The Lottawanna*, 21 Wall. 582.

The claimant is the owner of the vessel, which he purchased at public sale with notice of petitioner's claim. As between the claimant and the petitioner, the petitioner is entitled to preference in the distribution of the surplus fund in the registry of the court. Let a decree be prepared in accordance with these views.

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#### THE FRANK VANDERKERCHEN.

(District Court, D. New Jersey. May 20, 1898.)

#### ADMIRALTY JURISDICTION—SUITS IN REM—STIPULATION WITHOUT SEIZURE.

Where a libel in rem is filed against a vessel then within the jurisdiction, and, without issuance of monition or seizure of the vessel, the claimants voluntarily give a stipulation for value conditioned to perform and pay any decrees rendered, the court has jurisdiction to proceed with the cause just as if the vessel had first been seized, and a stipulation then given.

This was a libel in rem by Daniel S. Williams and others against the schooner Frank Vanderkerchen to recover damages resulting from a collision.

Hyland & Zabriskie, for libelants.

Joseph Hill Brinton and J. Warren Coulston, for claimants.

**KIRKPATRICK**, District Judge. The libel in this cause was filed January 26, 1894, by the owners of the schooner Maria Pierson, to recover damages, amounting to the sum of \$2,000, resulting from a collision of the libelants' schooner with the schooner Frank Vanderkerchen, off the coast of New Jersey, January 8, 1894. It is alleged in the verified libel that, at the time of its filing, the schooner Frank Vanderkerchen was lying in the waters of the Hudson river, within the district of New Jersey, and within the jurisdiction of this court. The agents of the owners of the schooner Frank Vanderkerchen, upon being notified of the filing of said libel, voluntarily entered into a stipulation with sureties, for value, in the sum of \$2,000, by which it was agreed that, in case of default or contumacy on the part of the claimants or their sureties, execution for the amount of \$2,000 might issue against their goods and chattels and lands. It was also specifically set out in the said stipulation that the said schooner Frank Vanderkerchen had not then been attached, and that the value of \$2,000 was fixed by consent of the sureties thereon indorsed, and the condition was that the said stipulators should abide by, and pay the money awarded by, the final decree in said cause. In consequence of this stipulation being entered into, no motion issued against the schooner Frank Vanderkerchen, and she was not taken into custody. To the libel so filed a general appearance was entered, and an answer was filed on behalf of the schooner Frank Vanderkerchen. Testimony was taken in said cause, hearing had, and final decree was entered April 13, 1897. Subsequently, on May 5, 1897, Charles A. Pettit, for himself and others, claiming to be owners of the schooner Frank Vanderkerchen, filed a petition asking that all proceedings in relation to said schooner be dismissed, that the final decree be vacated, and that the stipulators be relieved from the obligation of their stipulation, upon the ground that the court had not acquired jurisdiction in the premises, because no actual seizure of the said schooner had ever been made, such seizure being necessary to the exercise of jurisdiction by the court. A petition was also filed by said Pettit and others at the same time, praying that they might be allowed the benefit of the provisions of section 4284 of the Revised Statutes of the United States and its supplements, generally known as the "Limited Liability Act": but this latter petition was withdrawn subsequently in open court, so that the only question now to be decided by the court is one of jurisdiction.

It has been conceded that the schooner Frank Vanderkerchen was, at the time the libel was filed, within the territorial limits over which this court had jurisdiction; but it is contended that because no motion issued, because the schooner was not taken into actual custody, the court cannot exercise its authority over the vessel which is the

subject-matter of the suit. Actual, open, and notorious possession is necessary in actions in rem, so that all the world which may be interested in the suit can have due notice of the proceedings, and be given an opportunity to protect their rights, before the court should proceed to condemnation and sale. It is obvious, however, that the reason for this requirement applies only with regard to the thing itself of which the court proposes to dispose of the interest of all persons, whether they be represented before the court or not, but it fails entirely to be material when for the res there has been substituted a personal bond or stipulation to pay the damages awarded to the libellant. Then all the parties in interest are before the court, and there is no necessity for publicity. If a seizure has been made, upon the execution and delivery of the stipulation in sufficient amount to satisfy the libellant's claim, the res is surrendered to the claimant, and the stipulation is taken into the custody of the court, and thereafter becomes a substitute for the res, and to it alone the libellant thereafter looks for the satisfaction of his claim or decree. *Jennings v. Carson*, 4 Cranch, 25, 26; *U. S. v. Ames*, 99 U. S. 35. "The stipulators, to the extent of their stipulation, have been substituted for the steamer, and thus nothing but the value and the costs is within the custody of the court." *The Webb*, 14 Wall. 406. Ordinarily, seizure of the property precedes the appearance of the claimants in the suit; but it cannot make any material difference whether the claimants and their sureties voluntarily enter into the stipulation before actual seizure to avoid the expense and delay and inconvenience thereof, or whether they wait until the vessel has been taken into actual custody under the monition. The effect is the same so far as they are concerned. In the one case, the claimants are permitted to remain in possession of the vessel; in the other, it is redelivered to them. In both cases the stipulation becomes a substitute for the thing itself, and remains a pledge or security for the property as regards the claim of the libellants, and the "stipulators are held liable to the exercise of all those authorities on the part of the court which the tribunal could properly exercise if the thing itself were still in the custody of the court." *The Wanata*, 95 U. S. 611; *The Palmyra*, 12 Wheat. 1. "While the general rule requires an actual seizure and possession of the res by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import, and which stand for and represent the dominion of the court over the thing." *Cooper v. Reynolds*, 10 Wall. 317. It has been the practice in this district to make this substitution of stipulation for the res upon simple notice of filing the libel, and without monition being issued. Its legality has never before been questioned. The original object of the stipulation was to avoid the question of jurisdiction, and the agreement on the part of the stipulators to permit execution to issue against them in case of default, and abide and pay the amount awarded against them on final decree, was considered a waiver of all objection based on a failure to serve process. In *Re The Roslyn*, Fed. Cas. No. 12,068, his honor, Judge Brown, sitting in admiralty in the Southern district of New York, where the same practice prevails of accepting stipulation upon notice of filing libel and without issuing monition, held "that the fact that

the boat was not in custody would not render the stipulation void or prevent the court from enforcing it," and that such "stipulation was valid, though the vessel sought to be proceeded against is not and never was in custody." The rule to show cause will be discharged.

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THE KANSAS.

BUTLER et al. v. THE KANSAS.

(District Court, D. Massachusetts. May 10, 1898.)

No. 876.

**CARRIERS BY SEA—BILL OF LADING—LOSS OF GOODS.**

In a bill of lading for old metal, a provision that if the goods be prevented, "by any cause," from going by the steamer specified, the carrier may forward them by the succeeding steamer of his line, warrants him in leaving them for the next vessel, which sails four days later, when the space reserved for the goods is needed for more perishable articles. And his failure to notify the shipper that they are so left does not make either him or the vessel liable for their loss in transit by a peril of the sea, though the shipper procures insurance on the goods only by the vessel specified, whereby he is unable to recover on the policy.

This was a libel in rem by Thomas Butler and others against the steamship Kansas to recover for the loss of goods shipped.

Henry M. Rogers, for libelants.

Ball & Tower, for respondent.

**BROWN**, District Judge. This is a libel in rem to establish a maritime lien upon the steamship Kansas for failure to deliver at Liverpool 32 barrels of old metal. The Kansas is one of the Warren Line of steamships (so called), running between Boston and Liverpool, and was advertised to sail, and did sail, from Boston, January 26, 1897. On January 23d a bill of lading was delivered to the libelants, the material parts whereof are as follows:

"Received, in apparent good order and condition, from Thomas Butler & Co., to be transported by the good British steamship Kansas, now lying in the port of Boston, and bound for Liverpool," etc., "\* \* \* thirty-two barrels old metal, \* \* \* to be delivered \* \* \* at the port of Liverpool (or so near thereto as she may safely get) unto order, or to his or their assigns. It is mutually agreed that, in case the whole or any part of the goods specified herein be prevented by any cause from going in the said steamship, the carrier shall have liberty to forward them by succeeding steamship or steamships. \* \* \* In witness whereof, the master or agent, on behalf of the owners of said ship, hath affirmed to two bills of lading, all of this tenor and date," etc.

"Warren & Co., Agents,

"Per A. J. Noether."

The bill of lading is indorsed, "[Signed] Thomas Butler & Co."

Warren & Co. were agents for a number of steamships, known as the "Warren Line." In this line, besides the Kansas, owned by the claimant, the Kansas Steamship Company, Limited, a British corporation, was the Angloman, a steamship owned by the British & North Atlantic Steam-Navigation Company. The Angloman sailed January 30, 1897, four days after the Kansas, and was the next suc-

ceeding steamship of the Warren Line. The metal was received on the dock January 22d. A short time before the Kansas sailed, it was found that, after stowing the rest of the cargo, there was no room on the Kansas for the metal. It appeared in evidence that freight of this character is customarily loaded last. The loading of the various vessels was in charge of Warren & Co.'s superintendent, and not of the masters of the vessels. The merchandise was shipped upon the Angloman, and was totally lost, through perils of the sea, when the vessel was wrecked on the coast of Wales on or about the 10th day of February, 1897. The libelants insured their cargo on the Kansas on January 23d, for \$2,500, and had no insurance by any other ship. January 25th a draft was drawn on their consignees; and the draft, with insurance policy and bill of lading attached, was discounted by Kidder, Peabody & Co., of Boston, and sent forward for collection. In consequence of the loss of the Angloman, the draft was unpaid, and was protested. The insurance company refused payment, as they had insured by the Kansas only. The libelants were not personally informed that the goods had not gone on the Kansas until after the loss of the Angloman. The libelants seek to recover the value of the merchandise lost, with the expenses of protest of their draft.

The libelants contend that the bill of lading was a positive engagement that the goods should go by the Kansas, that they were in the custody of the ship Kansas, and that there has been a breach of contract, in the failure to put the goods on the Kansas, and deliver them by her at Liverpool. It seems clear, however, that the shipping of the goods upon the Angloman instead of upon the Kansas was, under the circumstances, in accordance with the express provisions of the contract, and not contrary thereto. The condition of the right to ship on a succeeding vessel was that the goods should be "prevented by any cause from going in the said steamship." Conceding that this right should not be exercised arbitrarily, and that the cause must be reasonable, yet as another vessel was to depart within the brief period of four days, and as there was, so far as appears, no reason to believe at the time that the transportation upon the second vessel would not as well fulfill the purpose of the shipper of these goods, which could not deteriorate by delay, I find, upon the evidence, that the right was reasonably exercised. It is obviously difficult for those in charge of a freighting line, whose vessels carry mixed cargoes, to foresee with exactness the amount of freight that will arrive, or the precise manner of stowing it. In this case the usual place of stowage for articles of this character was reserved until a short time before the Kansas sailed. There were other articles, more or less perishable in character,—bacon, apples, cheese, cattle, and sheep,—naturally entitled to preference, and the metal was left out because the ship was loaded to her limit. A contract which provides for such contingencies as arise in the ordinary course of business is not unreasonable, and should receive a construction that gives it effect. The contract must be considered, therefore, not as an absolute engagement to send the goods on the Kansas, but as giving a right to send them on a later vessel if reasons of the character existing in the

present case should arise. This conclusion would follow whether the contract were held to be with the Warren Line, so called, or with the owner of the Kansas. I am of the opinion, therefore, that there is no liability attaching either to the vessel or to the owner for failure to deliver the goods.

The libelant claims, however, that in reliance upon the bill of lading he insured the goods only by the Kansas, that it was the carrier's duty to notify him of a change of vessel, that he was not notified, and that his loss was the direct result of a failure to notify. It is, in my opinion, unnecessary to determine whether the notice of a change of vessels given to Farley & Sons, the brokers and freight forwarders, was notice to the libelants. If the carrier is not otherwise liable, it cannot be liable for the reason that the shipper has failed to insure. The libelants were notified by the so-called bill of lading that the goods might go upon another vessel. If they voluntarily disregarded this contingency, they took their chances. If they supposed the contract to be an absolute engagement to carry the goods upon the Kansas, they relied upon an erroneous construction thereof, and not upon the actual contract. In either event the carrier is not responsible for their failure to secure insurance that covered the actual risk. *Marx v. National Steamship Co.*, 22 Fed. 680-685; *Red Wing Mills v. Mercantile Mut. Ins. Co.*, 19 Fed. 115; *The Carolina Miller*, 53 Fed. 136. The libel will be dismissed, with costs to the claimant.

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**PETTIT v. BOARD OF CHOSEN FREEHOLDERS OF CAMDEN COUNTY.**

(District Court, D. New Jersey. June 10, 1898.)

**DEMURRAGE—DETENTION OF VESSELS IN RIVER—BREAKAGE OF COUNTY DRAW-BRIDGE.**

A county is not liable for detention of vessels in a river by breakage of the machinery operating a draw in a county bridge, where it does not appear that there was any negligence by the county's agents or servants, or any unreasonable delay in making repairs.

This was a libel in personam by Charles A. Pettit, agent, against the board of chosen freeholders of the county of Camden, N. J., to recover damages for the detention of certain vessels by the breakage of a county drawbridge.

Joseph Hill Brinton, for libelant.

Henry S. Scovel, for respondent.

**KIRKPATRICK**, District Judge. The libel in this case is filed to recover damages for the detention of the schooner Oscar G. Schmidt, and the steam tugs Israel H. Duncan and Laura, in Cooper creek, Camden county, in this district. It appears from the record that on February 17, 1897, the schooner, in tow of the tugs, passed up the creek through the draw of the bridge which spans the same; and that upon their return trip they were unable to pass through the bridge. The cause of the failure was that, in attempting to open the draw, the main casting, which operated the pivot on which the draw swung, broke. It is charged that this breakage was due to the careless and

negligent conduct of the servants of the respondent, and that they failed to have the same repaired within a reasonable time. The evidence fails to substantiate either of these charges.

The piers of the bridge had been injured by floods, and had been recently repaired. The ends had been raised a little too high, and the draw bound on the same, but at the time the accident occurred this difficulty was being remedied. The accident seems to have been caused, as testified to by a witness engaged in attempting to move it, by some foreign substance, as a stone getting fast in the moving mechanism, thereby causing it to break. After the breaking of the machinery for turning the draw, the captain of one of the tugs offered to attach a hawser to the end of the draw and pull it open, but the keeper declined to permit it to be done, fearing additional injury to the bridge. It is not shown on the part of the libelant that it would have been practicable to have safely opened the draw by the means suggested, while competent mechanics, after personal examination of the injury, testify, on the part of the respondent, that it would not have been safe to have allowed the tug to pull the draw open immediately after the accident, nor could the draw have been opened by any means until after the broken castings had been moved, which required two or three hours' work by skilled labor. The man in charge of the bridge immediately notified the chairman of the bridge committee of the freeholders, and, under authority from him, took the proper steps to repair the damage at once. The accident happened at 3 or 4 o'clock p. m. The mechanics came at the usual working hour on the following morning, and at about 9:30 o'clock the passage for the boats was free. I am of the opinion that the evidence fails to show carelessness or negligence on part of respondent or its agents, or that the bridge was not repaired and the draw opened with all reasonable dispatch. The libelants cannot recover.

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#### THE LIVINGSTONE.

(District Court, N. D. New York. May 30, 1898.)

##### **COLLISION—FAILURE TO HEED SIGNALS—INSUFFICIENT LIGHTS.**

A steamer on Lake Erie, in the open lake, on approaching another steamer head on, at night, gave the proper signal for passing port to port at the same time porting her helm. The second steamer, being unable to make out any red light on the first, supposed the latter would pass to starboard, and starboarded her own helm. When the vessels were only a quarter of a mile apart, and visible to each other without lights, the second put her helm hard a-starboard, thus bringing them into collision. *Held*, that the second vessel was in fault for making her last change of helm to starboard, when she should have ported; but that the first was also in fault for not displaying proper lights, not keeping a proper lookout, and not slackening speed.

The libel was filed by the Lackawanna Transportation Company and the Delaware, Lackawanna & Western Railroad Company against the steam propeller *Livingstone* to recover damages for the loss of the steam propeller *Grand Traverse* and her cargo owned by the libelants.

The libel alleges that the collision, which resulted in the sinking of the Grand Traverse and her cargo, occurred at half past 5 on the morning of October 19, 1896, near Colchester Light at the western end of Lake Erie. The faults which the libel avers against the Livingstone are, first, insufficient lights; second, failure to heed the signals of the Grand Traverse; third, failure to stop and reverse; and, fourth, starboarding when the vessels were only a quarter of a mile apart. The libel demands judgment for \$50,000, the value of the Grand Traverse, and for \$15,000, the value of her cargo.

The Michigan Navigation Company, the owner of the Livingstone, filed an answer denying all allegations of negligence on the part of the Livingstone and alleging that the Grand Traverse was at fault in the following particulars: First, she did not carry and display good and sufficient lights and at no time showed a red light on her port side; second, she had no proper or sufficient lookout; third, the persons composing her watch were incompetent and inattentive; fourth, she did not keep her course but negligently ported when danger of collision was imminent; and, fifth, she did not stop and reverse. The answer alleges that the Livingstone suffered damage in the sum of \$6,850, which constitutes a just and equitable claim against the owners of the Grand Traverse.

The Indemnity Mutual Insurance Company was the insurer of the coal lost upon the Grand Traverse, and, having paid the loss to the Delaware, Lackawanna & Western Railroad Company, the owner, was subrogated to the latter's rights and intervened as libellant to protect its interest.

At the time of the collision the act of congress passed February 8, 1895 (28 Stat. 645), was in force. The act provides "that the following rules for preventing collisions shall be followed in the navigation of all public and private vessels of the United States upon the Great Lakes and their connecting and tributary waters as far east as Montreal."

These rules, so far as applicable to the present controversy, are as follows:

Rule third provides that a steam vessel when under way shall carry:

"(a) On or in front of the foremast \* \* \* at a height above the hull not less than" the beam of such vessel "a bright white light so constructed as to show an unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side, and of such character as to be visible at a distance of at least five miles.

"(b) On the starboard side, a green light, so constructed as to throw an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible at a distance of at least two miles."

The rule also provides for a similar red light on the port side, and continues:

"(d) The said green and red lights shall be fitted with inboard screens projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.

"(e) A steamer over one hundred and fifty feet register length shall also carry when under way an additional bright light similar in construction to that mentioned in subdivision (a), so fixed as to throw the light all around the horizon and of such character as to be visible at a distance of at least three miles. Such additional light shall be placed in line with the keel at least fifteen feet higher from the deck and more than seventy-five feet abaft the light mentioned in subdivision (a)."

The steering and sailing rules applicable are as follows:

"Rule 17. When two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision each shall alter her course to starboard, so that each shall pass on the port side of the other."

"Rule 23. In all weathers every steam vessel under way in taking any course authorized or required by these rules shall indicate that course by the following signals on her whistle, to be accompanied whenever required by corresponding alteration of her helm; and every steam vessel receiving a signal from another shall promptly respond with the same signal or, as provided in rule twenty-six: One blast to mean, 'I am directing my course

to starboard.' Two blasts to mean, 'I am directing my course to port.' But the giving or answering signals by a vessel required to keep her course shall not vary the duties and obligations of the respective vessels."

"Rule 26. If the pilot of a steam vessel to which a passing signal is sounded deems it unsafe to accept and assent to said signal, he shall not sound a cross signal; but in that case, and in every case where the pilot of one steamer fails to understand the course or intention of an approaching steamer, whether from signals being given or answered erroneously, or from other causes, the pilot of such steamer so receiving the first passing signal, or the pilot so in doubt, shall sound several short and rapid blasts of the whistle and if the vessels shall have approached within half a mile of each other both shall reduce their speed to bare steerageway, and, if necessary, stop and reverse.

"Rule 27. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

"Rule 28. Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of a neglect of any precaution which may be required by the ordinary practice of seamen, or of the special circumstances of the case."

The rules of the board of supervising inspectors in force at the time of the accident, which are applicable, are as follows:

"Rule 1. When steamers are approaching each other 'head and head,' or nearly so, it shall be the duty of each steamer to pass to the right, or port side of the other; and the pilot of either steamer may be first in determining to pursue this course, and thereupon shall give, as a signal of his intention, one short and distinct blast of his steam whistle, which the pilot of the other steamer shall answer promptly by a similar blast of his steam whistle, and thereupon such steamers shall pass to the right or port side of each other. But if the course of such steamers is so far on the starboard of each other as not to be considered by pilots as meeting 'head and head,' or nearly so, the pilot so first deciding shall immediately give two short and distinct blasts of his steam whistle, which the pilot of the other steamer shall answer promptly by two similar blasts of his steam whistle, and they shall pass to the left, or on the starboard side of each other.

"Note. In the night, steamers will be considered as meeting 'head and head' so long as both the colored lights of each are in view of the other."

"Rule 3. If, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from signals being given or answered erroneously, or from other causes, the pilot so in doubt shall immediately signify the same by giving several short and rapid blasts of the steam whistle; and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerageway until the proper signals are given, answered, and understood, or until the vessels shall have passed each other.

"Vessels approaching each other from opposite directions are forbidden to use what has become technically known among pilots as 'cross signals'—that is, answering one whistle with two, and answering two whistles with one. In all cases, and under all circumstances, the pilot receiving either of the whistle signals provided in the rules, which for any reason he deems injudicious to comply with, instead of answering with a cross signal, must at once observe the provisions of this rule."

"Rule 5. The signals, by the blowing of the steam whistle, shall be given and answered by pilots, in compliance with these rules, not only when meeting 'head and head,' or nearly so, but at all times when passing or meeting at a distance within a half mile of each other, and whether passing to starboard or port.

"Note. The whistle signals of the above situations must be given in all cases, except as qualified by rule 3, Pilot Rules.

"The manner of fixing the colored lights should be particularly attended to. They will require to be fitted each with a screen, of wood or canvass, on

the inboard side, and close to the light, in order to prevent both being seen at the same moment from any direction but that of right ahead to two points abaft the beam.

"This is important, for without the screens any plan of bow light would be ineffectual as a means of indicating the direction of steering. This will be readily understood by a reference to the preceding illustrations, where it will appear evident that in any situation in which two vessels may approach each other in the dark the colored lights will instantly indicate to both the relative course of each; that is, each will know whether the other is approaching directly, or crossing the bows either to starboard or port.

"This intimation, with the signals by whistle, as provided, is all that is required to enable vessels to pass each other in the darkest night with almost equal safety as in broad day."

Allusion was made at the argument and in the briefs to the steering and sailing rules of the dominion of Canada. It is not deemed important or proper to refer to these rules, first, because both the *Livingstone* and *Grand Traverse* were vessels of the United States and, therefore, governed by the act referred to, which is applicable to "all public and private vessels of the United States upon the Great Lakes;" second, because the Canadian rules have not been introduced in evidence and the court cannot take judicial notice of them; and, third, because there is no positive proof that the collision occurred in Canadian waters. *The New York*, 27 C. C. A. 154, 82 Fed. 819.

Harvey D. Goulder and Franklin D. Locke, for libelants.

F. H. Canfield, C. E. Kremer, and Harvey L. Brown, for respondent.  
John C. Shaw, for intervenor.

COXE, District Judge (after stating the facts as above). The collision between the *Livingstone* and the *Grand Traverse* occurred about half past 5 on the morning of October 19, 1896, when the steamers were on Lake Erie about a mile northwest of Colchester Light, Ontario. The *Traverse*, a propeller 182 feet long and 33 feet beam, loaded with coal and merchandise, was proceeding up the lake on a voyage from Buffalo to Green Bay, Wis. Her course was W. by N.  $\frac{3}{4}$  N. Her speed was about  $8\frac{1}{2}$  miles an hour. The *Livingstone*, a propeller 280 feet in length and about 38 feet beam, loaded with corn, was proceeding down the lake on a voyage from Chicago to Buffalo. Her course was E. by S.  $\frac{1}{2}$  S. Her speed was about  $10\frac{1}{2}$  miles an hour. The two vessels were thus on substantially opposite courses. The wind was blowing fresh from the west. Though dark at the time of the collision it was clear and objects could be seen at a considerable distance. It was almost daylight. About half a mile ahead of the *Livingstone* was the *Peshtigo*, a propeller smaller and slower than the *Livingstone*, bound down the lake on substantially the same course. Just prior to the collision she passed the *Traverse* about a quarter of a mile to the northward. The members of her crew on watch at the time heard the signals given by the *Traverse* and saw the vessels when they came together. The collision occurred in the open lake, with plenty of room in which to maneuver, and with nothing in the condition of the wind or water to render navigation difficult. It must have been the result, therefore, of gross carelessness on the part of one or both of the colliding vessels. Indeed, the circumstances are almost sufficient to create a presumption of negligence on the part of both vessels. A collision so absolutely indefensible cannot easily be explained upon the theory that but one vessel was responsible. The problem cannot be satisfactorily worked out upon such an hypothesis.

No matter how gross the fault of one, an accident of this character could hardly have occurred without the concurring carelessness of the other. Human beings are not ordinarily so constructed that a single brain is capable of evolving such an over-production of stupidity. The court is bound to assume that both vessels were manned by men of ordinary experience and prudence. Upon the theory that one was wholly free from fault it is necessary to assume that the crew of the other were either intoxicated or insane. "The burden of proof is upon each vessel to establish fault on the part of the other." *The Victory and The Plymothian*, 168 U. S. 410, 18 Sup. Ct. 149.

### The Livingstone.

When the vessels first sighted each other they were about four miles distant. Their masthead lights were first seen. They were then meeting nearly end on and rule 17 became applicable. When about a mile and a half distant the *Traverse* saw the red and green lights of the *Livingstone* and blew one blast, as required by rule 23, to indicate that she was going to the right. She ported half a point. This was correct seamanship. The *Livingstone* did not answer this signal and continued on her course.

The first mate of the *Livingstone*, who had charge of her navigation at the time, testifies that he did not hear this signal, in fact, no one on the *Livingstone* heard it, if the testimony of her crew is to be accepted. There is nothing at all improbable in this story. The whistle of the *Traverse* was clogged with water. Her mate testifies that he blew an unusually long time before he could get a distinct response and as the wind was blowing the sound directly away from the *Livingstone* it is not surprising that it was not heard.

When the vessels were from three-quarters of a mile to a mile apart the *Traverse* seeing, at that time, only the range and red light of the *Livingstone*, repeated the signal and again ported half a point. There was no response from the *Livingstone*. When the distance had been reduced to a quarter of a mile the *Traverse* blew a third signal of one blast and ported a third time. This signal was heard by the *Livingstone*, but still there was no answer.

Assuming the *Traverse* to be guilty of all the faults charged against her what was the situation at the time the third signal was given? The vessels were then about a quarter of a mile apart, each could be seen by the other without the aid of lights. The *Livingstone* knew that the *Traverse* was directing her course to starboard. She knew it from the signal and it was perfectly obvious without the signal. The mate of the *Livingstone* said, "She seemed to put her wheel hard a-port and come right across our bow." What then was the manifest duty to the *Livingstone*? There can be no doubt that she should have ported also. Even had she kept her course there could have been no danger. There was but one thing possible for the *Livingstone* to do at this time to bring the boats into collision, namely, to starboard, and this was the one thing she did do. The proof establishes this proposition beyond a doubt. The reasons which lead to this conclusion are as follows:

First. The counsel for the Livingstone produced at the argument a carefully prepared diagram showing the course of the vessels from the time when the first signal was given, when they were distant a mile and a half. This chart shows that the Livingstone took a sharp swing to port when the last signal was given from the Traverse and when, as all concede, had she held her course or directed it to starboard the accident would not have occurred. In short, the chart shows that after the third signal the respondent's theory of the disaster agrees with that of the libelants. If the Livingstone had not starboarded at this supreme moment she would have passed the Traverse without difficulty.

Second. The wheelsman of the Livingstone testifies that pursuant to an order from the mate, who was then navigating the Livingstone, he put her wheel hard a-starboard. This was either just before or just after the last signal from the Traverse. He is corroborated by the mate of the Peshtigo, who says that after the third signal he saw the Traverse "swinging to the northward on a port wheel and the Livingstone swinging to the northward on a starboard wheel, showing both lights, red and green."

Third. It appears that when the men from the Traverse were taken aboard the Livingstone they overheard an acrimonious dispute between the mate and wheelsman in which the latter maintained that he was ordered to put the wheel a-starboard. This was denied by the mate, but the wheelsman admits that the conversation occurred substantially as narrated by the libelants' witnesses, though he disagrees with them as to the time and place. Of course it is immaterial whether the error was that of the mate or wheelsman. The wheelsman did starboard. If he were ordered to port the mistake was his. If the order was to starboard and he followed it, as he insists, the mistake was that of the mate. In either event the Livingstone is liable.

Fourth. The wheel was found to be hard a-starboard after the accident. This is established by the positive testimony of the wheelsman who says that he put the helm hard a-starboard and when the master came on deck after the collision he told him what had been done with the wheel and the master thereupon felt of the wheel and found it to be in that position. This testimony is uncontradicted.

For this obvious fault of starboarding when she should have ported the Livingstone must be condemned.

#### The Grand Traverse.

The principal accusations against the Traverse are that she displayed no red light and no range light on her mizzen mast or main mast, that she had no lookout and that she did not slacken her speed when risk of collision became apparent.

The last two propositions are conceded as matter of fact. The regular wheelsman was sent aft just prior to the collision to examine the log, and the lookout, who had shipped the day before as a deck hand, was put at the wheel, so that the navigation of the Traverse was solely in charge of the mate without assistance from

any one. It is also an undisputed fact that the *Traverse* was not reversed and no effort was made at any time to slacken her speed.

The first proposition presents an interesting question of fact. Did the *Traverse* have the proper lights? She insists that all her lights were burning. On the other hand, those on board the *Livingstone* testify that they saw only her masthead light and her green light. Upon this question the court is inclined to the opinion that the testimony from the crew of the *Livingstone* is entitled to greater weight than that from the *Traverse*.

No one who has stood on the bridge of a steamer at night when she is approaching another steamer can doubt that the attention of each is directed intently upon the other. At such a time the gaze of the lookout is straight ahead. He does not turn about and inspect his own vessel. He is watching the approaching lights, not his own. The truth of this suggestion has frequently been recognized by the courts. In *The Westfield*, 38 Fed. 366, the court says:

"Where competent officers are in their places, attentive to their duties, and navigating their vessel according to what can be seen, their testimony that no light was seen, which ought to have been seen and must have been seen if properly burning, is entitled to superior credit, if their evidence is not outweighed by other circumstances."

In *The Monmouthshire*, 44 Fed. 697, the same court holds that:

"When several persons on watch, apparently attentive to their duties, can see no light during such a considerable period, when it ought to be seen, the defect will be ascribed to the other vessel, even when the precise reason why the light is not seen does not appear."

See, also, to the same effect, *The Drew*, 35 Fed. 789; *The Naragansett*, 11 Fed. 918; *The Royal Arch*, 22 Fed. 457; *The Isaac Bell*, 9 Fed. 842; *The Johanne Auguste*, 21 Fed. 134; *La Champagne*, 8 C. C. A. 624, 60 Fed. 299; *The Daylight*, 20 C. C. A. 81, 73 Fed. 878; *The General*, 82 Fed. 830; *The Parker*, 18 C. C. A. 406, 71 Fed. 989; *The Mary Lord*, 26 Fed. 862.

Bearing this rule in mind it cannot be doubted that the absence of proper lights on the *Traverse* has been sufficiently established. Only one witness testifies that her red light was burning at the time of the collision. This was the wheelsman who had been sent aft to examine the log and who returned about two minutes before the collision. He says that he turned on the forecastle and "saw the port light and masthead light and after light. The port light was burning bright red, of course." The improbability that at such a fearsome moment with the towering bow of the *Livingstone* plunging towards him, when life and death were in the balance, he should turn his back to the approaching peril and proceed calmly to take an inventory of the steamer's lights must be obvious without further comment.

Other witnesses on the *Traverse* report the lights burning at various times during the night and there is, of course, a presumption that they continued to burn. This presumption is, however, overthrown by the other evidence.

The stern light was in such a condition that it could be seen for a short distance only. After the collision, the shock being sufficient

to extinguish all the lights on the Traverse, the lantern of the stern light was found to be badly smoked and blackened so that even if the light had been burning it would have been of little practical use. The green light was taken aboard the Livingstone, but the port light, if in its screen at all, was not rescued. Indeed, it is not easy to determine the fate of the port light after the collision. Appropriately enough its history seems lost in obscurity.

On the other hand, the witnesses for the Livingstone are unanimous and positive in saying that at no time did they see any lights on the Traverse but the masthead light and green light. Their testimony is strongly corroborated by their conduct. Should the court find that the lights were all burning brightly on the Traverse the course pursued by the Livingstone cannot be accounted for upon any of the rules which govern human action. As before intimated, her watch must have been either insane or criminally negligent. On the other hand, if she saw only the green light of the Traverse she was justified in supposing, for a time at least, that a collision was impossible. That other mariners would have pursued a similar course is proved by the testimony of the mate of the Peshtigo. The mate of the Livingstone was asked why he did not give a passing signal and he answered that he did not do so because "the Traverse was showing her green light."

The mate of the Peshtigo testified as follows:

"Q. As you were approaching the Grand Traverse and at the time she blew her first whistle and before that what colored lights were you showing to her? A. Green light. Q. And she showing her green light to you? A. Yes, sir. Q. Did you think that whistle might be meant for your boat? A. No, sir. Q. Why not? A. Because she showed me no red light."

It is, of course, true that the Peshtigo was in a position where she could not have seen the red light of the Traverse had it been burning, and the testimony is quoted simply to illustrate the proposition that a prudent navigator seeing only the green light of an approaching vessel may deem himself in absolute safety and may not even feel called upon to answer signals.

The men on the Livingstone were all mariners of experience. Their employer's property not only but their own lives depended on their prudence, and yet, if the libelants' theory be correct, they continued, in the teeth of obvious peril and with an imbecility unprecedented and unique, to persist in a series of acts which no prudent navigator would tolerate for a moment. Had the Livingstone seen the port light and range lights of the Traverse, indicating that she was approaching nearly end on, and subsequently that she was turning to the right, it is impossible to believe that the Livingstone would have neither given nor answered signals and would have continued to turn to the left. The testimony is that after seeing the Traverse she starboarded a quarter of a point and soon afterwards another quarter, before the last and fatal blunder was made. To the mind of the court the strongest confirmation of the Livingstone's theory regarding lights is found in the fact that her conduct was consistent with that theory, and wholly inconsistent with the libelants' theory. She did precisely what a vessel might do seeing only the

green light of an approaching vessel, she did precisely what would not be done if both lights were seen.

The court must, therefore, reach the conclusion that the *Traverse* did not display the proper lights.

But it is argued by the libelants that these faults had nothing to do with the collision and that they might safely concede the existence of them all without in any way jeopardizing the libelants' right to recover their entire loss. So that the following proposition is presented: A collision at night on the broad waters of Lake Erie. The vessels see each other when four miles distant. When about a quarter of a mile apart one of them makes the blunder of starboarding when she should have ported. The other has no lookout, no port light and no stern light and does not slacken her speed. Can the latter be held free from fault in these circumstances?

The law applicable to this situation is forcibly stated in *The Conoho*, 24 Fed. 758. Speaking of the law as to lights the court says:

"The strict observance of these rules is necessary to the safety of navigation. By their observance the navigation of steamers at night is rendered as safe as it is by day. \* \* \* These two sorts of lights (range lights) are probably more important in narrow channels than the red and white lights. They are both essential. It is for this reason that every steamer navigating narrow waters at night is required to have these lights up. If a steamer has them not it is in fault; it is grossly in fault. It takes the risk and responsibility of whatever may happen when they are not up. The burden of proof is upon the steamer to show that they were up. The proof must be positive. It must not be a matter of inference. These lights must be shown to have been up at the time of the collision and long enough during the moments just previously to have permitted the approaching vessel to make the maneuvers proper for avoiding a collision. There can be no safe navigation of our inland waters by steamers at night unless the master of each steamer knows that these lights are up at every moment while he is in motion. What I said in the case of *The Oliver*, 22 Fed. 848, I repeat with emphasis and enlargement: The law as to lights is imperative. It must be obeyed. It must be effectively obeyed. Obedience to the requirements of the law must be certain and unremitted. The master, or officer in charge, must know that the lights are continually up. Conjecture will not do. If he does not look to it himself he must have a lookout on deck, not only to keep the lights constantly burning, but to be able to say positively, in the event of a collision, that they were up before and at the time of it. The courts must not be driven to the necessity of fishing for the truth in the uncertain and conflicting testimony of the seamen of rival crews."

The rule as to the necessity for a competent lookout is thus stated by the supreme court in *The Genesee Chief*, 12 How. 443, 463:

"It is the duty of every steamboat traversing waters where sailing vessels are often met with, to have a trustworthy and constant lookout besides the helmsman. It is impossible for him to steer the vessel and keep the proper watch in his wheel house. \* \* \* And wherever a collision happens with a sailing vessel, and it appears that there was no proper lookout on board the steamboat but the helmsman, or that such lookout was not stationed in a proper place, or not actually and vigilantly employed in his duty, it must be regarded as prima facie evidence that it was occasioned by her fault."

This rule has been uniformly followed since in all the federal courts. *The New York*, 18 How. 223; *The Ottawa*, 3 Wall. 268; *Chamberlain v. Ward*, 21 How. 548; *The Tillie*, 13 Blatchf. 514, Fed. Cas. No. 14,049; *City of Philadelphia v. Gavagnin*, 10 C. C. A. 552, 62 Fed. 617; *The Myrtle*, 44 Fed. 779.

The failure of the *Traverse* to stop and reverse would seem to be in direct contravention of rule 26, which provides that "if the vessels shall have approached within half a mile of each other both shall reduce their speed to bare steerageway, and, if necessary, stop and reverse."

In *Chamberlain v. Ward*, *supra*, the court says (page 569):

"The Atlantic is chargeable with fault, because the officer of her deck did not seasonably and effectually change the course of the vessel, or slow or stop her engine, so as to avoid a collision, after he discovered the white lights of the approaching vessel. Whether his neglect to adopt these precautions, or some of them, arose from inattention or rashness, is immaterial, as, in either event, it was a culpable omission of duty, plainly required by the rules of navigation in that emergency, and one which the dictate of common prudence as well as a proper regard for the safety of his passengers should have prompted him to perform. \* \* \* The officer of the deck admits that the speed of the steamer was not slackened at any time throughout the entire period that elapsed after he saw the white lights of the approaching vessel. On this ground we think the steamer was clearly in fault." *The Stanmore*, 10 Prob. Div. 135; *The Manitoba*, 122 U. S. 97, 7 Sup. Ct. 1158.

It thus appears that the *Traverse* violated four well-known rules. It is, of course, possible that a case might arise where a vessel may be exculpated even in such circumstances, but it will not be denied that the presumptions are heavily against her and that she must show by the clearest proof that her neglect did not contribute to the disaster. It is not necessary for the respondent to prove that the failure to observe these rules caused the accident or helped to cause it or might have caused it. The libelants must prove that it did not and could not have caused or contributed to cause the accident. The fact being established that there was no lookout, no red light, no range light and no checking of speed the libelants must be condemned unless it appears that these omissions did not produce or contribute to produce the collision; and so, if the proof leaves the matter in doubt, for then the presumption against the libelants is not overcome. *The Pennsylvania*, 19 Wall. 126; *Belden v. Chase*, 150 U. S. 674, 699, 14 Sup. Ct. 264.

The argument for the libelants is based principally upon the testimony of the mate of the *Livingstone*. He said on cross-examination that up to the time the *Livingstone* blew the last whistle he could not have seen a properly screened red light on the *Traverse* if she were in the position indicated by him. He further testified that the one whistle heard by him gave him all the information needed, that the absence of the red light and mainmast light made no difference and that the only act he complained of on the part of the *Traverse* was that when about 1,500 feet away on a course which would have taken her at least 1,000 feet to starboard she blew one whistle and suddenly pulled across the *Livingstone's* bow.

The court is not concluded by this testimony:

First. It is based upon premises which both sides concede to be untrue. No one pretends that the *Traverse* was on a course a quarter of a mile to starboard of the *Livingstone*.

Second. The witness is not one who commends himself to the court. The libelants argue that he is unworthy of credence in other particulars.

Third. Taken in connection with the other testimony it is plain that the witness did not intend to make the broad admission asserted by the libelants.

It may be true that at the moment when the last whistle was blown the red light would have given the Livingstone no additional information. In that sense, and if confined to that period, the statement of the mate is intelligible, but if applied to the facts as they are actually proved it is absurd.

There is no doubt that when the vessels were a mile and a half away the Livingstone could have seen the red light and range lights of the Traverse if they had been in place. If they had been in place the Livingstone would have been informed as clearly as though it were broad daylight the exact direction in which the Traverse was pointing. Seeing the green light only and no range she had a right to assume that the Traverse was pointing so that she would pass far to the southward of the Livingstone. When she starboarded half a point she was going still further to the north and away from the Traverse. Instead of pointing to the southward of the Livingstone the Traverse was, in fact, pointing to the northward of her. Had the Livingstone known this her obvious course would have been to go to the right instead of to the left. The green light, therefore, told the Livingstone a falsehood of the most dangerous kind. It informed her that the Traverse was to pass starboard to starboard when, in fact, she was intending to pass port to port. In short, the fault of the Traverse put the vessels in a position of danger where the slightest fault might bring disaster, and the Livingstone furnished the coup de grâce.

A flagman who gives the wrong signal to an approaching train can hardly escape the charge of negligence by proof that the engineer had time to stop after he discovered the obstacle ahead of him on the track. A stage driver who signals that he is going to take the left hand side of the road is hardly in a position to escape entire responsibility for a collision occurring on the right hand side. If the Traverse had gone where her lights indicated she was going there could have been no collision. By her fault she made a collision possible, if not probable, which otherwise would have been impossible. It is, of course, difficult to predict what would have been the result had the Traverse had a lookout. It is possible that, having no other duties to perform, he might have discovered the Livingstone's erratic course soon enough to have caused the Traverse to change her course or to reverse or to signal danger sooner than she did. *The City of Augusta*, 25 C. C. A. 430, 80 Fed. 297.

Again, how is it possible to assert that the failure to stop and reverse was not a fault? Had the Traverse slowed down the collision might have occurred, but it might not. In any event the blow would not have been so severe. *The Jay Gould*, 19 Fed. 765, 771. It is enough that the libelants have failed to show that their neglect in these particulars could not have contributed to the disaster. The courts should be loth to make any ruling which shall encourage shiftlessness and inattention to duty in the navigation of ships. Only in the plainest cases should the courts take the responsibility of saying

that a vessel can violate the law and still be free from fault. The preservation of life and property depends upon the strict observance of these rules and those entrusted with the care of ships should understand that they must be enforced with uniform and absolute certainty. When it is distinctly understood that for carelessness in this respect no excuse will be received the discipline of our merchant marine will be improved and collisions like this will be heard of no more. It follows that there must be a division of damages and costs (The Warren, 23 Blatchf. 282, 25 Fed. 782) and a reference to compute the amount.

Although counsel on both sides must have contemplated the probability of this result they have discreetly refrained from discussing it in their briefs, each maintaining that the other vessel was solely responsible for the collision. The counsel for the intervener has submitted no brief and has expressed no opinion as to the form of the decree as to the cargo in case the damages are divided. Some interesting questions are presented in this regard, but as counsel have not been heard regarding them, their disposition is reserved until the settlement of the decree.

The attention of counsel is called to The Viola, 60 Fed. 296; The Manitoba, 122 U. S. 97, 7 Sup. Ct. 1158; The Alabama, 92 U. S. 695; The Atlas, 93 U. S. 302.

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### THE MINNIE.

(District Court, E. D. Virginia. May 2, 1898.)

#### 1. COLLISION—VESSEL AT ANCHOR—FOG SIGNALS—EVIDENCE.

On the question whether an anchored vessel was negligent in not ringing the fog bell during a snow, the fact that numerous other vessels anchored in the same vicinity were not ringing them is entitled to weight, as tending to show that the weather was not thick enough to require it.

#### 2. SAME—SHOWING TORCH.

Rev. St. § 4234, requiring sailing vessels to show a lighted torch to steam vessels approaching at night, does not apply to vessels at anchor.

#### 3. SAME—TUG AND TOWS WITH ANCHORED SCHOONER.

A tug with a long tow, entering a frequented roadstead at night in such a way as to bring one of the barges in the tow into collision with a schooner at anchor, and sink the latter, held in fault for insufficient lookout, and for careless handling; and the schooner held not in fault for not ringing a bell, it not appearing that the weather was thick enough to obscure her lights, or for not showing a torch, as required by Rev. St. § 4234, the facts not bringing the case within that rule.

This was a libel in rem by Henry A. Haines, master of the schooner John C. Haynes, against the steam tug Minnie, to recover damages caused by a collision.

Bickford & Stewart, White & Garnett, and Sharp & Hughes, for libellant.

Samuel Park and Whitehurst & Hughes, for respondents.

**BRAWLEY**, District Judge. The schooner John C. Haynes, loaded with coal, was lying at anchor in Hampton Roads, on the night of

February 6, 1895, at a point from one-half to three-quarters of a mile southwest of the wharf at Fortress Monroe. This is a capacious roadstead, and that it was a proper and safe anchorage ground was expressly decided in *The J. W. Everman*, 2 Hughes, 17, Fed. Cas. No. 7,591. The steam tug *Minnie*, having in tow the barges *Volunteer* and *Puritan*, passed the *Haynes* on the morning of February 7th, about 5:10, the *Volunteer* striking her bowsprit, and the barge *Puritan* struck the schooner on the port bow, and sunk her. As the proof clearly shows that the schooner had her regulation anchor light, and that it was brightly burning at the time of the collision, and as the law is clear that a vessel propelled by steam and in motion is bound to steer clear of a vessel at anchor, the burden of proof is upon the tug to show that she is without fault, or that the schooner contributed to the disaster, or that the same was the result of inevitable accident. The chief fault attributed to the schooner was her failure to ring her bell. As the international rules have no application in these waters, the measure of duty in this regard is fixed by rule 15 (section 4233, Rev. St.), which is as follows:

"Whenever there is a fog or thick weather, whether by day or night, fog signals shall be used as follows: \* \* \* Steam vessels and sail vessels when not under way shall sound a bell at intervals of not more than five minutes."

All the witnesses agree that the weather was cold and freezing, and as a fog is caused by evaporation, which could not have been produced under the prevailing conditions, and as the more credible witnesses have not testified to the existence of a fog, it will be sufficient to consider whether there is sufficient proof of "thick weather" to require condemnation of the schooner for her failure to give the usual fog signals, it being admitted that the bell was not being rung at or near the time of the collision. A great many witnesses have been examined as to the state of the weather at and near the place of collision, and there is the usual conflict of testimony on that point. That a heavy snow had fallen during the night is clearly proved. That the fall was lighter and intermittent about the time of the collision seems also to be established. By the new international rules, snow is treated as fog; but as this case is not governed by those rules, and in the absence of proof of a usage or custom of vessels at anchor to ring bells in snowy weather, I cannot hold a vessel at fault for failure to ring, without clear evidence that such snow prevents the visibility of lights, in which case the exigency of the fifteenth rule requiring bells to be rung in "thick weather" would apply, for the ringing of a bell is obviously intended to give that notice which cannot be had by the vision. The majority of the disinterested witnesses nearest the scene of the collision seem to agree that the weather was not thick enough to prevent lights being seen. Of the twelve or fifteen vessels lying at anchor in the roadstead, only one was ringing her bell. The bell at the Fortress Monroe Light was not rung. This was the lighthouse nearest to the point of collision. A majority of the masters and crews of the vessels lying nearest the schooner have testified that lights were easily visible; that the weather was not thick enough to demand the ringing of bells. It was suggested in the argument that there is a certain bias

in the masters of sailing vessels in favor of the schooner as against the tug. However that may be, and whatever consideration should be given to the suggestion in determining the weight of their testimony, this alleged bias could not have affected their actions; and what men do is often of more consequence in determining the truth than what they say. That they did not ring their bells sufficiently establishes the fact that they did not consider the weather such as to require it. It is true that they, too, may have been negligent, and their concurring negligence would not excuse the libellant; but it is scarcely to be believed that so many of them would have neglected a precaution enjoined by the statute, and upon compliance with which depended their own safety.

I will not undertake to state in detail or to analyze the testimony, for, inasmuch as I did not have the advantage of seeing or hearing any of the witnesses, it would not assist any court which may be called upon to review the correctness of my conclusions. I am of opinion that the claimant has failed to show by a preponderance of testimony that the weather was such as to require the ringing of bells or other fog signals, and I am of the opinion, further, that this alleged negligence was not a contributing cause to the collision. The disaster occurred before daylight on the morning of the 7th of February. Whatever the amount of obstruction at the time of its actual occurrence, all agree that it was not clear; and all agree that up to about 4 o'clock there was a heavy snowstorm, that there was a flood tide, and a strong wind. The weather reports show a north-east wind, of a velocity of about 20 miles an hour. The Minnie was entering the roadstead, used habitually in rough weather as a harbor of refuge. Her master was familiar with such use. It was to be expected that many vessels would be at anchor there. The testimony shows that there were 12 or 15. All of the circumstances were united which demanded extreme vigilance. The Minnie was carrying two seagoing barges, with sharp-pointed iron prows. To the first barge there was a hawser of 175 or 180 fathoms; to the second barge a hawser of 140 or 150 fathoms; each barge being 180 feet in length. In the absence of a statute or regulation by authorities charged with such duty, the courts should not undertake to lay down any hard and fast rule governing the length of hawsers. The testimony in this case shows that such length of hawser was not unusual. It also shows that, since this occurrence, the company, which is the owner of the Minnie, has made a regulation of its own directing the length of hawsers to be 30 fathoms. It is sufficient to say that, in such weather as prevailed, such great length of tow was unmanageable, or at least unmanaged. There was safe anchorage ground below, either under the lee of Cape Charles, before entering the roadstead, or near the Thimble, where two vessels were at anchor, and the testimony shows that the barges passed so near as to almost touch them. With all the conditions demanding uncommon vigilance, it is found that the lookout on the Minnie, whether from native inaptitude or because his faculties were benumbed by cold and fatigue, for he had been on duty over five hours in a most exposed place during most severe weather, neither saw nor heard what it is

the obvious duty of the lookout to see and hear. The other lookout has left the country, and was not examined. The mate of the schooner testified that he saw the lights of the Minnie a mile off. The lookout of the Minnie did not report the schooner's light at all. Her captain and mate were both on duty in the pilot house. Her captain did not see the light until she was about 400 feet off his starboard beam. The mate saw her on his starboard bow about two points,—a "couple of hundred feet or so ahead."

From this testimony I conclude that there was not that vigilant lookout demanded by the occasion, and I am also forced to the conclusion that there was a lack of seamanship on the part of the master of the Minnie after the schooner was discovered; for he kept his course, as he says, not apprehending that there was any danger, keeping no lookout in the stern, so as to direct the movement of his barges, and not knowing until he anchored his first barge, a half hour afterwards, that the second barge had been cut off or that a collision had taken place. That it is the obvious duty of a navigator to have a knowledge of, and to calculate the effect upon his tow of, the wind and tide, will scarcely be disputed. If the wind had suddenly sprung up, there might have been some excuse, but such was not the case here. Whether he could have hooked up, and, by starboarding his helm, pulled the barges away from the schooner, need not be determined, though it seems to me that such manoeuver would have been successful. He did not attempt it, because he believed that there was no danger. The event proved that there was danger, and all of the circumstances were such as should have aroused the vigilance of a prudent seaman.

The absence of an anchor watch on the schooner is complained of, but the proof does not sustain the charge. That the mate and others hallooed to the approaching barge, calling upon it to throw over its anchor, and in all ways possible endeavored to avert the danger, cannot be seriously controverted; and it is difficult to see what an anchor watch could have done that was not done.

It is also charged that the schooner failed to show a torch, as required by section 4234 of the Revised Statutes. The facts proved do not bring this case within the exigency of that rule. The *John H. Starin*, 2 Fed. 100, and *The Oregon*, 158 U. S. 186, 15 Sup. Ct. 804, are cases which discuss the application of this rule, and show that this was not a case falling within it.

In undertaking to tow these barges in a roadway where the presence of shipping was reasonably to be expected, with a hawser so long that it was practically unmanageable, with tows liable at all times to a sudden sheer, putting in jeopardy all anchored vessels, which were helpless to protect themselves, I am of opinion that there was a lack of that caution and foresight which the law demands of vessels navigated by steam; and, in so far as the testimony of the claimants is to be believed that the weather was so thick as to prevent the visibility of lights, there is an aggravation of his carelessness. With such a wind and tide it seems to be sheer recklessness and a trusting to luck which calls for condemnation. If it had been necessary for his own safety to pass through, and he had displayed great

vigilance and seamanship in the attempt, it might have been excused; but such were not the conditions, and I must therefore hold the Minnie at fault. The John H. May, 52 Fed. 882; The Ludwig Holberg, 157 U. S. 70, 15 Sup. Ct. 477; The Syracuse, 12 Wall. 172; The Michigan, 11 C. C. A. 187, 63 Fed. 288; The Oregon, 158 U. S. 193, 15 Sup. Ct. 804; The Rockaway, 19 Fed. 452. A reference to a commissioner to compute the damages may be had if counsel do not agree, and a decree will be entered in favor of the libellant.

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#### THE RAMBLER.

#### THE WILLIAM.

(District Court, D. Connecticut. June 14, 1898.)

#### COLLISION—CANAL BOAT AT DOCK—GROUNDED SCHOONER.

Tugs which towed a schooner alongside a canal boat lying at her dock immediately after discharging her cargo, and left the schooner grounded there, so that, on the going out of the tide, she listed against and injured the canal boat, *held* liable for the resulting damages.

This was a libel in rem by Mary J. McCaffrey, administratrix, against the steam tugs Rambler and William.

Carpenter & Park, for libellant.

Bristol, Stoddard & Bristol, for claimant.

TOWNSEND, District Judge. Libel in rem. At about half past 12 o'clock in the afternoon of October 20, 1896, the canal boat Charles McCaffrey, owned by libellant, was lying at the "Canal Dock," so called, at New Haven. She had just discharged a cargo of coal, and had hauled ahead away from her derrick, and was waiting for a tug to take her out. The wind was S. S. W., and blowing hard. The tide was two to three hours on the ebb. At this time the steam tugs Rambler and William came up, having the three-masted schooner P. T. Barnum in tow, and left her grounded alongside the Charles McCaffrey. When the tide went out, the Barnum listed away against the McCaffrey, and caused considerable damage. The claimants, by way of defense, say, "The schooner Barnum was alone responsible." In that case they might have prayed for process against her, under admiralty rule No. 59. The claims that the canal boat was negligent in not getting out sooner, and that the Barnum was not aground when the tugs left her, are not supported by the proofs. The reasonable time allowed to a boat to get out after discharging had not expired. Complainant's witness admits she could not have backed out, and it appears from the cross-examination of the captain of the tug William that the schooner must have been aground when the tugs left her. The listing and damage were natural consequences of the negligence of claimants in leaving the schooner aground, for which they are liable. *Meyers v. The America and The Nile*, 38 Fed. 256, and cases cited. Let the matter be referred to a commissioner to ascertain the damages.

## PLUME &amp; ATWOOD MFG. CO. et al. v. BALDWIN et al.

(Circuit Court, S. D. New York. June 14, 1898.)

## 1. CREDITORS' SUIT—JUDGMENT TO SUPPORT.

The allowance of a claim against an assigned estate in an insolvency proceeding is such a judgment as will support a creditors' bill.

## 2. EQUITY—JURISDICTION—RESIDENT AND NONRESIDENT EXECUTORS.

Where there are two executors of an estate, one resident in the state where the property is situated and one nonresident, courts of equity within the state have jurisdiction to decree a discovery and accounting against the resident executor without the presence of the nonresident.

## 3. CREDITORS' SUIT—PRINCIPAL DEBTOR NONRESIDENT—JURISDICTION.

The fact that the principal debtor in a creditors' bill is a nonresident, and cannot be served, does not oust the jurisdiction of the court to decree against resident defendants such relief as may be proper as against them alone.

This was a creditors' bill by the Plume & Atwood Manufacturing Company and the Scoville Manufacturing Company against Lewis S. Baldwin, Isaac P. Baldwin, Eli Baldwin, Walter S. Baldwin, and Charles E. Wilmot, as executors of the last will and testament of Lemuel H. Baldwin, deceased. The cause was heard upon pleas to the bill filed by certain of the defendants.

Hutchinson & Newhouse, for plaintiffs.

Richard M. Bruno and George Hastings, for defendants.

TOWNSEND, District Judge. This suit stands upon pleas to a bill in equity. The bill alleges that Lewis S. Baldwin, of Chicago, Ill., made an assignment for the benefit of creditors in Cook county, Ill., and under the assignment judgment was rendered in favor of the complainants; that the property so assigned was practically valueless; that Lemuel H. Baldwin, a brother of Lewis, died in New York City, leaving an estate exceeding \$70,000, and a will by which Lewis was given \$10,000 and one-tenth of the residuary estate, and in which the defendants Eli Baldwin, Walter S. Baldwin, and Charles E. Wilmot were appointed executors; that Lewis, upon being examined under oath in the insolvency proceedings in Cook county, stated that he had assigned his interest under his brother's will to Isaac P. Baldwin, a citizen of Virginia, which assignment was fraudulent and void; and the bill claims a discovery as to the assignment, and as to whether the executors have paid over the interest of Lewis S. Baldwin under said will; and that the assignment be declared void, and that the interest of Lewis under the will be paid to the complainants and other judgment creditors. Lewis S. Baldwin, Isaac P. Baldwin, severally, and Eli and Walter S. Baldwin, as executors, plead that the complainants did not obtain judgments against Lewis; that Charles E. Wilmot and the complainants are citizens and residents of Connecticut; that Isaac P. Baldwin is a citizen and resident of Virginia, and Lewis S. Baldwin of Illinois. Walter S. Baldwin has died since the service of process. No attempt has been made to serve the defendant Charles Wilmot with process, and he has not been served. The executors are all described as of New York, and

defendants claim that the bill should be dismissed, because they are not alleged to be citizens of New York. It would have been proper to allege that the defendant executors were citizens of New York. The statement that they are of New York is not such an allegation; but, as it is not denied that those who have been served are actually citizens of New York, and no mention is made of this point in the pleas, an amendment should be allowed.

As to the judgments, the fact seems to be that the claims, verified by oath, were duly presented in the insolvency proceedings in Illinois, and, in the absence of any objection, were allowed, and that this is all that is required to establish the debt in that proceeding. A judgment in a court of law is not always indispensable to the bringing of a creditors' bill, and should not be required in the present instance. *Case v. Beauregard*, 101 U. S. 688.

Complainants, at the time they brought this suit, say that they supposed that Wilmot was a citizen of New York, and he has not been served with a process. Unless he is an indispensable party, the court ought not to be ousted of jurisdiction. The estate is in settlement in New York, and the property situated there. I think that the court can have jurisdiction as against the resident executor without the presence of Wilmot, at least so far as to require a discovery and account. *Clifton's Adm'r v. Haig's Ex'rs*, 4 Desaus. Eq. 330; *Stewart v. Canal Co.*, 1 Fed. 361; *West v. Randall*, 2 Mason, 196, Fed. Cas. No. 17,424; *Footman v. Pray's Ex'rs*, R. M. Charl't. 291; *Shorter v. Hargroves*, 11 Ga. 658. If the defendants Lewis S. Baldwin and Isaac P. Baldwin, who cannot be served with process, being out of the jurisdiction, do not choose to submit to the jurisdiction of the court, this will not oust the court of jurisdiction as to the defendant who has been properly served. The pleas will be overruled upon an amendment being filed describing Eli Baldwin as a citizen of New York, and dropping Wilmot as defendant.

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ALLEN v. WINDHAM COTTON MFG. CO. et al.

(Circuit Court, D. Connecticut. June 22, 1898.)

MORTGAGE ON AFTER-ACQUIRED PROPERTY—ACCOUNTING—DECREE DECLARING LIEN.

A mortgage covering real estate, machinery, and "all the stock of cotton, raw, in process of manufacture, and manufactured goods," on the mortgaged premises, and all which may be placed thereon, stipulated that until default the mortgagor may use and sell such cotton and goods, and receive the proceeds thereof. *Held*, in a suit for an accounting, that the mortgagee had no rights as to goods sold before the bill was filed, but upon answer showing the amount of cotton and goods on hand, no rights of third persons intervening, she was entitled to a decree declaring her mortgage a lien thereon.

This was a suit in equity by Mary R. Allen against the Windham Cotton Manufacturing Company and others for foreclosure of a mortgage and an accounting.

Arnold Green and W. A. Briscoe, for complainant.

Edwards & Angell, for respondents.

TOWNSEND, District Judge. The mortgage in the present case specified a large amount of real estate and machinery, and added, "Together, also, with all the stock of cotton, raw, in process of manufacture, and manufactured goods, now on said mill estate, and all those which may be placed thereon in lieu of or in addition to what is now there;" and contained the stipulation that, "until default in payment of principal or interest, the mortgagor may use and sell said cotton, stock in process, and manufactured goods, and receive the proceeds thereof." The only question, if there is any question between the parties, seems to be as to the cotton which had been manufactured and sold previous to the filing of the bill. As to this, the complainant has no rights, and is not entitled to an accounting. The intent of the mortgage and the proper construction of its terms is that the mortgagor should go on with its business, buying, manufacturing, and selling, and using the money derived from said sales in carrying on its business, until default in payment of principal or interest, and until the mortgagee signified her intention to enforce the provisions of the mortgage.

A mortgage upon after-acquired property is good, under the laws of Connecticut, as between the mortgagor and mortgagee and as against third parties, provided the mortgagee actually takes possession before any other rights have intervened. *Rowan v. Manufacturing Co.*, 29 Conn. 282; *Walker v. Vaughn*, 33 Conn. 577. No question is made but that the mortgage is valid and effective as to real estate and machinery. The respondents' amended answer admits that they have on hand (presumably at the time of the filing of the bill) raw cotton, cotton in process of manufacture, and manufactured goods of the value altogether of something more than \$12,000. As to this cotton, raw, in process of manufacture, and manufactured, counsel for complainant claims that the provisions of the mortgage amount "to an agreement for a lien on after-acquired property," and says, "Probably the only effective decree in the complainant's favor would be a declaratory one establishing her mortgage lien on this property." Respondent does not seem to dispute complainant's right to such a decree. There is no intimation that the rights of any third party, such as a trustee in insolvency, or attaching creditor, have intervened. The simple bringing of this suit is not a taking possession by the mortgagee, and such rights of third parties would be superior to the complainant's; but, as between the complainant and the respondent, the mortgage has the effect which complainant claims, and a decree as is desired by her, extending to the cotton on hand, may be made. If counsel cannot agree as to the form of said decree, each party may draw and submit one to the court for final adjudication.

**WESTERN UNION TEL. CO. v. BOSTON SAFE-DEPOSIT & TRUST CO.**

(Circuit Court, S. D. New York. June 14, 1898.)

**MORTGAGE—FORECLOSURE—LEASE BY RECEIVER—RIGHT TO PROFITS.**

Where a mortgage upon the property of a telegraph company is foreclosed by the trustee named therein, and a receiver appointed, who, with the consent of the court, leases all the mortgaged property to another company, the lessee is entitled to rents accruing to the mortgagor, during the continuance of the lease, for use of the poles and wires, as against the trustee in the mortgage, who is the obligee in a bond given to secure such rents.

This was a suit by the Western Union Telegraph Company against the Boston Safe-Deposit & Trust Company to recover rents received by defendant, as trustee.

Rush Taggart, for complainant.

Wilson & Wallis, for defendant.

**TOWNSEND**, District Judge. On April 18, 1885, Edward Harland was appointed receiver in suit for the foreclosure of a mortgage of the property of the American Rapid Telegraph Company to the defendant, as trustee for bondholders. The order appointing the receiver authorized him to obtain possession of all the property of the mortgagor, and carry on its business. On July 10, 1885, said receiver made an agreement with the complainant, the Western Union Telegraph Company, which was approved by the court, by which agreement the complainant was authorized to collect and receive all the earnings and revenues of the property vested in said receiver, including all poles, wires, etc., during the period of the receivership, the complainant guarantying the receiver a net income of \$5,000 per month. The Bankers' & Merchants' Telegraph Company was in possession of six lines of wire between Cleveland and Chicago, strung upon poles, which poles, after litigation, were decided to belong to said mortgagor, and to be included in said mortgage; but it was directed that the United Lines Telegraph Company, then using said six wires, might retain them upon said poles until the termination of their appeal, upon their giving bond to the Boston Safe-Deposit & Trust Company in the sum of \$95,000 conditioned for the payment of a rental for the use of said line of poles from Cleveland to Chicago, at the rate of \$4 per mile per wire per annum, from the 23d of March, 1885, so long as they should remain on the said line of poles; provided it should finally be adjudged that the said line of poles was subject to the lien of the mortgage of the American Rapid Telegraph Company. The United Lines Telegraph Company afterwards leased said six lines of wire to the Postal Telegraph & Cable Company, and it was finally determined that the line of poles was subject to the lien of the mortgage. On September 1, 1889, the Postal Company, in accordance with the said final decision, surrendered said six lines of wire to the Western Union, and thereafter paid the sum of \$41,218 for the rental of said poles, at the price specified in the bond, between September 1, 1889, and September 1, 1894.

In the suit by the defendant upon the bond, Judge Shipman charged the jury that the poles were a part of the line mortgaged, and that, under its contract, the Western Union had the exclusive right to any rent which might come from the use of the poles by any other party; that the \$41,282 which had been received by the Western Union Telegraph Company as rent was a valid payment on account of the bond, and for that part of the bond the obligors were no longer liable. He also charged them that, if the Western Union should sue for the rents, it should sue in the name of the Boston Safe-Deposit & Trust Company, as they had the legal title, and directed them to render a verdict for the balance of the rent which had not been paid by the Postal Telegraph Company, to wit, \$39,088.10. This charge of Judge Shipman seems to have decided the question at issue. The defendant in this action claims to be entitled to hold all the rents secured by the bond against the Western Union, and this contention would seem to be well founded if it is entitled to hold any of them; but, if it is entitled to hold all of them, the payment of \$41,282 allowed by Judge Shipman would not have constituted a defense to any part of the bond. The settlement of the final accounts of the receiver without mention of this fund, the terms of the order declaring the termination of the contract between the receiver and the Western Union, and the ruling that the Postal Telegraph Company, in surrendering said wires to the Western Union, surrendered them to the receiver, confirm this view. These wires and the use of the poles for supporting them may well be included in the term "all rentals for the use of the strung wires" in said order. It is difficult to see how any other result could be reached. It has been finally decided that the mortgagee, and therefore the receiver, was entitled to the use of these poles; hence the Western Union was entitled to use them, and to any rent which could be derived from them. The Boston Safe-Deposit & Trust Company is a mere trustee, and, after the appointment of a receiver, could have no further right to take or hold the rents. The bond was properly made in the name of that company, but those who were beneficially entitled to the money were entitled to the benefit of any suit brought upon the bond. Let judgment be rendered in accordance with the prayer of the complainant.

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CLARK et al. v. McGHEE et al.

(Circuit Court of Appeals, Fifth Circuit. May 3, 1898.)

No. 680.

1. APPEALS—FROM INTERLOCUTORY ORDERS—FINAL DISPOSITION—REMANDING  
On an appeal from an interlocutory order the court has power to hear the whole case, and to make final disposition of it; but where the record is insufficient or incomplete, the court will only consider whether the interlocutory order was providently granted.

2. TAXES—PROPERTY IN COURT'S CUSTODY—ACTION STAYED.

A court whose receiver is in charge of a railroad may properly allow an injunction pendente lite forbidding the state taxing officers to collect disputed taxes levied against a part of the railroad property.

**Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.**

Wm. J. Wood, for appellants.

Milton Humes, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

McCORMICK, Circuit Judge. The Memphis & Charleston Railroad Company owns a railroad with about 160 miles of main track and 17 miles of side track in the state of Alabama. Its property in Alabama is in the hands of receivers appointed by the circuit court for the Northern district of Alabama. On the 12th of April, 1897, these receivers, C. M. McGhee and Henry Fink, exhibited their bill to the judge of that court, by which they were appointed, complaining therein of J. O. Clark, as tax assessor of Colbert county, and of M. Malone, as tax assessor of Lauderdale county, in that state. In their bill they show, in substance, that the property of the railroad which by law is made returnable to the state auditor includes a bridge about one-half mile long on the Florence branch of the railroad, which bridge crosses the Tennessee river at the town of Florence, and is partly in each of the counties for which the defendants are assessors of taxes; that by law the receivers were required to return to the auditor the total length of the railroad in the state of Alabama, including the right of way, roadbed, side tracks, and main track in the state, and specifying the total length in the state and in each county, city, and incorporated town thereof, and also of the number of locomotive engines, and passenger, freight, platform, construction, and other cars of said company, and of the average amount and value of merchandise and supplies kept or carried on trains for sale or other disposition for a profit by the company to employes or other persons; that the valuation of the property of railroad companies for taxation is required in Alabama to be made upon the same principles as the valuation of every other species of property,—that is to say, the valuation of such property shall be had exclusively upon the consideration of what a clear, fee-simple title thereto would sell for under the conditions under which that character of property is most usually sold; that the railroad property in the custody of the receivers has been thus returned by the receivers, and valued and assessed by the state board of assessment from time to time as required by law, and the taxes so assessed have been fully paid as required by law; that the Florence bridge is so constructed that it can be used, and it has been and is being used, as a thoroughfare over which persons, animals, and vehicles other than railroad cars pass and repass, paying a regular toll therefor; that all of the substructure of the bridge—that which supports the thoroughfare superstructure and that which supports the superstructure for the passage of trains—is identical and is necessary for the support and maintenance of the bridge as a railroad bridge; that the thoroughfare feature is a mere incident to the whole structure, the chief office, purpose, and use of the bridge being for the passage of trains of the Memphis & Charleston Railroad and of such other railroads as by con-

tract pass their trains over the same; that for more than ten years the owners of the Memphis & Charleston Railroad have made their returns to the state auditor as required by the law now in force, and they have duly paid their taxes assessed thereon, and have made no other return of the Florence bridge than such as is embraced in the return of its property, as above set out, to the auditor for assessment by the state board of assessment; that the defendants have undertaken to assess as property escaped from taxation for the five years last past, including the year 1892, that portion of said Florence bridge which the assessors have undertaken by their assessment to separate and segregate from the other portion of the bridge, namely, the thoroughfare portion thereof, making for the portion in Lauderdale county for the five years an aggregate valuation of \$450,000, and on that portion in Colbert county, for the same period, an aggregate valuation of \$337,500, or \$787,500 altogether, and have notified the receivers that it is the purpose of the defendants to take steps immediately to enforce the collection of the tax so assessed. The receivers allege that the entire tax on the property of the Memphis & Charleston Railroad Company due and owing to the state of Alabama, and each and every county and municipality thereof, has heretofore been fully paid and discharged, and that said assessment is unlawful and unauthorized by law, and its enforcement, as they are advised, should be perpetually enjoined by the court. In accordance with the prayer, the circuit court granted a restraining order, which subsequently was continued in force until the further order of the court, and the motion of the defendants to dissolve the same was refused at a later day, from which orders of the court this appeal is taken. The motion to dissolve the restraining order presents seven grounds on which the dissolution was asked, going to the merits of the whole case.

The assignment of errors is, in substance, that the court erred in overruling all and each of these grounds of the motion to dissolve the restraining order. The counsel for each of the parties, respectively, have submitted printed briefs and oral argument addressed to the merits of the whole case, as though the appeal was from a decree passed on the final hearing. It is settled that in such a case as this we have jurisdiction on this appeal from an interlocutory order to consider the whole case as the counsel have presented it, and doubtless it is the wish of both parties that the decision now should dispose of the case. But, after a careful examination of the record brought up, with all of the provisions of the statutes of Alabama which appear to us to bear on the subject, we do not feel that we are required or fully prepared now to make such final disposition of the issues presented, and we prefer to consider only whether on the bill and the answer and exhibits the circuit court acted improvidently in granting and refusing to dissolve the restraining order. The property being in the custody of the court, any charge upon it, even for taxes, could only be enforced against it through the orders of the court; and upon the coming in of this bill the judge of the court might very well insist that the hands of the executive officers should be stayed until the issue between them and the receivers as to its liability to the charge sought

to be fastened on it could be passed upon by the court in the regular course of proceeding for the final hearing of such issue.

There is evidently a substantial issue between the receivers and the assessors. The bridge is certainly not an ordinary toll bridge, owned and operated by a toll-bridge company. It is certainly a very substantial and necessary railroad bridge, owned and operated by a railroad company, and it constitutes nearly a half mile of the length of its track in the state of Alabama. The railroad company, under an express grant of power, heretofore acquired, and is still exercising, the franchise of a toll-bridge company at that place, and the bridge in question is so constructed as to enable the railroad company, as the owner of the franchise for the toll bridge, to discharge its duty to the public, and to get a revenue therefrom. It would seem, therefore, that there is a property here not necessary to the operation of the railroad, or necessarily included in the returns made to the state auditor. But what part of this bridge is a toll bridge? Not the whole of it necessarily, because the railroad bridge must have a substructure, and there is but one substructure to the two-story superstructure. This inherent union of elements not only attaches to the structure as it stands, but it also attaches equally to the matter of its maintenance. There is a provision in the tax laws of Alabama which, having before us only its letter, and having no exemplification, by testimony or otherwise, of its practical application, we find it difficult to construe. It is under the subtitle "Other subjects of taxation and rates thereon," and reads thus: "(3) On the gross incomes of all gas works, electric light companies, telephone companies, street railways, toll bridges and ferries, and also all canals, ditches, channels, passes, tramroads and pole-roads used for transporting timber or other valuable commodities of commerce, at the rate that property is taxed." Code Ala. 1896, § 3912, subd. 3. We think the final disposition of the questions here presented requires an ampler record than we have before us, and therefore we affirm the action of the circuit court in refusing to dissolve the restraining order on the grounds presented, and remand the cause to be proceeded with to a final hearing according to the practice in such cases.

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BOSTON & M. R. R. v. WADE.

(Circuit Court of Appeals, First Circuit. May 11, 1898.)

No. 217.

GARNISHMENT—DESCRIPTION OF DEFENDANT.

Defendant was summoned to answer touching its indebtedness to "the Central Vermont Railroad Company, a corporation established under the laws of the state of Vermont, and doing business under the name of the Ogdensburg Transit Company," and answered that it had no funds belonging to the defendant described, but that it had funds of the Central Vermont Railroad Company, and that the Ogdensburg Transit Company was an independent corporation. *Held*, that the defendant was properly charged as trustee.

**In Error to the Circuit Court of the United States for the District of Massachusetts.**

This is a writ of error brought by the Boston & Maine Railroad upon a judgment of the circuit court against the Central Vermont Railroad Company as principal defendant, whereby execution for the amount of the judgment was awarded as well against the goods, effects, and credits of the defendant in the possession of the Boston & Maine Railroad, as trustee.

A writ was served upon the Boston & Maine Railroad, in which writ "the Central Vermont Railroad Company, a corporation established under the laws of the state of Vermont, and doing business under the name of the Ogdensburg Transit Company," was described as defendant, and the Boston & Maine Railroad was summoned as trustee of the defendant. The Boston & Maine Railroad filed in the superior court an answer of "no funds"; and subsequently the cause was removed by the Central Vermont Railroad Company, describing itself as defendant, to the United States circuit court for this district. The plaintiff then filed interrogatories to the Boston & Maine Railroad, inquiring as to what property of the Central Vermont Railroad was in its hands at the date of the service of the writ, which the Boston & Maine Railroad declined to answer, alleging that the property of the Central Vermont Railroad Company was not attached. Thereupon plaintiff moved for a default for failure to answer his interrogatories, and the court below ordered that the Boston & Maine Railroad answer said interrogatories. The Boston & Maine Railroad then answered, disclosing funds in its hands belonging to the Central Vermont Railroad Company. By subsequent proceedings, the court below entered judgment against said Central Vermont Railroad, and against the Boston & Maine Railroad as trustee. The trustee's contention is that no attachment under the writ was directed or made of property in the hands of the trustee belonging to the Central Vermont Railroad, but that the writ directed only an attachment of the property of the Ogdensburg Transit Company (alleged to be an independent corporation) in the hands of the Boston & Maine Railroad, or of the Central Vermont Railroad, doing business under the name of the Ogdensburg Transit Company, in the hands of the Boston & Maine Railroad, and that, as the answers of the Boston & Maine Railroad disclose that it had no property of either in its possession at that time, no judgment against it could properly be entered.

Sigourney Butler, for plaintiff in error.

Robert M. Morse and Wm. M. Richardson, for defendant in error.

Before COLT, Circuit Judge, and WEBB and BROWN, District Judges.

**PER CURIAM.** The appellant's admission of the possession of funds belonging to the Central Vermont Railroad Company was a sufficient basis for the action of the circuit court in charging the appellant as trustee. The defendant described in the original writ was "the Central Vermont Railroad Company, a corporation established under the laws of the state of Vermont." The addition to this description of the words "and doing business under the name of the Ogdensburg Transit Company" cannot be regarded as sufficient to mislead the appellant as to the identity of the defendant, or to give rise to any substantial doubt that the Central Vermont Railroad Company was the sole defendant named in the writ. The judgment of the circuit court is affirmed, with the costs of this court to the appellee.

## DESPEAUX v. PENNSYLVANIA R. CO.

(Circuit Court, E. D. Pennsylvania. June 16, 1898.)

No. 43.

## LIMITATIONS—FRAUDULENT CONCEALMENT—WHAT CONSTITUTES.

In an action at law, not based upon fraud or violation of trust, the defendant cannot be deprived of the benefit of the statute of limitations on the ground of fraudulent concealment, upon proof merely of his silence.

## Motion to Take Off Nonsuit.

James M. W. Newlin, for plaintiff.

David W. Sellers, for defendant.

DALLAS, Circuit Judge. The asserted cause of action accrued more than six years before this suit was brought. This appears from the plaintiff's statement of claim, which, however, especially avers that, owing to the "fraudulent concealment by the defendant" of the facts out of which his alleged right to recover arose, he was not able to and did not discover them until within two years of the date of this suit. With reference to this averment, this court, in overruling the defendant's demurrer, said: "If the plaintiff proves the fraudulent concealment of facts set out in the statement, the limitation does not, we think, apply." The plaintiff accordingly assumed the burden of proving the fraudulent concealment which he alleged, but he entirely failed to adduce any evidence upon which the jury would have been warranted in finding its existence. The only testimony which he offered upon the point was that of the plaintiff's business agent and attorney in fact. That witness, however, testified that during the years 1881, 1882, and 1883, when the discriminations in transportation charges complained of were alleged to have been made by the defendant against the plaintiff, he (the witness) did not have any conversation with any agent of the defendant company upon the subject. Only upon one occasion, late in 1885 or early in 1886, did he have any conversation about rates with any person representing the defendant company; and the correctness or incorrectness of the information then given him is wholly immaterial. Even if what he was then told was absolutely false, it did not amount to a fraudulent concealment of anything which had existed or had been done two or three years before. I have carefully read and re-read the whole of the testimony of this witness, and find it impossible to believe from it that he made, or intended to make, any inquiry with reference to the period of time covered by the plaintiff's claim. On the contrary, the substance of all that occurred at the only interview to which he has testified seems to have been this: He said that he had been told that other persons were then obtaining lower rates than himself, and he asked that the same rates should be accorded to him, and was told, in reply, that the plaintiff was charged no more than others. This plainly referred to the time of the interview, and not to a period three years prior thereto. Therefore I thought upon the trial, and I still think, that to have permitted the jury, from such evidence, to

impute to a man, who has since died, the fraudulent concealment of discrimination in rates (if any existed), in the year 1883, would have been wholly unjustifiable.

This is a common-law action, based, not upon fraud or violation of trust, but upon a breach of duty or an implied undertaking. As to such an action the law seems to be well settled, in accordance with the judgment of this court upon the demurrer, that the defendant cannot be deprived of the benefit of the statute except upon proof of actual fraudulent concealment, amounting to something more than mere silence. *Armstrong v. Milburn*, 54 Law T. (N. S.) 247; *Mitchell v. Buffington*, 10 Wkly. Notes Cas. 361; *Sankey v. McElevey*, 104 Pa. St. 265; *Rankin v. Woodworth*, 3 Pen. & W. 48; *Barton v. Dickens*, 48 Pa. St. 518; *Campbell's Adm'rs v. Boggs*, Id. 524; *Glenn v. Cuttle*, 2 Grant, Cas. 273; *Fleming v. Culbert*, 46 Pa. St. 498; *Funk v. Smith*, 66 Pa. St. 27; *Owen v. Savings Fund*, 97 Pa. St. 47; *Binney v. Brown*, 116 Pa. St. 169, 9 Atl. 186; *Rhines' Adm'rs v. Evans*, 66 Pa. St. 192; *Morgan v. Tenner*, 83 Pa. St. 305. The decision in *Bailey v. Glover*, 21 Wall. 342, when considered with reference to the facts and circumstances of that case, does not appear to be in conflict with those above cited.

It is not to be inferred from anything that has been said that I am of the opinion that the plaintiff adduced evidence upon which, but for the plea of the statute, he would have been entitled to a submission of the case to the jury. Several additional questions were raised and argued upon the trial, and on the hearing of the present motion, which, in view of the conclusion I have reached respecting the statute of limitations, it is not necessary to discuss. The motion to strike off the judgment of nonsuit is denied.

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#### CLAFLIN & KIMBALL v. MATHER ELECTRIC CO.

(Circuit Court, D. Connecticut. June 20, 1898.)

##### RES JUDICATA—CAUSES OF ACTION BARRED.

Numerous breaches of a contract occurred before the commencement of an action, but recovery for some of them was then prevented by a temporary bar resulting from a compromise agreement, which afterwards fell through before the trial, so that plaintiff, by amendment, might have included them in that action. *Held*, that the judgment therein was a complete bar to any subsequent recovery.

This was an action at law by Claflin & Kimball, an incorporated company, against the Mather Electric Company, to recover damages for breach of contract. The case was heard on demurrer to the complaint.

Hungerford, Hyde, Joslyn & Gilman, for complainant.  
Perkins & Perkins, for defendant.

TOWNSEND, District Judge. The parties herein were at issue in an action at law for damages for alleged breach of contract, which

was tried on the merits, and decided by the court. During the pendency of said action plaintiff brought this action for other alleged breaches of said contract. The defendant alleges that the cause of action in this suit is the same as the cause of action in the first suit, and was included in the issues therein, and that the breaches now complained of occurred before the first suit was brought, and might have been determined therein. The plaintiff replies that, when said first suit was brought, the parties had agreed to a compromise, which then operated as a bar to an action, and that afterwards, said compromise agreement having fallen through, plaintiff brought said second suit for said breaches. Defendant demurs.

This case presents the question whether, all the alleged breaches having occurred at the commencement of the first action, but recovery for some of them being then prevented by a temporary bar, the plaintiff should have included said breaches in said original action, provided said bar was removed after the action was brought, but before trial, and whether, having failed to do so, his right of action therefor is barred by the former judgment. The exhaustive briefs of counsel fail to show any decision of this question. It is thought that this case falls within the general rule that a party cannot thus split up his causes of action. The cause of action was defendant's breach of an agreement to indemnify plaintiff against all damages by reason of electrical defects in machines made by defendant for plaintiff, and sold by plaintiff to outside parties. At the time of trial of the former action proof could have been made under an amendment to the complaint of all the damages claimed by reason of said breach. Under the provisions of section 1050, Gen. St. Conn., damages accruing from the same cause of action subsequent to the bringing of the suit may be recovered therein. The demurrer is sustained.

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In re BURNS.

(Circuit Court, D. Massachusetts. May 24, 1898.)

**ARMY—ENLISTMENT OF MINORS.**

Rev. St. § 1117, providing that no minor shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardian, prohibits such enlistment into the volunteer army.

**Petition for Writ of Habeas Corpus.**

Sewall C. Brackett, for petitioner.

Boyd B. Jones, U. S. Atty.

LOWELL, District Judge. This is a petition for a writ of habeas corpus, on which petition an order of notice has been issued. The facts are agreed as follows: Malachi G. Burns is the son of Malachi Burns, the petitioner. Malachi G. was born June 2, 1879, and on May 4, 1898, enlisted and was mustered into the Massachusetts volunteer

militia, Company C, 1st regiment, as a private. On May 9, 1898, he was mustered into the service of the United States volunteer army. On the above dates he was a citizen of Massachusetts. The petitioner and his wife did not consent to the enlistment or mustering in of Malachi G. The respondent was colonel of the 1st regiment Massachusetts volunteer militia, and is now colonel of the regiment in the volunteer army of the United States into which Malachi G. was mustered. The petition is based upon Rev. St. § 1117, which is as follows:

"No person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians: provided, that such minor has such parents or guardians entitled to his custody and control."

The district attorney contends that this section is applicable only to an enlistment or mustering into the regular army of the United States, of which regular army it is admitted that Malachi G. is not a member. Section 1117, which is a re-enactment of the act of congress of May 15, 1872 (17 Stat. 117), must, however, be read in connection with the third article of war (Rev. St. § 1342, art. 3) the material part of which is as follows:

"Every officer who knowingly enlists or musters into the military service any minor over the age of sixteen years without the written consent of his parents or guardians, or any minor under the age of sixteen years, \* \* \* shall, upon conviction, be dismissed from the service, or suffer such other punishment as a court-martial may direct."

This third article of war is based, not only upon the statute of 1872, above cited, but also upon Act July 4, 1864, § 5, and Act March 3, 1865, § 18 (13 Stat. 380, 490), the material parts of which are as follows:

"If any officer of the United States shall enlist or muster into the military service any person under the age of sixteen years, with or without the consent of his parents or guardian, such person so enlisted or recruited shall be immediately discharged upon repayment of all bounties received, and such recruiting or mustering officer who shall knowingly enlist any person under sixteen years of age, shall be dismissed the service."

"Any officer who shall muster into the military or naval service of the United States \* \* \* any minor between the ages of sixteen and eighteen years, without the consent of his parents or guardian, \* \* \* shall, upon conviction by any court-martial, be dishonorably dismissed the service of the United States."

The titles, terms, and occasions of the acts of 1864 and 1865 prove conclusively that their provisions just quoted apply to an enlistment or to a mustering of certain classes of minors into the volunteer army of the United States, as then composed, as well as to the enlistment of such minors in the regular army. When the act of 1872 made it unlawful to "enlist or muster into the military service" any minor whatsoever without his parents' or guardian's consent, the words "military service" were used therein with the same meaning these words had borne in the similar and earlier statutes just cited. And so it is an offense, under the third article of war, alike to enlist or to muster into the regular army and into the volunteer army a minor without the consent required. If this act of the officer is a military offense under the third article of war, it would be absurd to construe

the identical words of the closely related section 1117 as applying only to the regular army. Both provisions apply alike to regulars and volunteers.

The opinion just expressed is confirmed by the use of the words "mustering into" in section 1117. Though this term is sometimes confused with "enlistment," yet it has some weight as an indication that a volunteer or militia force, rather than the regular army, is contemplated by its use. See 1 Winthr. Mil. Law, p. 760; 5 Stat. 9; 9 Stat. 60; 12 Stat. 274, 326, 339, 489, 620. It seems clear therefore, that section 1117 applies to the enlistment and mustering in of Malachi G. Burns. Most or all of the cases cited upon the brief of the district attorney were decided prior to the act of 1864, and are concerned with statutes of a scope quite different from that of section 1117.

The district attorney further contends that section 1117, if it originally applied to volunteers, has been restricted to the regular army by the act of congress of April 22, 1898. There is nothing in that act, however, to suggest an age limit in the volunteer army differing from that in the regular army. Moreover, there is no reference whatsoever in that act to the age of soldiers of "the army of the United States," so called, but only to the age of those persons who, as members of the "national forces," are liable to perform military duty when required by law to do so. These "national forces" obviously correspond to the enrolled militia of Rev. St. § 1625, and 1 Stat. 271, a force quite different from the "organized and active land forces of the United States" mentioned in section 2 of the act of April 22d, into which Malachi G. has been mustered. There is no indication that previous legislation upon the age limit is affected by the last-named act. If it be said that this construction of the statutes, which permits the parents or guardian of a minor to prevent his enlistment in the active military forces of the United States, unduly hampers the national government in the prosecution of the present war, it may be answered that the entire matter is within the control of congress, which can require military service from any citizen of the United States, whatever his age, and without the consent of any one. If the acts of 1864 and 1865, as amended by the act of 1872, are unwise, they can be repealed or modified at once.

Writ to issue.

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#### UNITED STATES v. ROTHSCILD et al.

(Circuit Court, S. D. New York. May 27, 1898.)

No. 2,684.

#### DUTY ON WRAPPER TOBACCO—PERCENTAGE SYSTEM.

Except for the purpose of imposing a penalty for importing a bale containing more than 15 per cent. of wrapper and less than 85 per cent. of filler, any percentage system is abandoned in the tariff act of 1897; and all wrapper tobacco, wherever found, and in whatever amount, is subject to the duty of \$1.85 per pound, provided in paragraph 213 of said act.

Appeal from a decision of the board of general appraisers reversing a decision of the collector of the port of New York touching the duty on certain wrapper tobacco found packed in bales of filler tobacco, but not exceeding 5 per cent. of each bale.

John S. Wise, for the United States.

E. R. Gunby, for importers.

LACOMBE, Circuit Judge. Amid the awkward, tortuous, and obscure phraseology of paragraph 246 of the act of 1883, one thing was manifest, namely, that, in determining whether any particular leaf tobacco should pay a lower or a higher rate, it would be necessary to calculate a specified percentage—of something. It became absolutely necessary, in order to apply the rule prescribed in the paragraph, to determine upon what base or on what unit such percentage should be calculated. In *Falk v. Robertson*, 137 U. S. 225, 11 Sup. Ct. 41, the court had to deal with an abnormal, if not a bogus, bale; and it is not surprising that the language used in the opinion was not practically of much use when normal commercial bales came under consideration. The necessity of finding a base number or unit available for such cases could not be overlooked. *U. S. v. Blumlein*, 5 C. C. A. 142, 55 Fed. 383. Such a unit was declared to be the bale, and it is understood that the conclusion upon that point reached in that case has not since been questioned. *Erhardt v. Schroeder*, 155 U. S. 124, 15 Sup. Ct. 45; *U. S. v. Rosenwald*, 14 C. C. A. 399, 67 Fed. 323. The McKinley tariff of 1890, however, concededly abandoned the practice of taxing according to percentages. Under that act it was wholly unnecessary to fix upon any base number or unit at all. Quite possibly, the percentage method was restored by the Wilson tariff of 1894, indirectly by the use of the words "commercially known"; but there seems much force in the suggestion that, when those words were dropped out of the Dingley tariff of 1897, the percentage system dropped with them. Of course, if the percentage system were abandoned, the necessity of determining a unit or base number ceased also, and the decisions in the cases cited would be no longer instructive.

Construing the phraseology of the act of 1897 without reference to the earlier statutes and decisions, the correct paraphrase of the paragraphs 213 and 214, so far as they relate to unstemmed leaf tobacco, may be stated thus:

"A duty of 35 cents per pound shall be paid on (A) all leaf tobacco not suitable for cigar wrappers, and not otherwise provided for.

"A duty of one dollar and eighty-five cents per pound shall be paid on (A) all leaf tobacco of any kind, and wherever grown, which may be packed or mixed with any other leaf tobacco which other tobacco is the product of any other country or dependency; (B) all leaf tobacco not suitable for cigar wrappers, which shall be found to be mixed or packed with more than fifteen per cent. of tobacco which is suitable for cigar wrappers; (C) all leaf tobacco suitable for cigar wrappers."

The language used in the act seems to indicate that the draftsman has tried to cut loose from earlier legislation and the decisions predicated thereon; and the case seems to be one where the language of

the later act may fairly be construed without much regard to the construction put upon earlier and much more intricate phraseology. I am strongly of the opinion that, except for the purpose of imposing a penalty on any one importing an abnormal bale (i. e. as the evidence shows, one with more than 15 per cent. wrapper, to less than 85 per cent. filler), any percentage system is abandoned in this tariff, and that all wrapper tobacco, wherever found, and in whatever amount, shall pay the higher rate. Inasmuch as the case will undoubtedly be appealed, it seems unnecessary to discuss the question presented at any greater length. Decision reversed, and collector sustained.

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DUNHAM et al. v. UNITED STATES.

(Circuit Court, D. Connecticut. June 20, 1898.)

CUSTOMS DUTIES—CLASSIFICATION—ROVINGS OF COTTON.

"Rovings" made of cotton, not commercially known as thread, but being in fact a cotton thread, were dutiable under paragraph 250 of the act of 1894, as "cotton thread in singles, not advanced beyond a condition of singles, by grouping or twisting two or more single yarns"; and not as manufactures of cotton not specially provided for, under paragraph 264.

This was an application by Austin Dunham & Sons for a review of the decision of the board of general appraisers in respect to the classification for duty of certain goods imported by them.

Comstock & Brown, for importers.

C. W. Comstock, for the United States.

TOWNSEND, District Judge (orally). The article in question is "rovings" made of cotton. It was assessed for duty under paragraph 264 of the act of 1894, as "manufactures of cotton not specially provided for"; and the importer protested, claiming that it was dutiable under paragraph 250 of said act, as "cotton thread in singles, not advanced beyond a condition of singles, by grouping or twisting two or more single yarns together." The board of appraisers sustained the classification of the collector, and overruled the protest, and the importer appeals.

This article is not commercially known as "thread." It is, in fact, a twisted sliver of cotton. If still further twisted, it would become yarn. The testimony of the importer that it is a cotton thread in fact is not denied by any of the witnesses called by the government, and his testimony is supported by the history of the manufacture of thread, by the dictionary definitions, and by the use of the term "thread" by congress in reference to manufactures of cotton cloth. If this article was not intended to be covered by this provision of the statutes for cotton thread, it does not appear that there would be anything on which this provision could operate. The decision of the board of general appraisers is reversed.

## SHOSHONE MIN. CO. v. RUTTER et al.

(Circuit Court of Appeals, Ninth Circuit. May 23, 1898.)

No. 413.

**1. ADVERSE CLAIMS TO MINING LAND—JURISDICTION—FEDERAL QUESTION.**

A suit brought in pursuance of Rev. St. § 2326, based upon an adverse claim made upon the filing of an application for a patent for mining ground, is a suit arising under the laws of the United States, and is within the jurisdiction of the circuit court. 75 Fed. 37, affirmed.

**2. SAME—EQUITABLE OR LEGAL ACTIONS.**

Suits brought in pursuance of Rev. St. § 2326, to determine adverse claims to mining ground, are in their nature equitable, and not legal, actions. 75 Fed. 37, affirmed.

**3. RELOCATION OF MINING CLAIM—EXTENDING LIMITS UNDER NEW NAME.**

A locator may relocate his mining claim, including additional vacant ground unclaimed by others, under a different name, and convey it by the designation of the last name.

**4. RIGHT TO LOCATE MINING CLAIM—DISCOVERY OF LODGE OR VEIN.**

Seams containing mineral-bearing earth and rock, discovered on a claim before its location, were similar to seams that had induced other miners to locate claims in the same district, and which by development had proved to be a part of a well-defined lode or vein containing ore of great value. *Held* a sufficient compliance with Rev. St. § 2320, requiring the discovery of a lode or vein within the limits of a claim before a valid location thereof can be made.

Gilbert, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Northern Division of the District of Idaho.

W. B. Heyburn, for appellant.

John R. McBride and Garber & Garber, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

**HAWLEY, District Judge.** This is a suit in equity brought under the provisions of section 2326 of the Revised Statutes to determine the rights of the respective parties to certain mining ground situated in Yreka mining district, Shoshone county, Idaho. On August 21, 1895, appellant applied for a patent to the Shoshone lode claim. Appellees thereafter filed their protest and an adverse claim against said application, and in due time commenced this suit in support of their claim in the circuit court of the United States for the district of Idaho. Both parties are citizens and residents of the state of Idaho. A demurrer was interposed to the complaint, and overruled by the court. 75 Fed. 37. The cause thereafter came to issue, was tried upon its merits, and resulted in a decree in favor of the appellees. The questions presented by the demurrer will be first considered:

1. Appellant claims that the circuit court had no jurisdiction to try the case. Does the complaint in this case show upon its face that the suit is one arising under the laws of the United States? This question, under the repeated decisions of the courts in this and other circuits, has been, so far as we are advised, universally answered in

the affirmative. Different grounds have been stated and different reasons assigned by the various courts, but the conclusion has always been the same,—that the circuit courts of the United States have jurisdiction to try all cases instituted under and by virtue of the provisions of section 2326 of the Revised Statutes, independent of the question of citizenship of the respective parties. *Frank G. & S. M. Co. v. Larimer M. & S. Co.*, 8 Fed. 724; *Cheesman v. Shreve*, 37 Fed. 36; *Doe v. Mining Co.*, 43 Fed. 219; *Strasburger v. Beecher*, 44 Fed. 209, 213; *Burke v. Mining Co.*, 46 Fed. 644, 646; *Wise v. Nixon*, 76 Fed. 3, 6. But it is argued by appellant's counsel that all of these decisions have been virtually overruled by the decision of the supreme court in the case of *Bushnell v. Mining Co.*, 148 U. S. 682, 13 Sup. Ct. 771. As we understand the decision in that case, no such question as is here presented was there raised, discussed, or decided. That action was brought in the state court, tried in the state court, and an appeal was taken to the supreme court of the state; and after a petition for rehearing was filed the losing party for the first time suggested that a federal question was involved, to wit, a construction of section 2322 of the Revised Statutes. The petition for rehearing being denied, a writ of error was sued out, and the case taken to the supreme court of the United States. The writ of error was there dismissed upon the ground,—to quote the language of the decision:

"The attempt to raise for the first time a federal question in a petition for rehearing, after judgment, even assuming that the petition presented any such question, is clearly too late. It has been repeatedly decided by this court that a federal question, when suggested for the first time in a petition for rehearing, after judgment, is not properly raised, so as to authorize this court to review the decision of the highest court of the state."

No question was raised as to the competency of the courts, either national or state, to try a case brought under the provisions of section 2326. The only question at issue there, under the pleadings and at the trial, was as to the true course of the lode or vein. The instructions referred to in the opinion had reference to that question only, which was solely a question of fact; and the court said that no federal question was involved,—that is, that no question was raised which called for any construction of section 2322. The other decisions that we have cited go directly to the point raised in this case. In *Burke v. Mining Co.*, 46 Fed. 644, 646, the court said:

"It is claimed on one side, and denied on the other, that this suit, having been brought to determine the title to a mining claim, in pursuance to the requirements of section 2326 of the Revised Statutes, as amended in March, 1881 (1 Supp. Rev. St. p. 609), is for that reason a suit arising under the laws of the United States, within the meaning of the statute giving jurisdiction on that ground, irrespective of the character of the questions involved in the litigation. It seems to us that all the authorities, as they now stand, have determined the question in favor of the affirmative of this proposition."

In *Jackson v. Roby*, 109 U. S. 440, 3 Sup. Ct. 301, which was a suit brought in the circuit court of the United States for the district of Colorado in support of an adverse claim under the provisions of section 2326 of the Revised Statutes, the court disposed of the case upon its merits, and it is certainly fair to assume that it had no doubts as to its jurisdiction in the premises. In *Chambers v. Harrington*, 111

U. S. 350, 4 Sup. Ct. 428, it was claimed that a judgment rendered in a suit brought under the provisions of section 2326 of the Revised Statutes was not subject to review in the supreme court. The court said:

"But it is apparent that the statute requires a judicial proceeding in a competent court. What is a competent court is not specifically stated, but it undoubtedly means a court of general jurisdiction, whether it be a state court or a federal court; and as the very essence of the trial is to determine rights by a regular procedure in such court, after the usual methods, which rights are dependent on the laws of the United States, we see no reason why, if the amount in controversy is sufficient in a case tried in a court of the United States, or the proper case is made on a writ of error to a state court, the judgment may not be brought to this court for review, as in other similar cases."

The proceedings required to be commenced, under the provisions of section 2326, in a court of competent jurisdiction, may be brought either in the state or national courts, at law or in equity, as the facts may warrant; but section 2326 does not confer any special jurisdiction on the state courts. When the suits are brought and tried in the state courts, they are subject to the provisions of the state statutes in relation to such cases, and the courts proceed in the manner prescribed by such statutes. The proceedings in the national courts are regulated by the provisions of section 2326, as will more fully appear in the consideration of the next question involved herein. In several Pacific Coast states, statutes have been passed for the purpose of supplementing the provisions of section 2326, and the cases, when tried in the courts of such states, are controlled by such statutes, independent of any other provisions of the state statutes. *Rose v. Mining Co.*, 17 Nev. 25, 52, 27 Pac. 1105; 2 Lindl. Mines, §§ 754, 755, and authorities there cited. In *Steel v. Mining Co.*, 18 Nev. 87, 1 Pac. 450, the court said:

"These actions may be brought by the plaintiff, whether he is in or out of possession of the mining ground in controversy; and the only sensible construction of the law is that each party must prove his claim to the premises in dispute, and that the better claim must prevail."

Now, if there were no statute of the state specially providing for the trial of this class of cases, it might be that the state courts would not be able in all cases to try questions required to be heard and determined by section 2326, as amended. But, be that as it may, our conclusion is that, upon reason and authority, the circuit courts of the United States have jurisdiction to hear and determine the respective rights of the parties in controversies arising under the provisions of section 2326, if the property in controversy exceeds in value the sum of \$2,000, independent of the question of the citizenship of the respective parties, or of the fact as to whether or not the case presents any federal question involving the construction of any other provision of the laws of the United States. In other words, that a circuit court of the United States is "a court of competent jurisdiction" to try such cases, within the meaning of those words as used in said statute.

2. The next point raised by the demurrer is "that it appears on the face of the bill that the plaintiff has an adequate remedy at law."

The bill, among other things, alleges that the complainants long prior to August 20, 1895, were, "ever since have been, and now are the owners (subject only to the paramount title of the United States) and in the possession of that certain mine and mining claim containing a lode of rock in place, bearing silver, lead, and other valuable minerals and metals, situate in Yreka mining district, Shoshone county, state of Idaho, called the 'Kirby Fraction Lode and Mining Claim,'" which is particularly described by metes and bounds; that the defendant, claiming to be the owner of an alleged adjacent mining claim, called the "Shoshone Mining Claim," on or about the \_\_\_\_\_ day of August, 1895, wrongfully caused said Shoshone mining claim to be so surveyed as to crop upon and overlap the said Kirby Fraction lode mining claim, and to include a portion thereof, which is particularly described in the bill; that on or about the 24th day of August, 1895, the said defendant applied for a United States patent at the proper land office; "that in and by said application for patent the defendant set up and wrongfully alleged that it was the owner and in possession of the whole of said Shoshone mining claim, inclusive of the premises last above described, and of the lode therein, part of the Kirby Fraction lode and mining claim, and the property and in the possession of the complainants." The proceeding required, authorized, and directed by section 2326 of the Revised Statutes has no specific relation whatever to the action of ejectment, or to any other common-law action. The object of the proceeding is the determination of the contest in the land office, as to which of the parties, if either, is entitled to receive a patent from the government, —a right which arises out of a full compliance with the laws of congress for the acquisition of a government patent for mineral lands. The proceedings are purely statutory, and their inception is in the land office, not in the courts where the suit is commenced. As was said in *Wolverton v. Nichols*, 119 U. S. 485, 488, 7 Sup. Ct. 289, 291:

"The proceedings in this case commenced by the assertion of the defendants' claim to have a patent issue to them for the land in controversy. The next step was the filing of an adverse claim by the plaintiffs in the land office, and the present suit is but a continuation of those proceedings, prescribed by the laws of the United States to have a determination of the question as to which of the contesting parties is entitled to the patent. The act of congress requires that the certified copy of the judgment of the court shall be filed in the land office, and shall be there conclusive. And we must keep this main purpose of the action in view, in any decision made with regard to the rights of the parties."

Whatever may be said of the nature and character of these proceedings when tried in the state courts, where the statutes have, as to the forms of action, abolished the distinction which exists in the national courts between law and equity, it must, we think, be conceded that such proceedings are of an equitable nature, and, when brought in the national courts, are to be tried as equity cases. The mere fact that in certain cases an action at law has been deemed sufficient does not change the equitable character of the suit. The suit is brought for special relief, and the judgment required to be entered is such as a court exercising jurisdiction in equity alone could render. This is clearly shown by the court in *Hammer v. Mill-*

ing Co., 130 U. S. 291, 296, 9 Sup. Ct. 548, where the court, in the course of its opinion, following the views expressed in *Basey v. Gallagher*, 20 Wall. 670, 679, said:

"The suitor, whatever relief he may ask, is required to state in ordinary, concise language, the facts of his case, upon which he invokes the judgment of the court; but the consideration which the court will give to the questions raised by the pleadings when the case is called for trial or hearing—whether it will submit them to a jury, or pass upon them without any such intervention—must depend upon the jurisdiction which is to be exercised. If the remedy sought be a legal one, a jury is essential, unless waived by the stipulation of the parties; but, if the remedy sought be equitable, the court is not bound to call a jury, and, if it does call one, it is only for the purpose of enlightening its conscience, and not to control its judgment. The decree which it must render upon the law and the facts must proceed from its own judgment respecting them, and not from the judgment of others. The court might therefore have heard this case and disposed of the issues without the intervention of a jury, but, it having called a jury, the trial was conducted in the same manner as a trial of an issue at law. Such is the practice under the system of procedure in the territory" (of Montana).

The determination of the rights of the parties, as required by section 2326, as we have already said, is not necessarily the subject of a common-law action; and a trial thereof on the equity side of the court is certainly not a violation of the provisions of the constitution, which declares that the right of trial by jury shall be secured to all and remain inviolate forever. The equity jurisdiction of the United States courts is not controlled by state legislation. In *Perego v. Dodge*, 163 U. S. 160, 16 Sup. Ct. 971, the court held that the amendatory act of March 3, 1881 (21 Stat. 505), was not intended to require, and does not require, all suits brought under section 2326 to be actions at law, and to be tried by a jury. In the course of the opinion, in reference to sections 2325 and 2326 the court said:

"Thus, the determination of the right of possession as between the parties is referred to a court of competent jurisdiction, in aid of the land office, but the form of action is not provided for by the statute; and apparently an action at law or a suit in equity would lie, as either might be appropriate under the particular circumstances,—an action to recover possession when plaintiff is out of possession, and a suit to quiet title when he is in possession."

The courts in this circuit have frequently entertained jurisdiction of suits in equity instituted under the provisions of section 2326. In *Doe v. Mining Co.*, 43 Fed. 219, there is a clear enunciation of the principles applicable to this case, substantially in accord with the views herein stated. That case was affirmed in this court in 17 C. C. A. 190, 70 Fed. 458, 462. In *Preston v. Hunter*, 15 C. C. A. 148, 67 Fed. 996, counsel, being in doubt as to whether the suit should be classed as one in equity or an action at law, sent up two transcripts,—one upon appeal, as required in equity suits; the other upon writ of error, as required in actions at law. This court, without any discussion of the question, considered the case as an equity suit. It follows from the views herein expressed that the court did not err in overruling the demurrer to the bill.

3. This brings us to a consideration of the case upon its merits. It appears from the record that appellees first located a claim on a portion of the ground in dispute, under the name of the "Edith Mining Claim," and recorded the same; that thereafter, before any right of

the appellant was made to the ground, the locators of the Kirby Fraction mining claim made a location "on top of the Edith," and also included more ground. These locations were made by the same parties. The Edith was located June 10, 1886, embracing 1,200 feet on the lode; the Kirby, on July 11, 1886, claiming 1,400 feet. Jacob Johns, one of the locators, testified that after the location of the Edith he found more ground, "and located another claim right over it. It was all our property, anyhow, so we located over it,—right over the top of the Edith. The location of the Edith was completed before the Kirby was located. \* \* \* I intended to hold both the Edith and Kirby locations." In the conveyances made by the locators, they mentioned the Edith as well as the Kirby claim. Upon these facts appellant contends that, if the Edith location was valid, the Kirby location is void; that the appellees cannot recover upon the Edith title, because they have not set up any title to that claim in their bill; that they cannot recover upon the Kirby title without showing an abandonment of the Edith location. In considering these questions it must be remembered that the Kirby was located long prior to the Shoshone claim. The evidence does not show that the ground covered by the Edith location was intended to be abandoned, but it does show that the original locators of the Edith concluded to change the boundaries by adding more ground, and gave a new name to their claim. The locators had the right to do this, as long as they did not interfere with the rights of other parties. The fact that the Edith was mentioned in the conveyances does not prove that the parties relied upon the title under that name. A conveyance of the ground by metes and bounds, by any name of the claim, would be valid and effective. The name is generally used to designate or identify the claim, but it may be designated or identified by the use of one, or more than one, name, if it is known or called by different names. There is no statute, law, rule, or regulation which prevents locators of mining claims from relocating their own claim, and including additional vacant ground, unclaimed by other parties, under a different name, and conveying it by the designation of the last name. In *Weill v. Mining Co.*, 11 Nev. 200, 210, where the facts were in some respects similar to the case in hand, there were two locations made by the same parties, known, respectively, as the "Boston" and the "Lucerne." The Boston was located prior, and the Lucerne subsequent, to the location of the Waller's Defeat, owned by the plaintiff. The question was whether the defendant obtained any title to the Boston ground under a deed conveying the same by the name of the "Lucerne Company's Claims." The court said:

"If the Boston notice and the Lucerne notice were posted upon and claimed the same lode, a conveyance of his interest in the lode necessarily conveyed his interest in both locations, and it was immaterial by what particular name he designated it. *Phillipotts v. Blasdel*, 8 Nev. 61."

4. It is next claimed that there was no sufficient discovery made of any mineral, lode, or vein at the time the Kirby claim was located, and that for that reason the Kirby location was absolutely void. Upon this point there is some conflict in the evidence, but the weight and preponderance, in its entirety, clearly shows that at the time the loca-

tion was made the locators had discovered a vein, or seams of rock in place, bearing minerals. The discovery was made in running a tunnel, where small seams of iron oxide, quartz, and small quantities of carbonate of lead were found, two or three inches wide. These indications were of such character as miners in that district would follow in the expectation of finding ore, and such as would justify miners in working a claim for that purpose. The rock in these seams was different from the country rock, and was of such character as is designated by the witnesses, who were practical miners, "as a vein containing rock in place, bearing minerals." These facts show that the location was made in good faith, and not "simply upon a conjectural or imaginary existence of a vein or lode," which cannot be permitted. *King v. Mining Co.*, 152 U. S. 222, 227, 14 Sup. Ct. 510. The seams, containing mineral-bearing earth and rock, which were discovered before the location was made, were similar in their character to the seams or veins of mineral matter that had induced other miners to locate claims in the same district, which by continued developments thereon had resulted in establishing the fact that the seams, as depth was obtained thereon, were found to be a part of a well-defined lode or vein containing ore of great value. The discovery made at the time of the Kirby location was therefore such as to justify a belief as to the existence of such a lode or vein within the limits of the ground located. *Erhardt v. Boaro*, 113 U. S. 528, 536, 5 Sup. Ct. 560. The subsequent developments made after the claim was located, and before the location of the Shoshone, show more clearly the existence of a lode or vein. We are of opinion that the testimony on behalf of appellees is sufficient to show a compliance with the provisions of section 2320, which requires that there must be a discovery of a vein or lode within the limits of the claim before a valid location thereof can be made. In *Book v. Mining Co.*, 58 Fed. 106, 120, the court, in construing this section of the statute, said:

"The words 'vein or lode,' in the last clause of this statute, were evidently intended to apply to such veins or lodes as were described in the first section, and to have the same meaning, viz. a vein or lode 'of quartz or other rock in place bearing gold, silver,' etc. This statute was intended to be liberal and broad enough to apply to any kind of a lode or vein of quartz or other rock bearing mineral, in whatever kind, character, or formation the mineral might be found. It should be so construed as to protect locators of mining claims, who have discovered rock in place, bearing any of the precious metals named therein, sufficient to justify the locators in expending their time and money in prospecting and developing the ground located. It must be borne in mind that the veins and lodes are not always of the same character. In some mining districts the veins, lodes, and ore deposits are so well and clearly defined as to avoid any questions being raised. In other localities the mineral is found in seams, narrow crevices, cracks, or fissures in the earth, the precise extent and character of which cannot be fully ascertained until expensive explorations are made, and the continuity of the ore and existence of the rock in place, bearing mineral, is established. It never was intended that the locator of a mining claim must determine all these facts before he would be entitled, under the law, to make a valid location. Every vein or lode is liable to have barren spots and narrow places, as well as rich chimneys and pay chutes, or large deposits of valuable ore. When the locator finds rock in place, containing mineral, he has made a discovery, within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that

constitutes the discovery, and warrants the prospector in making a location of a mining claim."

See, also, *Migeon v. Railway Co.*, 44 U. S. App. 724, 737, 23 C. C. A. 156, and 77 Fed. 249; *McShane v. Kenkle*, 18 Mont. 208, 44 Pac. 979; *Bonner v. Meikle*, 82 Fed. 697, 703.

The purpose of the statute in requiring that "no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located" was to prevent frauds upon the government by persons attempting to acquire patents to land not mineral in its character. But as was said in *Bonner v. Meikle*, supra:

"It was never intended that the court should weigh scales to determine the value of mineral found, as between a prior and subsequent locator of a mining claim, on the same lode."

The location of the Kirby was made in 1886. The discovery of mineral then made was sufficient to induce the locators and their grantees to perform the amount of annual labor thereon as required by the mining laws; to expend their time and money in prosecuting the work thereon, in the belief and expectation of finding ore of profitable value therein. The location of the Shoshone was not made until 1895. There is no good reason why the owners of the Kirby should be deprived of the discoveries made by them in prosecuting the work thereon after the location was made, and prior to the time of the location of the Shoshone claim. The court did not err in admitting the testimony upon this point. *North Noonday Min. Co. v. Orient Min. Co.*, 1 Fed. 522, 531; *Jupiter Min. Co. v. Bodie Consol. Min. Co.*, 11 Fed. 666, 676; *Strepey v. Stark*, 7 Colo. 614, 5 Pac. 111; *Zollars v. Evans*, 5 Fed. 172, 175; *Patchen v. Keeley*, 19 Nev. 405, 415, 14 Pac. 347.

5. We have examined the objections made and exceptions taken by appellant to certain rulings of the court at the trial with reference to the annual assessment work done upon the Kirby claim in the years 1895 and 1896, and find no error therein.

6. Another case between the same parties was commenced in the state court, removed to the United States circuit court, and there tried as an equity suit, and, as it involved the title to the same mining ground, was consolidated, for the purpose of this appeal, with the case above disposed of. In the case brought in the state court, appellant claimed title to the mining ground under the Ibex location. The facts and circumstances as to the location of the Ibex claim are substantially the same as those pertaining to the Shoshone claim. Having arrived at the conclusion that the Kirby claim was a valid location, and it being prior in point of time to the others, it becomes unnecessary to notice any of the questions raised concerning the Shoshone or Ibex locations. The other questions are the same in both cases. The decree in each case is affirmed, with costs.

GILBERT, Circuit Judge (dissenting). In dissenting from that portion of the opinion which deals with the question of the jurisdiction, I am guided solely by what I conceive to be the purport of the decision of the supreme court in the case of *Bushnell v. Smelting Co.*, 148 U. S. 682, 13 Sup. Ct. 771. I am unable to concur in the view

that the only point decided in that case was that the suggestion of a federal question in a petition for rehearing after judgment comes too late. The jurisdiction of the supreme court in that case was invoked upon two grounds: First, that a federal question was presented upon the pleadings in the case and the instructions to the jury, since it was a case arising under section 2326 of the Revised Statutes; and, second, that a federal question was specially presented in the petition for rehearing which was filed in the supreme court of the state of Colorado, asserting rights under section 2322. The first question was inherent in the case, and appeared upon the face of the record. It required no presentation by petition or otherwise. It was in passing upon the second question that the court ruled that the attempt to raise for the first time a federal question in such a petition, after judgment, was too late. But in dealing with the other question the court said:

"It is plainly manifest that neither the pleadings nor the instructions given and refused present any federal question, and an examination of the opinion of the supreme court affirming the action of the trial court as to instructions given, as well as its refusal to give instructions asked by the defendants below, fails to disclose the presence of any federal question. It does not appear from the record that any right, privilege, or immunity under the constitution or laws of the United States was specially set up or claimed by the defendant below, or that any such right was denied them, or was even passed upon by the supreme court of the state; nor does it appear, from anything disclosed in the record, that the necessary effect in law of the judgment was the denial of any right claimed under the laws of the United States. The decision of the supreme court of Colorado in no way brought into question the validity, or even construction, of any federal statute, and it certainly did not deny to the plaintiffs in error any right arising out of the construction of the federal statutes."

In so ruling upon that question the court had under consideration the very question which is before us in the case at bar, namely, whether the fact that a case arises under section 2326 presents, of itself, a question of the construction of a law of congress. The court expressly held that the pleadings suggested no federal question. The pleadings in that case contained the necessary averments and issues to determine the rights of the contesting claimants under section 2326. It so distinctly appears from the opinion. In that respect the case is identical with the case before us. In the present case there is no suggestion of a federal question, unless it be in the fact that the pleadings raise an issue under section 2326. The other questions which the record contains are similar to those which were submitted to the jury in *Bushnell v. Smelting Co.* The language above quoted from the opinion in that case applies with equal propriety to the case at bar. I find no allegation in the bill in the present case which suggests that a question arises under a federal statute, or that the right of either party to the suit will depend upon the interpretation to be given to such a statute. If there was no federal question in the case of *Bushnell v. Smelting Co.*, there is none in this. The decisions in that case and in other recent cases in the supreme court have established the doctrine that the United States circuit courts cannot entertain jurisdiction of a cause upon the ground that it presents a question of a federal nature unless it

clearly appears from the averments of the complaint or the declaration that in the progress of the trial, and preliminary to an adjudication, the right of the one or the other of the parties to the controversy will depend upon the construction to be given by the court to some provision of the constitution, laws, or treaties of the United States. *Metcalf v. Watertown*, 128 U. S. 586, 9 Sup. Ct. 173; *Mining Co. v. Turck*, 150 U. S. 138, 14 Sup. Ct. 35; *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654; *Chappell v. Waterworth*, 155 U. S. 102, 15 Sup. Ct. 34. The cases of *Jackson v. Roby* and *Chambers v. Harrington*, cited in the opinion of the majority of the court, are not in conflict with the foregoing views of the purport and effect of the decision in *Bushnell v. Smelting Co.* In *Jackson v. Roby* no question of the jurisdiction was raised, and it may be assumed that the case was one of which the court had cognizance, either upon the ground of the diverse citizenship of the parties, or the federal question suggested by the pleadings. The case of *Chambers v. Harrington* was in the supreme court upon appeal from a territorial supreme court, and hence no question of the jurisdiction could arise. The language of the court in that case, "And as the very essence of the trial is to determine rights by a regular procedure in such court, after the usual methods, which rights are dependent on the laws of the United States, we see no reason why, if the amount in controversy is sufficient in a case tried in a court of the United States, or the proper case is made on a writ of error to a state court, the judgment may not be brought to this court for review, as in other similar cases," is not inconsistent with the view that, in order that the case made shall be one of federal cognizance, the jurisdiction must be made to appear by a proper averment pointing to the statute which the court shall be called upon to construe. And if, indeed, any expression of the court found in the language so quoted can be construed as countenancing a different doctrine, it is certainly discredited by the later decisions of the supreme court to which reference has been made above.

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**BURDEN CENTRAL SUGAR-REFINING CO. v. FERRIS SUGAR-MFG. CO., Limited, et al.**

(Circuit Court of Appeals, Fifth Circuit. April 12, 1898.)

No. 684.

**COUNSEL FEES—SUIT AGAINST INSOLVENT CORPORATIONS—PAYMENT FROM GENERAL FUND.**

The solicitors for a creditor commenced a suit against an insolvent corporation, in its behalf, and in behalf of all other creditors who might intervene and contribute to the expense, and procured the appointment of a receiver. Subsequently they carried on other litigation in the name of their client, but to the benefit of the creditors. *Held*, that they were entitled to compensation out of the general fund for the services rendered after, as well as those rendered before, the appointment of the receiver.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

On the 4th day of January, 1895, the complainant brought its bill against the Ferris Sugar-Manufacturing Company, Limited, and procured the appointment of a receiver thereof. The bill was brought in behalf of the complainant, a creditor of the corporation, and in behalf of all other creditors thereof who might join in the suit and contribute to the expense. The answer of the defendant company was a virtual confession of its insolvency. Since the appointment of the receiver the administration of its affairs has been conducted under the direction of the court a qua. A number of interventions have been filed by parties alleging themselves to be creditors of the defendant corporation, some of which resulted in protracted litigation, and were carried to the circuit court of appeals, and thence to the supreme court of the United States. On the 24th of May, 1897, it was ordered that the receiver and the complainant, and any other person claiming fees and allowances for themselves and their solicitors in this case, go before the master within 10 days from the date of the decree, and present their claims therefor. After hearing, the master reported, recommending the allowance of \$5,000 as compensation for services rendered by Rouse and Grant, solicitors for the complainant, to be paid out of the fund brought into court. Exceptions were filed to the master's report by John H. Murphy, one of the interveners, and the Reading Iron Company, also an intervener; the exceptions being to the conclusion of the master that the fund was chargeable with the fees of Rouse and Grant, solicitors for the complainant, for services rendered after the appointment of a receiver; it being admitted that the fund was chargeable with the sum of \$1,500 for their services up to and including the appointment of the receiver. The exceptions were argued and maintained in the court below upon the ground, as expressed in the opinion and decree, that the solicitors for the complainant are entitled to counsel fees, as against the receiver, only for services up to and including the appointment of the receiver, and that they are not entitled herein to counsel fees thereafter; and to that extent the court sustained the master's report, and maintained the same so as to fix the allowance of Rouse and Grant for counsel fees, to be paid out of the receivership, at the sum of \$1,500. The complainant appealed from the decree, and made the following assignment of errors: (1) "Said circuit court erred in sustaining the exceptions to the master's report, when they ought to have been overruled, and the report confirmed." (2) "Said circuit court erred in holding that the appellants were entitled to be paid out of the fund impounded herein only the value of the services rendered by complainant's solicitors up to and including the appointment of the receiver, and not for services thereafter rendered on behalf of all parties in interest."

John D. Rouse and Wm. Grant, for appellant.

Chas. P. Fenner, Frank McCloin, and W. H. Saunders, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

SWAYNE, District Judge, after stating the facts, delivered the opinion of the court.

It is a familiar and well-established doctrine of equity that, where a suit has been instituted and carried on for the benefit of many, all who come in to avail themselves of the benefits of the decree obtained under the litigation shall bear their proportion of the expense. The bill in this case was filed, not only in behalf of the complainant, but of all other creditors of the defendant corporation who might join in the suit and contribute to the expense thereof. The exceptors to the master's report intervened in this case, and were admitted upon that condition, and therefore must pay their proportionate share of the expense of the litigation. One jointly interested with others in a common fund, who in good faith maintains the necessary litigation to save it from waste, and secures its proper application, is entitled in equity to the reimbursement of his costs, as between the solicitor and

the client, either out of the fund itself, or by proportionate contributions from those who received the benefits of the litigation. Trustees v. Greenough, 105 U. S. 527; Railroad Co. v. Pettus, 113 U. S. 116, 5 Sup. Ct. 387; Hobbs v. McLean, 117 U. S. 567, 6 Sup. Ct. 870; Harrison v. Perea, 168 U. S. 325, 18 Sup. Ct. 129; Trust Co. v. Green, 24 C. C. A. 506, 79 Fed. 224. From the brief filed by the appellees, and from their oral argument at bar, the court understands their contention to be that it was the duty of the receiver to litigate these questions; and inasmuch as an allowance had been made to his counsel for services, out of the fund, therefore, complainant's solicitors should not receive anything after the appointment of the receiver. But it was the duty of the complainant to act in behalf of all creditors standing in a similar position, to see that their rights were protected in the final decree, and to prosecute the suit to a final distribution, and to defend and otherwise protect the fund. Having initiated the litigation on behalf of the creditors, it is his duty to prosecute it in the common interest to a termination, and to protect the fund, as far as he can, against unfounded claims for preference. He is made a party to the interventions. It has not been questioned that the complainant's solicitors conducted the litigation in this case from the filing of the bill to the final decree, and its solicitors appeared before the master, and contested all claims of the interveners, so far as they appeared to be without merit, and when they sought priority not thought to be sanctioned by law. One most important intervention, for a claim of about \$26,000, was successfully defeated, partly through their efforts, the benefits of which went largely to the exceptors herein. It certainly must be admitted that the complainant had control of the litigation from the beginning to the end, and was not displaced by the appointment of the receiver, and that the receiver is only the hand of the court, to take and hold, for the purpose of its administration, the assets brought into court through process of the complainant, without right to have any voice in the conduct of the litigation. We think that the master was correct when he found that the services of complainant's solicitors rendered subsequently to the appointment of the receiver were for the benefit of the creditors, and to the interest of the fund brought into court, and therefore he should be paid out of the fund, and that the court, in sustaining the exceptions to the award of \$5,000, as recommended by the master, was in error, and the decree should be reversed. It is therefore ordered that so much of the decree as awards the sum of \$1,500 to complainant's solicitors, Grant and Rouse, for services up to and including the appointment of the receiver, is affirmed, and so much of said decree as overrules the allowance to them for said services after the appointment of the receiver is reversed, and the cause is remanded, with instructions to allow, after hearing the parties, such additional compensation for complainant's solicitors as may be proper and just for services rendered after the appointment of the receiver, in accordance with the above opinion.

## GUARANTY TRUST CO. OF NEW YORK v. GALVESTON CITY R. CO.

(Circuit Court of Appeals, Fifth Circuit. April 19, 1898.)

No. 678.

## RAILROAD MORTGAGES—PLEDGE OF BONDS AS COLLATERAL—MORTGAGE TRUSTEE.

A trust company, which was trustee under a railroad first mortgage, afterwards, in its individual capacity, made a loan to the railroad company, secured by a pledge of its second mortgage bonds. *Held*, that the trust company's right to sell the collateral according to the terms of the pledge was not affected by the fact that it had already commenced a foreclosure suit as trustee under the first mortgage, and that a receiver had been appointed in that suit, or by the fact that it had also become the owner of the majority of the first mortgage bonds.

## Appeal from the Circuit Court of the United States for the Eastern District of Texas.

On the 11th day of October, 1897, the Guaranty Trust Company of New York, as trustee, presented to the Honorable David E. Bryant, in the United States circuit court for the Eastern district of Texas, a bill foreclosing a mortgage upon the Galveston City Railroad Company, appellee, for \$1,000,000, principal, and interest, default having been made in the payment of the interest on the bonds issued in conjunction with said mortgage; and on the same day the court appointed a receiver, as prayed in said bill. On December 31, 1896, the Galveston City Railroad Company borrowed of the Guaranty Trust Company of New York, acting in its own right, the sum of \$50,000, for which the railroad company executed its note of that date, payable on demand to appellant or order, and deposited as collateral security for said note 75 6 per cent. second mortgage bonds theretofore executed by the Galveston City Railroad Company; being a part of a series of \$150,000 of second mortgage bonds secured by a second mortgage executed by the Galveston City Railroad Company to the United States Mortgage & Trust Company of New York, and subordinate to the first or consolidated mortgage previously executed to appellant as trustee. The note provided that, in case of the nonpayment of the same, appellant should be thereby authorized, at its option, to sell the said bonds, without notice, at public or private sale, with the right to purchase the same free from any equity of redemption, and to apply the net proceeds to the payment of the note, and all other indebtedness of the maker. Payment of the principal of the note was demanded, and the note protested, on October 8, 1897; and public advertisement was thereupon made that appellant would sell at auction the bonds deposited as collateral security as aforesaid, at the New York Real-Estate Sales Rooms, the usual place for sales of securities at auction in the city of New York, on October 13, 1897, and notice thereof was sent by telegraph to the appellee; but, upon telegraphic request of appellee's president, appellant postponed the sale. Afterwards, on or about November 15, 1897, the defendant having done nothing towards the payment of said note, appellant advertised said bonds for sale on December 1, 1897, and notified defendant of the time and place of such proposed sale. About November 19, 1897, appellee presented to Judge Bryant, in chambers, at Paris, a petition in this cause, setting forth a copy of the note; alleged the purpose of appellant to sell the bonds on December 1, 1897, in accordance with the notice before mentioned; alleged that the institution of this suit, and the appointment of the receiver herein, had tended to depreciate and impair the value of said second mortgage bonds held as collateral. It is also alleged that the property of appellee, if properly administered, was ample for both the first and second mortgage bonded indebtedness; that the second mortgage bonds so pledged were assets of appellee, and as such subject to the receivership in this cause; and that the sale thereof should not be allowed without the order of the court herein. It was also alleged that such sale would probably enable appellant to bid in the bonds at a nominal figure, and proceed against the property of the appellee for the deficit; that appellee would be irreparably damaged by the sale of said bonds; that the course of dealing between the par-

ties had been such as to amount to an extension of said loan, but that, aside from that, appellants should not be allowed to take advantage of the situation, and dispose of said bonds at a depreciated price, resulting from its own action in obtaining the appointment of a receiver in this cause, etc. And the prayer was for an injunction prohibiting and restraining appellant from selling said bonds until the further order of the court. Upon this petition, Judge Bryant, on November 29, 1897, made an order granting the restraining order asked, with leave to appellant to at any time apply for dissolution of the same after five days' notice to appellee, and the restraining order issued accordingly. On December 13, 1897, appellant filed a motion to dissolve the restraining order for the reasons therein stated, and gave notice to appellee that it would present said motion to Judge Bryant, at Tyler, on the 3d day of January, 1898, or as soon thereafter as said judge could hear the same. In support of said motion, it filed an affidavit of Henry A. Murray, treasurer of appellant, which is set forth in the record (and from it it appears that appellant holds the note set forth in the appellee's petition for injunction, and the bonds therein referred to, as collateral), and stated the notice given, and the proceedings taken to sell the same, as hereinbefore shown, and that the bonds thus held as collateral were not assets of the appellee, but were its own obligations, and were not subject to the receivership in this cause, which extends only to the assets covered by the mortgage sought to be foreclosed herein. It is also denied that the course of dealing between the parties had been such as to amount to an extension of said loan, as stated in the petition for injunction. Subsequently, on January 5, 1898, appellee filed a reply to the motion to dissolve; and the court, after hearing, on the same day, refused appellant's motion to dissolve said injunction, and ordered that it be continued and made perpetual, which order was assigned as error; and an appeal was taken, and brought to this court.

R. S. Lovett, for appellant.

James B. Stubbs, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

SWAYNE, District Judge, after stating the facts as above, delivered the opinion of the court.

It is difficult to understand upon what the appellee bases its right for an injunction in this case. In the suit for foreclosure, in which the receiver was appointed, appellant acted solely as a trustee for the bondholders, and its powers and status in that case was as such trustee only. It stands in the place of, and represents, the bondholders. It has no individual interest in the suit, further than the performance of its duties as trustee; proceeding solely in a fiduciary capacity, and in the interest of those it represents. The relief sought by the Galveston City Railroad Company by its petition herein is against the appellant individually. It does not grow out of its connection with the foreclosure of the mortgage. The indebtedness of \$50,000 occurred nearly a year before foreclosure suit was commenced. Seventy-five second mortgage bonds to another corporation as trustee were pledged as collateral security for this loan. Appellant was given a right, by the terms of the pledge, to sell this collateral upon default in the payment of the debt. In this transaction appellant was acting in its own interest, as a lender of money. Upon what principle can it be claimed that its rights in respect to such transaction are in any way affected by the circumstance that it happened to be at the time a trustee named in a mortgage theretofore executed by the railroad company

to secure an issue of bonds held by others? The foreclosure was commenced and prosecuted by the bondholders through their representative. That controversy is wholly between the bondholders and the railroad company, and the controversy between the railroad company and the appellant respecting this \$50,000 loan is altogether foreign to the foreclosure proceedings. The bondholders are in no wise concerned in it, and their foreclosure proceedings cannot properly be modified or incumbered thereby. Neither does the charge made in the petition for injunction, that the foreclosure proceedings had impaired the value of the second mortgage bonds, have any effect on the rights of the appellant in this case. Its rights as the holder of the note and the collateral pledge to secure the same are wholly distinct from the right and action of the bondholders secured by the first mortgage now under foreclosure; and its right to proceed against the appellee upon its own claim could not be in any manner impaired or prejudiced by the action taken by the holders of the first mortgage bonds. Whatever position the second mortgage bonds might hold under other circumstances, their relation in this suit is that of a liability of the appellee, pledged to secure a debt to the appellant on a note which is overdue, and are not the bonds of some other corporation or person, owned by the railroad company, and subject to the control of the receiver. They are evidence of debt, not assets of the appellee. They have never been assets of the Galveston City Railroad Company. The right of appellant to sell the bonds pledged under the terms of the contract, and the powers confirmed by the terms of the pledge, were not in any way affected by the appointment of a receiver; nor were the position, character, or rights of the parties modified by the allegation that the appellants were the holders of the majority of the first mortgage bonds. The bonds may change hands; the trustee may be changed for cause; the receivership may extend for years. When, it might be asked, shall the appellant be permitted to realize on its collateral? The order granting the injunction is reversed, and the cause remanded, with instructions to the circuit court to dismiss the petition.

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CENTRAL TRUST CO. OF NEW YORK v. COLUMBUS, H. V. & T. RY.  
CO. et al.

(Circuit Court, S. D. Ohio. April 25, 1898.)

1. POWERS OF CORPORATION—MODE OF EXERCISING—LIMITATION BY CHARTER.

A business corporation may exercise all the powers within the fair and reasonable intent of the law under which it is organized, and, in doing so, may exercise a choice of means reasonably adapted to the end authorized, unless clearly limited to a particular method by its charter.

2. MORTGAGE BY CORPORATION—CHALLENGE BY SUBSEQUENT MORTGAGEE—VALIDITY.

The validity of a mortgage executed in good faith by a corporation, and consented to by it and all its stockholders, cannot be successfully challenged as ultra vires by a subsequent mortgagee with notice, unless it is absolutely void, as wholly beyond the power of the corporation.

**2. SAME—MINING AND MANUFACTURING CORPORATION—TRANSPORTATION FACILITIES—MODE OF SECURING.**

Under Rev. St. Ohio, §§ 3862, 3863, giving to mining and manufacturing corporations power to purchase or subscribe for so much stock of transportation companies as they may deem necessary to procure proper transportation facilities, such a corporation may mortgage its real estate to guaranty the bonds of a railroad company, in consideration of such transportation facilities, and to enable such company to provide the same.

**4. SAME—INDEBTEDNESS IN EXCESS OF CAPITAL—SUBSEQUENT MORTGAGEE.**

Rev. St. Ohio, § 3256, provides that a corporation may borrow money not exceeding the amount of its capital stock, issue its notes or bonds therefor, and secure them by mortgage of its real or personal property, but does not declare indebtedness in excess of capital void. *Held*, that the mortgage of a corporation in excess of its capital stock is not void as to a subsequent mortgagee with notice, if upheld by the corporation and its stockholders.

**6. SAME—SUBSEQUENT MORTGAGEE—ESTOPPEL.**

A subsequent mortgagee is estopped to question the validity of prior mortgages to which his mortgage is expressly subject.

Butler, Notman, Joline & Mynderse, for complainant.

Wm. Church Osborn, for cross complainant.

James H. Hoyt and C. I. Hunter, for receiver.

Davies, Stone & Auerbach, for the Knickerbocker Trust Co.

**LURTON, Circuit Judge.** This is a consolidated cause, in which are united two suits to foreclose mortgages made by the Columbus, Hocking Valley & Toledo Railway Company and the Hocking Coal & Railway Company. They will be referred to in this opinion as the "Railway Company" and the "Coal & Railroad Company." The original foreclosure suit was filed by the Central Trust Company of New York, to foreclose a consolidated 5 per cent. mortgage of the two companies made to it as trustee, dated October 1, 1881. That mortgage was made to secure bonds to the aggregate amount of \$14,500,000, of which \$8,000,000 only were issued, the remainder being reserved in accordance with provisions contained in the mortgage, to take up outstanding divisional bonds; the Railway Company being the result of the consolidation of two or more companies. The suit was based upon defaults in the payment of interest. Prior to the filing of this foreclosure bill by the Central Trust Company, it had filed a bill in this court, based upon an unsecured claim; and upon its application a receiver had been appointed, and possession taken of all the property of the Railway Company. The Central Trust Company's foreclosure bill was therefore filed in the same court. The defendants to the original bill are the two mortgagors, the Knickerbocker Trust Company and the Guaranty Trust Company, trustees under subsequent mortgages. A decree pro confesso was entered against the two mortgagors. To this bill of the Central Trust Company, the Knickerbocker Trust Company and the Guaranty Trust Company have filed answers. Their interests are as follows: (1) The Knickerbocker Trust Company is trustee, substituted in the place of John H. Devereux, under a mortgage dated August 1, 1884, made by the Railway Company and the Coal & Railroad Company, and known as the "Joint Mortgage," securing 6 per cent. bonds issued by the two companies, to the amount of \$2,000,000. Default was made June 1, 1897, in the payment of the interest on these bonds. (2)

The Guaranty Trust Company of New York is trustee under the general lien mortgage of the Railway Company, dated October 1, 1896, securing 4 per cent. bonds, of which \$2,133,000 are outstanding, together with \$18,290.93 scrip. Default was made July 1, 1897, in payment of interest thereon. The issue raised by the answers of the Knickerbocker Trust Company and the Guaranty Trust Company is, in substance, as follows: Whether or not the consolidated mortgage, so far as it relates to the lands of the Coal & Railroad Company, is valid, and constitutes a lien prior to the lien of the Knickerbocker Trust Company's mortgage; the Knickerbocker Trust Company asserting that the execution by the Coal & Railroad Company of the consolidated mortgage was ultra vires, and that the only valid mortgage affecting the Coal & Railroad Company's lands is the mortgage to the Knickerbocker Trust Company, securing bonds executed by both the Railway Company and the Coal & Railroad Company. Before the hearing upon the issues presented in the foreclosure bill of the Central Trust Company, the Knickerbocker Trust Company, as trustee of the joint mortgage, filed its original bill in this court to foreclose that mortgage. In this bill the parties defendant are the two mortgagors, the Central Trust Company, the Guaranty Trust Company, and the Ohio Land & Railway Company.

By this bill the Knickerbocker Trust Company affirmatively attacks the validity of the consolidated mortgage so far as it embraces the property of the Coal & Railroad Company. The Ohio Land & Railway Company was made defendant because of a certain lease made by it to the Coal & Railroad Company, dated March 19, 1894, under which it is alleged that the last-mentioned company pledged certain royalties from its coal lands by way of security for performance of its obligations under the lease. The Guaranty Trust Company was made defendant as a junior mortgagee, and answered, assailing the joint mortgage as invalid in respect to the Coal & Railroad Company's lands, and asserting the priority of the claim of the Ohio Land & Railway Company. The two causes were consolidated by order of the court, made upon stipulation; and, by the same order, the Central Trust Company was allowed to file an amendment to its bill, joining the Ohio Land & Railway Company as defendant. Such amendment was duly filed, and the Ohio Land & Railway Company answered. The bonds secured by the consolidated mortgage of October 1, 1881, to the Central Trust Company, are the bonds of the Railway Company only. The mortgage includes the property of both the Railway Company and the Coal & Railroad Company, the latter joining therein for the purpose of conveying its property to secure the bonds of the Railway Company. The validity of the bonds is not questioned. Neither is the validity of the mortgage challenged so far as the property of the Railway Company is concerned. Neither is the validity of the mortgage by the Coal & Railroad Company challenged by that company or any of its stockholders. The Knickerbocker Trust Company and the Guaranty Trust Company, as subsequent mortgagees of the Coal & Railroad Company, with con-

structive notice of the consolidated mortgage, deny the validity of that mortgage so far as it includes property of the Coal & Railroad Company. The bonds issued under the consolidated mortgage are, so far as this record shows, in the hands of bona fide purchasers, with no other notice of the purposes for which the Coal & Railroad Company joined in the mortgage than such as appear in the recitals of the bonds and upon the face of the mortgage securing them. The question of ultra vires is that upon which the decision must turn.

The Hocking Coal & Railroad Company was incorporated September 17, 1881, under the provisions of Rev. St. Ohio, § 3235 et seq. Its authorized capital stock was \$3,000,000. Section 3235 is as follows:

"Corporations may be formed in the manner provided in this chapter for any purposes for which individuals may lawfully associate themselves, except for dealing in real estate or carrying on professional business; and if the organization is private it must have a capital stock."

Section 3866 of the Revised Statutes provides:

"Companies organized for the purpose of mining, quarrying or manufacturing, may, when such purpose is stated, in the articles of incorporation, construct a railroad with a single or double track, with such side-tracks, turn-outs, offices and depots as they may deem necessary to carry out the objects of the incorporation, from any mine, quarry, or manufactory to any other railroad, or any canal, slack water navigation, or other navigable water or place within or upon the borders of this state, and shall in respect to such railroad be subject to and governed by the provisions of chapter 2."

The articles of incorporation of the Hocking Coal & Railroad Company contain the following provision:

"Said corporation is formed and organized for the purpose of mining coal and iron ore, and transporting the same to market; also, for manufacturing ores and iron, and carrying on such incidental business as is usual in such cases. Said corporation shall also possess all the powers conferred by statute to own, build, and construct railroads, to acquire and hold stock in railroads, and all powers to own, acquire, or hold transportation, railroad, or stock shares or bonds conferred in any case upon coal or other mining companies in this state. Said corporation shall also have the power to build a railroad from its mines to any other railroad. It is understood that this company will acquire lands and carry on its mining and manufacturing chiefly in the counties of Hocking, Perry, Athens, and Vinton, in the state of Ohio, but that it shall not be confined in its mining, manufacturing, or building, or owning of railroads to said counties."

On September 19, 1881, the incorporators met, and received subscriptions to the amount of \$1,500,000 of stock, which, by the record of that company, appears to have been paid in. Directors and officers were elected September 30, 1881. At a meeting of the directors held on same day, propositions for the sale to the company of coal lands to the extent of 10,000 acres were received and accepted, for which \$1,500,000 were to be paid in cash within 60 days. On the same day a resolution in the following terms was adopted:

"Resolved, that this company, for the purpose of enabling the Columbus, Hocking Valley and Toledo Railway Company to sell and negotiate its consolidated bonds to the amount of \$14,500,000, and at the request of said Railway Company, and in view of the additional benefits to be derived by this company from the increased facilities to be afforded by said Railway Company in the transportation of its coal and iron ore and otherwise, and in consideration of the

sum of \$1,000 this day paid by said Railway Company to this company, hereby consents and agrees to become a party to the mortgage to be executed to said Railway Company to secure said bonds, and hereby authorizes its president and secretary to unite in said mortgage to be executed by said Railroad Company to secure said \$14,500,000 of bonds, and to secure the payment of said bonds and interest, upon all the lands, real estate, and property of this company, being 10,000 acres and over of coal and mineral lands held by this company in fee simple in the counties of Hocking, Perry, and Athens, in the state of Ohio, and which are to be particularly described in said mortgage.

"Resolved, that the president and board of directors, having examined the resolutions passed by said Railway Company in respect to the execution of said mortgage, and the terms and conditions upon which it is to be executed, and having seen and examined said mortgage as the same has been prepared for execution, are content and satisfied with the terms and conditions of said mortgage, and assent to the same, and authorize the president and the secretary of this company to execute said mortgage with said Railway Company for the purposes therein expressed, and to embrace in said mortgage all the lands held and owned by this company as aforesaid, and to make said mortgage and bonds a first lien upon the said lands."

This resolution was also submitted on the same day to a meeting of the stockholders, and unanimously adopted.

The mortgage referred to in these resolutions is the mortgage designated as the "consolidated mortgage," and was duly executed and delivered October 1, 1881. That mortgage, among other things, recites that:

"Whereas, the said Hocking Coal & Railroad Company is the owner of ten thousand acres of coal lands and real estate, situated in the counties of Hocking, Perry, and Athens, aforesaid, and whereas, said Coal and Railroad Company is desirous that the said Columbus, Hocking Valley & Toledo Railway Company should execute this mortgage, and make the loan provided for therein, and for that purpose the said Hocking Coal and Railroad Company, by the unanimous vote of its directors and stockholders, being desirous of enabling said railway company to make the loan herein provided for, and to receive the benefit to its property which will come by the greater facilities thus afforded to it in the transportation of its coal and iron ores hereafter to be mined, and its iron hereafter to be manufactured, enters into this mortgage, and secures the payment of the bonds hereinafter mentioned, and interest thereon upon its real estate hereinafter described."

In the subsequent parts of this mortgage, the resolution of the directors and stockholders authorizing its execution is set out in full. At the date of this mortgage, the Railway Company appears to have been the sole stockholder in the Coal & Railroad Company. Thus, on September 30, 1881, the persons who had subscribed for the stock of the Coal & Railroad Company acquired their stock by an instrument in these words:

"Cleveland, Ohio, September 30, 1881.

"We, the undersigned, hereby sell, assign, and transfer to M. M. Greene, president and trustee of the Columbus, Hocking Valley & Toledo Railway Company, all of our stock now held or owned by us, and each of us, in the Hocking Coal & Railroad Company; and we hereby authorize said Hocking Coal & Railroad Company to transfer said stock on its books to said M. M. Greene, president and trustee, and to issue to him a certificate therefor.

"Continental Coal Company,

"By Wm. J. McKinnie, President.

"W. J. McKinnie.

"Wm. B. Sanders.

"Charles G. Hickox.

"H. Fenninger.

"J. J. Purcell."

The only certificate for stock which ever appears to have been issued was in these words:

"Certificate No. 1, Issued to M. M. Greene, President-Trustee, Columbus, Hocking Valley & Toledo Railway Company, of Columbus, Ohio, 15,000 shares, September 30, A. D. 1881."

Whether the Coal & Railroad Company was ever paid by the subscribers for its stock, or whether the subscribers were ever paid by the Railway Company for their stock, does not satisfactorily appear on this record. The fact is unimportant upon the issues here to be tried. That the Railway Company controlled and voted this stock, both when this mortgage was authorized and when it was executed and delivered, does sufficiently appear on the minutes of the Railway Company, which have the appearance of a record made to subserve some undisclosed purpose. Thus, on November 2, 1881, there appears a resolution in these words:

"Resolved, that the president of this company is hereby directed to hand over to Stevenson Burke six million four hundred thousand dollars (\$6,400,000) of the consolidated mortgage bonds of this company."

Below, and originally a part of this entry, there appears the following words: "To apply to the purchase of the stock of the Hocking Coal & Railroad Company,"—which words now appear to have been erased. No explanation of this is offered.

On August 14, 1882, the same minutes show the following action:

"Resolved, that the president be, and is hereby, directed to purchase the whole of the stock of the Hocking Coal & Railroad Company, which covers and represents ten thousand acres of coal lands in Hocking, Perry and Athens counties, amounting to fifteen thousand shares at and for the price of eight million dollars, payable in the consolidated bonds of this company, dated September 1st, 1881, at their par value; that the title to such stock be taken in the name of the president, as trustee for this company.

"Thereupon, during the meeting, the president reported that he had purchased said fifteen thousand shares of the capital stock of said Hocking Coal & Railroad Company, at and for the price of eight million dollars, and paid therefor, in the bonds of this company, at the price above mentioned. And thereupon, on motion, it was resolved, that the purchase of said Hocking Coal & Railroad Company's stock, as aforesaid, be, and the same is hereby, ratified, approved, and confirmed."

The relation of the Coal & Railroad Company and the Railway Company to each other, as shown by this stock transaction, and by the three mortgages here involved, most clearly indicates that the former was a mere auxiliary of the latter; and, although they must be regarded as legally distinct corporations, they were equitably and substantially but one. This fact, though not determinative as to the power of the Coal & Railroad Company to mortgage its property to secure a debt of the Railway Company, is still of some significance when we come to consider whether its mortgage is to be regarded as a mere security for the debt of the Railway Company. That the Coal & Railroad Company had the power to make a mortgage to secure its own debts is not disputed. Neither is it contended for the complainant that one corporation, in the absence of express or implied authority in its constituting law, has the power to appropriate its capital for the benefit of another, or in a business not authorized by its charter. The general doctrine is well settled that a mining or man-

ufacturing corporation cannot lend its credit nor employ its resources for any purposes or objects not fairly within the business it is authorized to conduct. *Pearce v. Railroad Co.*, 21 How. 441; *Green Bay & M. R. Co. v. Union Steamboat Co.*, 107 U. S. 98, 2 Sup. Ct. 221; *Humboldt Mining Co. v. Variety Iron-Works Co.*, 22 U. S. App. 334, 10 C. C. A. 415, and 62 Fed. 356; *Vault Co. v. Boynton*, 37 U. S. App. 602, 19 C. C. A. 118, and 71 Fed. 797. But it is equally clear that a business corporation may exercise all the powers within the fair and reasonable intent of the law under which it is organized, and, in doing so, may exercise a choice of means reasonably adapted to the end authorized, unless it is clearly and explicitly limited to a particular method defined by its charter. The validity of the mortgage to the Central Trust Company is not challenged by the corporation which made it, nor by any stockholder. The latter unanimously consented to its execution, and, if a mortgage for the purposes indicated upon the face of this conveyance could be validly made at all, the corporation is undoubtedly bound. The question as to its validity is made only by two subsequent mortgagees, who accepted their respective securities with full notice of the existence of this prior incumbrance. Unless, therefore, the instrument is absolutely void, as wholly beyond the power of the corporation, it must be regarded as a valid security.

The Coal & Railroad Company was not formed for the purpose of mining coal alone. Its articles of association stated that its purposes were much wider, and included the mining of iron ore and its manufacture into iron, and the transportation of all its products to market. In addition, the purpose to construct a railroad and to own stock in railroads or other transportation companies was also asserted. We must look to the statutes of Ohio to see how far these various purposes might be combined in one corporation, and what powers are conferred upon such a company. This corporation was organized under the general incorporation law of Ohio, and its powers are therein defined. Section 3235, Rev. St. Ohio, provides that corporations may be organized for any purpose "for which individuals may lawfully associate themselves"; and section 3866 gives power to any mining company, when such purpose is stated in the articles of association, to construct a railroad from its mines to any other railroad, or to navigable water within or upon the border of the state, if such railroad shall be deemed necessary to carry out the objects of the incorporation. The articles of association, showing the purpose of this company to engage in both mining and manufacturing, and to construct a railroad in aid of that business, have already been set out. By section 3862 and 3863, power is given such mining and manufacturing companies "to purchase or subscribe for, in the name of the company, such an amount of the stocks of any railroad, or other transportation company, as they deem necessary, in order to procure proper facilities for transportation for the manufactories, mines, or other works of the company." These are the provisions of the general law under which this Coal & Railway Company was organized which have any direct bearing upon the issues here to be decided.

The object of the Railway Company in issuing its bonds, and in making a mortgage upon its property, stated in the face of the mortgage itself, was—First, to apply \$6,500,000 in exchange for prior divisional bonds; second, to apply the proceeds arising from the sale of the remaining bonds in double-tracking, equipping, and improving its railway, and in the purchase of such property as the interests of the company should require. The bonds issued for these latter purposes are the only bonds actually issued, and aggregate \$8,000,000. The inducement moving the Coal & Railroad Company to join in the mortgage stated on the face of the mortgage was that:

"Said Coal and Railroad Company is desirous that the said Columbus, Hocking Valley & Toledo Railway Company should execute this mortgage, and make the loan provided for therein; and for that purpose the said Hocking Coal & Railroad Company, by the unanimous vote of its directors and stockholders, being desirous of enabling said Railway Company to make the loan herein provided for, and to receive the benefit to its property which will come by the greater facilities thus afforded to it in the transportation of its coal and iron ores hereafter to be mined, and its iron hereafter to be manufactured, enters into this mortgage, and secures the payment of the bonds hereinafter mentioned, and interest thereon, upon its real estate hereinafter described."

The Coal & Railroad Company owned mineral lands in several counties, which lands were contiguous to the existing line of the Railway Company. That railroad extended from navigable water on the northern border of the state, at Toledo, to navigable water on the southern border of the state, at Pomeroy. It was just such a railroad as the Coal & Railroad Company was authorized to construct by the provisions of section 3866 of the Ohio Revised Statutes. If the facilities of the existing railway were not such as to serve the necessities of this mining company, but could be made so by double-tracking, branches, switches, depots, or greater special equipments, I see no reason why it might not have purchased or subscribed to the stock of the Railway Company, if, by so doing, it could procure the transportation facilities it needed. The power to do this is found in section 3863, Rev. St., which provides that:

"The directors of any such [mining] company may authorize its president to purchase or subscribe for, in the name of the company, such an amount of the stocks of any railroad or other transportation company, as they deem necessary, in order to procure proper facilities for transportation for the manufactories, mines, or other works of the company."

The power existed to obtain needed transportation by either building a railroad for itself or by subscribing to the stock of a railroad company. It exercised this power, not by construction, nor by subscribing to the stock of a railway company, but by mortgaging its property to secure the bonds to be issued by a railway company to obtain means to double-track and otherwise enlarge its facilities as a transportation company serving the Coal & Railroad Company. That this was the purpose of this mortgage appears from the resolution of the stockholders of the Coal & Railroad Company set out on the face of the mortgage. The mortgagees are entitled to stand upon this record declaration of the purposes of the mortgagor. They had no other information or source of information, and could not be presumed to know that

an ulterior purpose (if any there was) was to be subserved, not authorized by the mortgagor company. A purchaser of one of the bonds secured under this mortgage would undoubtedly be charged with notice of the general powers of the Coal & Railroad Company, and would be required to take notice of all that appeared upon the face of the bond and of the mortgage under which it was secured. If he turned to the mortgage, he would find the Railway Company had issued the bonds to "enable it to borrow money found necessary to be used in building and double-tracking its road, paying for property purchased and to be purchased, improvements made and to be made, and for the equipment of its said line of railroad, providing terminal facilities, constructing docks, building bridges, and otherwise extending and enlarging its capacity for the transportation of freight and passengers, and for other general purposes of said railway." He would find also that the Coal & Railroad Company extended the mortgage to its property for the purpose of enabling said Railway Company to make the loan provided for, and to receive the benefits "to be derived by this company from the increased facilities to be afforded by the said Railway Company in the transportation of its coal and iron ores," etc. The fair inference to be drawn from these recitals of the instrument is that the relation of the Coal & Railroad Company to the Railway Company was not that of a mere accommodation security or guarantor, but was that it had, in effect, guarantied the bonds of the Railway Company as a means of acquiring needed additional transportation facilities.

What the Coal & Railroad Company did was this: It found an existing railway, and aided it in raising means to enlarge its transportation facilities, by guarantying its bonds, and thus obtained for itself needed transportation through that method, rather than by building a railway or subscribing to the stock of one. The purpose to obtain adequate transportation facilities was one clearly within the general powers of the corporation. It may be that the facilities it had in the railroad as then existing were sufficient, and that the proposed improvements were not needed, or that the mortgage was not in good faith intended to secure such transportation facilities, or that the proceeds of the bonds so secured were intentionally misapplied. But this is no answer to innocent holders of the securities which were thus given credit and placed on the market, ostensibly for an authorized purpose. *Mor. Priv. Corp. § 609; Railway Co. v. Hawkes, 5 H. L. Cas. 331-371.* In the case last cited was involved a contract made by a railroad company for the purchase of lands not, in fact, needed or useful for the legitimate purposes of the company, and therefore was an unlawful acquisition. Yet this contract was specifically enforced in favor of the vendor, who had a right to assume the purchase was for a legitimate corporate purpose. Lord St. Leonards said:

"Where the party contracting with the directors is not aware of any intended misapplication on their part, I am of opinion that the contract is binding, although it can afterwards be shown that the property really was not acquired for the railway. The safety of men in their daily contracts requires that this doctrine of ultra vires should be confined within narrow bounds."

To the same effect are the cases of *Mayor of Norwich v. Norfolk Ry. Co.*, 4 El. & Bl. 397.

The stockholders unanimously agreed to this method of obtaining better transportation facilities. There were then no creditors to be affected. What was done injured no one having any interest, direct or indirect. The creditors now challenging the mortgage became such with full knowledge of this prior mortgage, and have no higher legal right to avoid this security than the corporation itself would have. It was not a mere accommodation security. By lending its credit, it, in effect, purchased transportation facilities as effectually as if it had subscribed for the stock of the company in order to acquire what it needed, or had in any other way used its capital in the acquisition of means of transportation. Section 3266 of the Revised Statutes of Ohio provides that "no corporation shall employ its stocks, means, assets or other property, directly or indirectly, for any other purpose whatever than to accomplish the legitimate objects of its creation." But this is nothing more than common law, and gives no added force to the well-settled rule so often stated by the courts of Ohio and all other tribunals administering the common law. Under any fair and reasonable construction of the recitals of the objects and purposes of this mortgage, it was executed by the Coal & Railroad Company "for no other than to accomplish the legitimate objects of its creation." The particular means adopted are not expressly prohibited; nor, under any fair and reasonable interpretation of the powers conferred, can we say that the method adopted of accomplishing an authorized corporate purpose was intended to be excluded by the provisions of the Ohio law in respect to this class of companies. In accomplishing a lawful corporate purpose, a reasonable chain of means adapted to ends must be regarded as within the legislative intent, unless a contrary purpose is clearly indicated. *Mor. Priv. Corp.* §§ 320-323; *City of Bridgeport v. Housatonic R. Co.*, 15 Conn. 475; *Thompson v. Railroad Co.*, 3 Sandf. Ch. 625; *Jones v. Guaranty Co.*, 101 U. S. 622; *Ellerman v. Stockyards Co.*, 49 N. J. Eq. 217, 23 Atl. 287.

The primary question here is one of construction: Was this method of accomplishing an authorized corporate purpose so far in excess of the granted powers of this corporation as that the mortgage is absolutely void, and not in the way of a subsequent mortgage by the same mortgagor to a mortgagee having constructive notice of its existence?

In *Attorney General v. Great Eastern Ry. Co.*, 5 App. Cas. 473, 478, 481, the lord chancellor, referring to *Railway Co. v. Riche*, L. R. 7 H. L. 653, said:

"It appears to me to be important that the doctrine of ultra vires, as it was explained in that case, should be maintained. But I agree with Lord James that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may be fairly regarded as an incident to or consequential upon those things which the legislature has authorized ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires."

In the same case, Lord Blackburne said that:

"Those things which are incident to, and may reasonably and properly be done under, the main purpose, though they may not be literally within it, would not be prohibited."

In *Green Bay & M. R. Co. v. Union Steamboat Co.*, 107 U. S. 100, 2 Sup. Ct. 221, a railway company was authorized to build, construct, and run, as a part of their corporate property, such number of steamboats as they may deem necessary to facilitate the business operations of the company. It made a contract guarantying that the gross earnings of each steamer of an independent steamboat company should equal a certain sum for each of two years if it would run a line in connection with the railway company. When sued upon this agreement, it relied upon the defense of *ultra vires*. The contract was held to be valid. In considering the question as to whether the power to construct and run a line of boats in connection with its railroad implied the power to guaranty the earnings of an independent line of boats, the court said:

"The general doctrine upon this subject is now well settled. The charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers; and a contract manifestly beyond those powers will not sustain an action against the corporation. But whatever, under the charter and other general laws reasonably construed, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited."

In *Marbury v. Tod*, 22 U. S. App. 267, 10 C. C. A. 393, and 62 Fed. 335, affirming *Tod v. Land Co.*, 57 Fed. 47, this court sustained a guaranty of the bonds of a railroad company by a land company, upon the ground that a power to consolidate with a railroad company implied power to induce the building of a railroad necessary to the successful working of the business of the land company by guarantying its bonds.

In *Zabriskie v. Railroad Co.*, 23 How. 381, the guaranty of the bonds of one Ohio railroad company by another Ohio railway company was sustained, under section 3300, Rev. St. Ohio, which gave power to railway companies to aid another in the construction of its road, "by means of a subscription to the capital stock of such company or otherwise."

In *Hill v. Nisbet*, 100 Ind. 341, power to consolidate was held to imply power to purchase stock in another company with a view to consolidate.

A corporation having power to buy and improve, lease, and sell lands, was held to have power to contribute to the building of a railroad by which its property was rendered accessible. *Vandall v. Dock Co.*, 40 Cal. 83. A similar corporation, with like powers, was held to have power to contribute to a college which it was proposed to establish, although not upon the company's lands. *Whetstone v. Ottawa University*, 13 Kan. 320. A company authorized to buy and hold and develop wild lands, "and to aid in the development of minerals and other materials, and to promote the clearing and settlement of the country," was held to have power to build sawmills and an hotel for the accommodation of those having business with the company. The same corporation had power to employ their capital in the construction of such railways, not exceeding twenty miles in length, as may be necessary from such mines, to intersect the Sunbury and Erie or the Allegheny Valley Railroad. The directors subscribed an amount greater than the entire authorized capital of the corporation to the

stock of the Sunbury & Erie Railroad Company, under an agreement that that company would build to the lands of the subscribing company. The shareholders sought to hold the directors liable to them as for a diversion of corporate assets. The court held that, though the subscription was excessive and ultra vires the directors, yet it had been ratified by the shareholders, and the directors were therefore not liable.

In ascertaining the powers of a corporation, great regard must necessarily be paid to the character of the business which the particular company is authorized to conduct; for the general rule is that a business corporation may, in the conduct and management of its authorized business, adopt the means reasonably appropriate and usually adopted by individuals in the conduct of the same kind of business. This rule finds illustration in many of the cases, and in the case of *Ft. Worth City Co. v. Smith Bridge Co.*, 151 U. S. 294, 14 Sup. Ct. 339. There a corporation created for the purpose of dealing in lands, by subdividing and selling, and having power "to enter into obligations or contracts essential to the transaction of its authorized business," obligated itself to pay to a bridge company one-third the cost of constructing a bridge over the Trinity river, whereby the property of the land company would be made accessible. The bridge was to be constructed upon one of the public streets of the city of Ft. Worth, and was the property of the city. The remainder of the cost of the bridge was to be borne in equal shares by the city and the county of Tarrant. The land company, when sued by the bridge company for its contribution to the cost of the bridge, denied the validity of its contract. The court held the contract valid, saying:

"The object of the creation of the corporation was the acquisition and sale of lands on subdivision; and it cannot be successfully denied that that object would be directly promoted by the use of legitimate business methods to render the lands accessible. This involved the expenditure of money or the assumption of liability; but there is no element in this case of any unreasonable excess in that regard or of the pursuit of any abnormal and extraordinary method. The result sought was in accomplishment of the legitimate objects of the corporation and essential to the transaction of its authorized business; and the power to make the contract was fairly incidental, if not expressly granted."

Thus, while some corporations might be, from the very nature of their business, authorized to lend their credit or invest in the stocks of other corporations, yet manufacturing or mining corporations would have no authority to guaranty the contracts of another, nor to purchase shares for the purpose of controlling another nor to appropriate their assets to support the credit of another, or of an individual or firm. That an unauthorized use of corporate property was of benefit and advantage to the business of such a corporation is no justification, and will not validate a transaction if it be not within the general scope of its granted powers. This is all that was decided in the cases of *Humboldt Mining Co. v. Variety Iron-Works Co.*, 22 U. S. App. 334, 10 C. C. A. 415, and 62 Fed. 356; *Vault Co. v. Boynton*, 37 U. S. App. 602, 19 C. C. A. 118, and 71 Fed. 797; and *Valley Ry. Co. v. Lake Erie Iron Co.*, 46 Ohio St. 44, 18 N. E. 486. The case last cited involved only the question of the power of the iron company to invest its capital in

the stock of a railway company. It was held that no authority existed in the iron company to subscribe to the capital stock of the railway company. The question in that case arose between the companies themselves, under a suit based upon the contract of subscription. Here the question is made by a subsequent creditor only, and after the execution of the mortgage, and after the bonds secured thereunder had passed into circulation. The iron company had no express power to subscribe for stock in a railway company. The Coal & Railroad Company did have express power to obtain needed transportation facilities, either by building a railroad or by subscribing to or purchasing the stock of one. The iron company had no power in respect to the subject of acquiring railroad facilities. The procuring of adequate transportation facilities was a subject within the granted powers of the Coal & Railroad Company, and the only objection which can be made to what it did is that it did not exercise its powers in the particular mode mentioned in its charter.

The case falls much more nearly under *Ehrman v. Insurance Co.*, 35 Ohio St. 324-337. There one Ohio corporation had absorbed another, and acquired real estate and other property which it was not authorized to acquire or hold under its charter. Among the assets so obtained was the note in suit. The maker of the note, when sued, denied the title of the plaintiff, upon the ground that its absorption of the corporation to whom the note was payable, and the acquisition thereby of property which it was not authorized to hold, was *ultra vires*. This defense was overruled, upon the ground that the title of the offending corporation could not be defeated by one who was a stranger to the transaction. In discussing the general subject of *ultra vires* contracts, White, J., said:

"In applying the doctrine of *ultra vires* in a particular case, regard must not only be had to the unauthorized agreement or transaction, but also to the relation which the litigating parties sustain to it. Where there is an absolute and total want of power in a corporation to deal in respect to a given subject, it may be that acts done in the name of the corporation, in regard to such subject, would, as corporate acts, be void for all purposes and as against all persons. But there is an obvious distinction between such a case and one where the corporation deals with a subject within the scope of its granted powers, but for a purpose or in a mode not authorized by its charter. Thus, where property which the corporation, under certain circumstances, is authorized by its charter to acquire, is purchased, in a mode or for a purpose not authorized, it seems clear to us that the title of the corporation to the property cannot be defeated by a party who is a stranger to the agreement by which the property was acquired, and who is not injured by the transfer."

2. It is next objected that this mortgage is void because the amount of the bonds secured exceeds the amount of the stock of the Coal & Railroad Company. The Revised Statutes of Ohio, affecting corporations of the class to which the Coal & Railroad Company belongs, provide that a corporation may borrow money not exceeding the amount of its capital stock, and issue its note or coupon and registered bonds therefor, bearing any rate of interest authorized by law, and may secure payment of the same by a mortgage of its real or personal property, or both. Rev. St. Ohio,

§ 3256. This limitation as to third persons must be regarded as applying to the authorized, and not the subscribed, stock. *Farmers' Loan & Trust Co. v. Toledo, A. A. & N. M. Ry. Co.*, 67 Fed. 49; *Water Co. v. De Kay*, 36 N. J. Eq. 548. The Coal & Railroad Company was not borrowing money. The Railway Company was the borrower, and its capital stock was \$20,000,000. But, assuming that if the Coal & Railroad Company could not mortgage its property to secure its own debt in excess of its capital stock, it could not mortgage it for the debt of another to any greater amount, the mortgage is not thereby rendered so absolutely void as that subsequent creditors can be heard to complain. The same question has many times been decided in favor of creditors. *New Britain Nat. Bank v. Cleveland Co.*, 91 Hun, 447, 36 N. Y. Supp. 387; *Sioux City Terminal R. & W. Co. v. Trust Co. of North America*, 27 C. C. A. 73, 82 Fed. 124; *Farmers' Loan & Trust Co. v. Toledo, A. A. & N. M. Ry. Co.*, 67 Fed. 49; *Allis v. Jones*, 45 Fed. 148; *Wood v. Waterworks Co.*, 44 Fed. 146; *Reed's Appeal*, 122 Pa. St. 565, 16 Atl. 100; *Water Co. v. De Kay*, 36 N. J. Eq. 548. *Raymond v. Railroad Co.*, 21 Wkly. Law Bul. 103, was a case arising under this same provision of the Ohio Revised Statutes, and the question was fully considered by Judge Peck, of the superior court of Cincinnati. The execution of the mortgage was within the general scope of the powers of the corporation, and this objection is only that it is in excess of the limitations imposed upon the exercise of that power. The statute does not declare that indebtedness in excess of capital stock shall be null and void. The corporation and every shareholder consented, and will not therefore be heard to complain. The transaction was not on its face immoral, and involved no turpitude. The objection comes from subsequent creditors, who, with knowledge that the indebtedness thus secured was in excess of the authorized capital stock, voluntarily added to that excess, and now seek to sweep out of the way a prior assumption of liability that they may profit by it. Such subsequent creditors stand in the shoes of the mortgagor, and, if it could not object, they cannot. For such a violation of the limits imposed by law upon the power of the Coal & Railroad Company to create an indebtedness, the state alone should be heard to complain. The cases holding valid mortgages taken by national banks to secure loans made at the time are in point. Neither the borrower nor subsequent creditors will be heard to object. *Bank v. Matthews*, 98 U. S. 621-629; *Bank v. Whitney*, 103 U. S. 99-103; *Fritts v. Palmer*, 132 U. S. 282-292, 10 Sup. Ct. 93; *Bank v. Townsend*, 139 U. S. 67, 11 Sup. Ct. 496. The same conclusion was reached by the court of appeals of the Eighth circuit in *Sioux City Terminal R. & W. Co. v. Trust Co. of North America*, 27 C. C. A. 73, 82 Fed. 124-133 et seq., the opinion being by Sanborn, circuit judge.

3. The mortgage to the Knickerbocker Trust Company is one jointly executed by the Railway Company and the Coal & Railroad Company, to secure \$2,000,000 of the joint bonds of the two corporations. The mortgage recites that the bonds are issued for the purpose of improving both properties. The only attack on this

mortgage is made by the Guaranty Trust Company, which is a third mortgagee. This mortgage expressly recognizes the mortgage to the Central Trust Company and that to the Knickerbocker Company as existing prior mortgages, and is expressly subject to them. This is an estoppel, and we need not consider the objections it urges to either of said mortgages. *Bronson v. Railroad Co.*, 2 Wall. 283.

4. If any question shall arise under the answer of the Ohio Land & Railway Company as to the royalties due from the Coal & Railroad Company, it may be presented hereafter upon the coming in of the report heretofore ordered upon that matter.

5. A decree of foreclosure will be drawn, which may be presented to me hereafter, and the terms settled, if there shall be disagreement.

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### WARNER V. CITY OF NEW ORLEANS.

(Circuit Court of Appeals, Fifth Circuit. May 17, 1898.)

No. 691.

#### 1. EQUITY—MAXIMS.

The city of New Orleans purchased the drainage system then in process of construction from the contractor; paying therefor in warrants, and covenanting not to obstruct or impede, but to facilitate by all lawful means, the collection and application of the drainage assessments to the payment of the warrants. The city abandoned the work, and the supreme court of the state decided that the assessments were not enforceable, because the abandonment of the work had rendered it a detriment, rather than a benefit, to the lands. Suit was brought against the city by a holder of the purchase warrants. *Held* that, under the maxim "that equity looks upon that as done which ought to have been done," the city must be treated as having done whatever was necessary to render the assessments available, and therefore as liable to account for the fund as if actually collected and in hand.

#### 2. ESTOPPEL.

A city, by drawing warrants against a fund composed largely of assessments and judgments against itself as quasi owner of the streets and public squares, etc., is estopped to deny the validity of those assessments and judgments.

#### 3. MUNICIPAL CORPORATIONS—ASSESSMENT OF CITY PROPERTY FOR LOCAL BENEFITS.

A city is liable for special assessments against itself for local benefits to its streets and other public places, regardless of the rule that public property is exempt from taxation.

#### 4. SAME—INCREASE OF DEBT.

By an amendment to the Louisiana constitution, the city of New Orleans was prohibited from increasing its debt, except that it might issue drainage warrants under a certain contract then in process of completion. *Held*, that a purchase of works being built, and the issuance of warrants for the price, were within the exception.

#### 5. SAME—POWER TO CONTRACT.

A municipal corporation which has enjoyed the fruits of a contract fairly made cannot, when called to account, deny the corporate power to make it.

#### 6. LIMITATIONS.

A city bought property, and issued warrants against a fund in payment therefor, and undertook to collect the judgments and assessments belonging to such fund, and apply them to pay the warrants. *Held*, that the city

could not avail itself of the plea of the statute of limitations against the holders of the warrants, based on the fact that the city had allowed the judgments to outlaw.

### Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

The legislature of the state of Louisiana, by an act approved March 18, 1858, established a system of drainage of certain portions of the parishes of Orleans and Jefferson, which was to be carried on by boards of commissioners appointed for the three drainage districts into which the territory was divided. The commissioners were required to prepare plans of the proposed work, giving the names of the proprietors of the lands to be drained, which were to be filed in the mortgage office. The act further provided that notice of the filing of the plans should be given by publication, and that, upon the application of the commissioners to the courts specified in the act, judgments should be entered decreeing the lands subject to a first mortgage lien and privilege for such amount as might be assessed for drainage purposes. By a supplemental act approved March 17, 1859, the commissioners were authorized to borrow money to carry on the work. By another act, approved March 1, 1861, the prior acts were amended for the purpose of providing a mode of enforcing assessments when made, and for that purpose authorizing the commissioners to apply to certain courts for the approval and homologation of the assessment rolls, which approval and homologation the act declared "shall be a judgment against the property assessed and the owners thereof, on which execution may issue as on judgments rendered in the ordinary mode of proceeding." The commissioners made plans of the work proposed to be done, including therein the streets, squares, and public places within the several districts, as the property of the city of New Orleans; and from time to time judgments were rendered charging these public places, as well as private property, with the amounts that might be assessed for drainage purposes. Subsequently assessments were made, in some districts by the commissioners, and in others by the board of administrators of the city of New Orleans, which succeeded them under the act of 1871; and judgments were rendered for the amounts assessed against the lands and the owners, pursuant to the act of 1861. These assessments in every instance included the streets, squares, and public places, and the city of New Orleans, as the proprietor thereof. In 1871 the legislature, by Act No. 30 of that year, abolished the several boards of drainage commissioners, transferring all the assets and everything appertaining to the drainage districts to the board of administrators of the city of New Orleans, which was subrogated to all the rights and powers and facilities then possessed by the commissioners; and the board was directed to collect the balance due on assessments, as shown by the books of the First, Second, and Third drainage districts, "which said assessments are hereby confirmed and made exigible at such time and in such manner as the board of administrators may designate." The act further authorized the board of administrators to make other assessments, and required it to place all collections of drainage assessments to the credit of the Mississippi & Mexican Gulf Ship-Canal Company,—said company being the corporation charged under the act with the drainage work,—and hold the same as a fund to be applied to drainage purposes. Under these several acts, assessments were made against the city on the area of the streets and other public places within the drainage districts, and reduced to judgment, to the amount of \$696,349.30, and against private persons to the amount of \$1,003,342.28, of which about \$230,000 has been collected from private property, in cash and drainage warrants; leaving outstanding at the date of the filing of the bill in this case uncollected assessments to the amount of \$1,469,714.47, of which the city owes \$696,349.30. The canal company carried on the work until 1872, when it transferred its franchise, drainage boats, and machinery to Warner Van Norden, who thereafter continued the work, receiving warrants against the drainage fund in payment of the amount earned. In 1876, after more than two-thirds of the drainage system had been completed, the legislature, by Act No. 16 of that year, authorized the city of New Orleans to acquire, if the council deemed it

advisable, the property and franchise of the canal company, or its transferee, at a valuation to be affixed by appraisers to be appointed by itself; the price to be paid in warrants drawn against the drainage assessments. The same act granted the city the right and power thereafter to do all necessary drainage work, in case it should make the purchase. The city availed itself of this authority, and on the 6th day of June, 1876, made the purchase at an appraised value of \$300,000, and issued drainage warrants to that amount to Van Norden for the price; covenanting in the act of sale not to obstruct or impede, but on the contrary to facilitate by all lawful means, the collection and application of the drainage assessments to the payment of the purchase warrants.

On this state of facts the complainant, as holder of \$6,000 of these warrants, brings this suit. The bill, after reciting these facts, avers, in substance, that upon acquiring the drainage plant and franchises of the canal company the city abandoned all drainage work, and suffered the dredge boats and machinery purchased as above stated to decay and become valueless, and that by reason of the city's failure to complete the drainage and benefit the lands the courts have refused to enforce the collection of the assessments; that, having thus abandoned all drainage work, the city, by its ordinances and by a proclamation of the mayor, then advised property holders not to pay the assessments; and that in consequence of these ordinances and said proclamation, and the decisions of the courts, the drainage assessments became practically valueless and uncollectible. The bill further avers that the city had issued bonds in exchange for drainage warrants given for work, prior to the sale, under the authority of the act of the legislature of 1872, to an amount in excess of all the drainage assessments, which it will claim operated as a discharge of its liability as assessee of the streets, etc., and of all liability it may have incurred by any dereliction of duty in regard to the assessments against private property, but that this claim was not made known to Van Norden at the time of the purchase, and that he would not have parted with his property payable out of drainage assessments if he had known that such claim would be set up to defeat the payment of the price. The bill closes with a prayer for an accounting of the drainage fund, including the amounts due by the city, and the application thereof to the payment of the complainant's warrants, and those held by others similarly situated who may come in and avail themselves of the benefit of the bill.

To this bill the defendant filed a demurrer, both general and special, assigning for cause (1) want of jurisdiction in the circuit court; (2) want of equity in the bill; and (3) that the matters sought to be litigated had been decided adversely to the complainant's pretensions in the case of *Peake v. City of New Orleans*, 139 U. S. 342, 11 Sup. Ct. 541. The demurrer was sustained and the bill dismissed by the circuit court, and the cause was removed here on the appeal of the complainant. This court, being in doubt as to the application in *Peake v. City of New Orleans*, supra, to the case made by the bill, certified the following questions to the supreme court for advice and instructions: "First. Is the city of New Orleans, under the warranties, express and implied, contained in the contract of sale of June 7, 1876, by which she acquired the property and franchise from Warner Van Norden, and under the averments of the bill, estopped from pleading against the complainant the issuance of bonds to retire \$1,672,105.21 of drainage warrants issued prior to said sale, as a discharge of her obligation to account for drainage funds collected on private property, and as a discharge of her own liability to that fund as assessee of the streets and squares? Second. Should the decision in the case of *Peake v. City of New Orleans*, 139 U. S. 342, 11 Sup. Ct. 541, be held to apply to the facts of this case, and operate to defeat the complainant's action?" The court declined to answer the second question, on the ground that it practically submitted the whole case, but answering the first, after reciting the facts, said: "And now the question is whether the city is not estopped to plead in defense of liability on these drainage warrants the fact of prior issue of bonds to a larger amount than that assessed against the areas of its streets and squares, and collected from private property. We think this question must be answered in the affirmative. The city, in respect to the purchase of this property from the canal company and its transferee, and in the obliga-

tions assumed by the warrants issued, acted voluntarily. It was not in reference to these matters, as it was to those considered in *Peake v. City of New Orleans*, 139 U. S. 342, 11 Sup. Ct. 541, a compulsory trustee, but a voluntary contractor; and the proposition which we affirm is that one who purchases property, contracting to pay for it out of a particular fund, and issues warrants therefor payable out of that fund,—a fund yet partially to be created, and created by the performance by him of a statutory duty,—cannot deliberately abandon that duty, take active steps to prevent the further creation of the fund, and then, there being nothing in the fund, plead in defense to a liability on the warrants drawn on that fund that it had, prior to the purchase, paid off obligations theretofore created against the fund. Whatever equity may do in setting off, against all warrants drawn before this purchase from the canal company and its transferee, the bonds issued by the city (and in respect to that matter we can only refer to *Peake v. City of New Orleans*, supra), it by no means follows that the city can draw new warrants on the fund in payment for property which it voluntarily purchases, and then abandon the work by which alone the fund could be made good, resort to means within its power to prevent any payments of assessments into that fund, and thus, after violating its contract promise not to obstruct or impede, but on the contrary facilitate by all lawful means, the collection of the assessments, plead its prior issue of bonds as a reason for evading any liability upon the warrants. One who purchases property, and pays for it in warrants drawn upon a particular fund, the creation of which depends largely upon his own action, is under an implied obligation to do whatever is reasonable and fair to make that fund good. He cannot certainly so act as to prevent the fund being made good, and then say to his vendor, 'You must look to the fund, and not to me.' We are clear in the opinion, therefore, that the first question must be answered in the affirmative." *Warner v. City of New Orleans*, 17 Sup. Ct. 892. Being thus advised, and being satisfied that the complainant was entitled to the relief prayed, this court itself answered the second question in the negative, reversed the decree appealed from, and directed the circuit court to overrule the demurrer. See *Warner v. City of New Orleans*, 26 C. C. A. 508, 81 Fed. 645. The city subsequently filed an answer at great length, admitting that judgments were rendered against it, as alleged in the bill, for the amount assessed against the streets, squares, and public places, but alleged that the assessments first levied by the commissioners, and afterwards extended by the board of administrators to the city, were null and void because levied on public property exempt from taxation, and that the judgments against the city therefor were for the same reasons also void. The answer further alleges that the city has performed its full duty in relation to the collection of assessments against private property, but admits that the proclamation referred to in the bill, advising property owners not to pay drainage assessments, was issued by the mayor under authority of an ordinance of the city. It further alleges that the drainage plans made by the canal company were so defective that their completion would have been of no benefit to the property attempted to be drained; that the work done under them was also defective and of no value, and that for these reasons the city was justified in suspending the further prosecution of the work, which resulted in the decision of the supreme court in the case of *Davidson v. City of New Orleans*, 34 La. Ann. 170, declaring judgments for drainage assessments void for failure of consideration; and that this decision has become the settled rule of law in the state, rendering further collections impossible, but that notwithstanding this decision the city has constantly and at all times endeavored in every way possible to realize the assessments. And the city files an account showing the collections made in 1871 to June 20, 1891, inclusive, and the disposition thereof, as a sufficient compliance with its duty as a trustee. In conclusion the city pleads the appointment of a receiver for the drainage fund by the circuit court, and the prescription of five and ten years in bar of the bill, and the issuance of the bonds under the act of 1872, as a discharge from all liability, and the decision in *Peake v. City of New Orleans* as res adjudicata on all the issues in the case.

Richard De Gray, Wm. Grant, and John D. Rouse, for appellant.  
Branch K. Miller and Samuel L. Gilmore, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

SWAYNE, District Judge (after stating the facts as above). As to nearly all of these defenses, we might well rest our decision in this case on the opinion of the supreme court expressed in answer to the certified question. All the facts averred in the bill have either been admitted by the answer, or abundantly established by evidence. Indeed, the only fact in dispute between the parties is the question of responsibility for the alleged defects in the drainage plan. So far, however, as the answer attempts to fasten this responsibility on the canal company and Van Norden, its transferee, as a defense to this action, it is entirely unsupported by the evidence, as the counsel for the city very frankly admitted in their argument at the hearing. The general plan under which the work was undertaken by the contractor was prescribed by the legislature in the act of 1871, which directed the canal company to dig canals above, below, and in the rear of the city, and with the earth removed therefrom to build levees to protect the city from overflow, and to dig such interior canals as might be necessary for the drainage of the city and the lands in the rear; but the right to prescribe the location and number of all the canals was expressly vested in the city. As a matter of fact, the city, through its ordinances, based on the recommendation of the city engineer, located each of the canals that were excavated, and exercised direct supervision over the work, which the assistant engineer having charge of the work says was done strictly in accordance with the specifications furnished by the contractor, and well done. The principal objections made to the plan by some of the eminent engineers who have testified are that it was not sufficiently extensive to meet the future requirements of a growing city like New Orleans, that it did not provide the number of interior canals necessary to hold and carry off the excessive rainfall, and that the method of discharging the drainage water by means of pumps into the lake was too expensive, and was wrong from a sanitary point of view. Testifying by the light of experience and investigation made by them since 1871, they give it as their opinion that a greater number of canals should be excavated than called for by the plan, and that the drainage ought to be discharged into Bayou Bienvenue, some distance below the city proper, through the main canal, by means of a series of pumping stations. Other engineers of equal reputation—notably, Mr. Bell, who, as engineer of the city in 1871, devised the plan now condemned, and the present city engineer, and others—testify that the plan was a good one, and, if carried out, would have accomplished the drainage of the city. The cost of completing the work after the city purchased the drainage plant, as testified to by some of the witnesses for the defendant, would have been about \$500,000, if paid for in cash, and not in warrants. But it now appears that a new plan of drainage has recently been adopted, which, incorporating and using all the old works, is estimated to cost about \$8,000,000. Without commenting further on the evidence on this part of the defense, our conclusion is that the plan under which the work was done by the canal company and its

transferee would, if carried out as contemplated, have sufficiently accomplished the drainage of the lands within the several districts to render the assessments available, if the city had kept the work in serviceable condition after its completion, as the law required. It is a singular fact that, while the answer in this case charges the failure of the drainage to the alleged defective plan and the work of the contractor, the principal ground of the decision in *Davidson v. City of New Orleans*, 34 La. Ann. 170, for annulling the judgment for one of these assessments, is that the city had abandoned the work, without any probability of renewing it, so that the work, in its incomplete state, was a detriment, rather than a benefit, to the lands. The failure of consideration which worked the destruction of the drainage fund was therefore, as adjudged by the supreme court of the state, caused directly by the fault of the city. Its conduct in this and other respects was a violation of its duty as a trustee, and was a breach of the covenant contained in the act of purchase, "not to obstruct or impede, but on the contrary to facilitate by all lawful means, the collection of the drainage assessments." Treating the city, therefore, as a trustee, under an express duty to do whatever was reasonably required to make the drainage fund available for the purpose of paying the purchase warrants, a court of equity will apply the maxim "that equity looks upon that as done which ought to have been done." "The true meaning of this maxim is that equity will treat the subject-matter, as to all collateral consequences and incidents, in the same manner as if the acts contemplated by the parties had been executed exactly as they ought to have been. \* \* \* They are also deemed to have the same consequence attached to them, so that one party, or his privies, shall not derive benefit by his laches or neglect, and the other party, for whose profit the contract was designed, shall not suffer thereby." 1 Story, Eq. Jur. § 64g. The city must therefore be treated as having done whatever was necessary to render the assessments available, and should be held to account for the drainage fund, as if collected and in hand.

It is claimed, however, that the city is not bound to account for the assessments and judgments against itself, as the quasi owner of the streets and other public places, on the ground that such assessments and judgments should be considered void ab initio, for the reason that public property is exempt from taxation. But we think the city, by drawing these warrants against the drainage fund, composed largely of these very assessments and judgments, is, under the principles laid down by the supreme court in the present case, estopped to deny their existence and validity, to the same extent that it is estopped from setting up the issue of bonds under the act of 1872 as a discharge of its general liability as trustee with reference to the fund. As an original question, however, the authorities seem to affirm the liability of a municipal corporation for its proportion of the cost of local improvements, independently of the existence of any estoppel. In *Re New Orleans Drainage Co.*, 11 La. Ann. 338, the supreme court of Louisiana held the city of New Orleans liable for assessments made on the area of the streets under the act of 1835, which is similar in all respects to the acts involved here, except that the assessments in

that case had not been ratified by the legislature, as was done in this instance by the act of 1871. This case has since been commented upon and affirmed in *Marquez v. City of New Orleans*, 13 La. Ann. 319, and *Correjolles v. Succession of Foucher*, 26 La. Ann. 362, and in *Paving Co. v. Gogreve*, 41 La. Ann. 259, 5 South. 848. The matter of local assessments has been the subject of judicial inquiry in other states, notably by the supreme court of Illinois in the case of *County of McLean v. City of Bloomington*, 106 Ill. 209, where all the objections raised in this case have been elaborately considered, and decided in harmony with the case above quoted. Says the court in that case:

"The objections may be included under three heads: First, that public property is exempt from special assessments; second, that the statute under which the state is proceeding does not authorize any assessments against the property of the county; third, that the judgment cannot be enforced by the sale of the property, and no other mode of enforcing such judgments can be resorted to. It is not claimed the first objection has the direct sanction of the statutes in its support, but the contention is such property is expressly exempt from taxation, and special assessments are included within the meaning of the word 'taxation.' We have been too long and too firmly committed to the doctrine that exemption from taxation does not exempt from special assessments to now admit that it is even debatable. \* \* \* The distinction between taxation and special assessments is also clearly made in our present constitution, and while providing that the general assembly may exempt the property of the state, counties, and other municipal corporations from the former, makes no such provision in regard to the latter, but on the contrary \* \* \* authorized the general assembly to vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessments, without any restriction as to the property to be assessed. The second objection rests entirely on the assumption that, to include the property of counties, it should be expressly named, and that language, however comprehensive, in general terms only, is not sufficient. The rule held by this court is directly the reverse of this assumption. The exemption, and not the inclusion, must specifically appear. \* \* \* The question relates solely to the right of the state to apportion the public burden upon public property, in common with private property, in proportion to the benefit conferred upon that property. The remaining question, we think, involves no serious difficulty, although at first blush it may seem to do so. We certainly do not hold the court-house square may be sold, and title passed to private parties or to the city. In *Taylor v. People*, 66 Ill. 322, we held that in such cases the amount should be paid out of the treasury. The distinction here made between taxes and local assessments has been fully recognized by the supreme court of Louisiana in *Charnock v. Levee Co.*, 38 La. Ann. 326, and in *Paving Co. v. Gogreve*, 41 La. Ann. 263, 5 South. 848, where the *Drainage Case* in 11 La. Ann. 338, is cited with approval."

Whether the obligation for these drainage assessments had its origin in the original acts of 1858, 1859, and 1861, or was cast upon the city by the act of 1871, confirming the assessment rolls, upon which the city was named as a debtor, or results from judgments based on these rolls, the amount of the assessments constitutes a lawful debt of the city, which must be discharged by the exercise of the power of taxation; such power being the usual, and in most instances the only, method by which municipal corporations can discharge their indebtedness. *U. S. v. City of New Orleans*, 98 U. S. 381; *Wolff v. City of New Orleans*, 103 U. S. 358.

It is urged, however, that the contracts of purchase made in 1876 are null and void, because they operated to increase the debt of the

city, in violation of the amendment of the constitution of the state adopted in 1874. This assumption is based on the theory that assessments against the city were at that time void, and that to now enforce them would be to increase the city debt. It is said, also, that the city was not at that time the primary debtor for assessments against private property, and that, if the court should now impose a liability on the city for the dereliction of duty charged in the bill, it would create a new debt, which will come within the prohibition. We cannot concede the correctness of this argument. It is true the amendment prohibited any increase of the city debt after January 1, 1875; but it also expressly provided that it should not prevent the issue of drainage warrants to the transferee of the contract, under Act No. 30 of 1871, payable out of the drainage taxes. But it seems clear to us that by express terms the amendment excludes, and intended to exclude, from its operation, the liability of the city growing out of its relation to drainage matters, including the city's liability as assessee of the streets and public places, as shown by the assessment rolls. Indeed, it would seem that the authority to issue warrants against the drainage fund after that date necessarily implied an affirmance of the right of the city to proceed to the completion of the drainage work then in progress, and imposed a corresponding duty on the city to collect and apply all the drainage assessments to the payment of the warrants. These taxes, being then liabilities of the city, cannot by any cause or reason be included in the clause prohibiting an increase of the debt of the corporation without imputing to the authors of the constitution an intent to defraud those who might deal with it under the invitation of the constitution. We cannot give to the organic law of the state a construction so repugnant to honesty and good morals; nor do we believe the legislature, in authorizing the city to purchase the property of the transferee of the canal company, nor the city, in making the purchase for the purpose of carrying on and completing the drainage, contemplated defrauding the vendor by invoking any such inequitable construction. Even admitting that the purchase created a debt in excess of the limitation, the most that can be said is that it was made in error of law, which, according to article 1846 of the Civil Code of Louisiana, cannot be alleged to acquire the property of another. This principle is embedded in the civil law, as shown by the learned disquisition of D'Auguesseau, to be found in the second volume of Poth. Obl. p. 350. The same principle is recognized by the supreme court in *Railway Co. v. McCarthy*, 96 U. S. 258, in which the court says that a corporation, having enjoyed the fruits of a contract fairly made, cannot, when called to account, deny the corporate power to make it.

The only remaining question which requires consideration is the plea of prescription, and that, we think, cannot be maintained. The act of sale created an express trust, in which the city undertook, as a trustee, to collect and apply the drainage assessments to the payment of the warrants given for the price of the property sold to it. This trust was a continuing and executory one, and the universal rule in such cases is that the statute of limitations is not set in motion until the trustee has disavowed the trust, and notice of his repudia-

tion has been brought home to the *cestuis que trustent*. Perry, Trusts, § 24; Lewis v. Hawkins, 23 Wall. 119. This rule has been expressly recognized and applied by the supreme court of Louisiana in Insurance Co. v. Pike, 32 La. Ann. 483, where it is held that prescription against the right to demand an accounting begins to run only from the date of the last act performed by the trustee with reference to the trust. In that case the act which was held to be a recognition of the trust consisted of a credit entry, for money collected, made by the defendant in the books of the insurance company, of which he was treasurer. In the present case the city alleges in its answer that it has constantly endeavored, by suits and otherwise, to collect the drainage assessments, thus affirming the trust, and has filed an account showing the collection of the assessments up to June 20, 1891, —only three years prior to the date of the bill filed. Notwithstanding these facts, it is still insisted that the judgments against the city are prescribed, under the laws of the state, because they have not been revived within 10 years since their rendition, even if the city has continued to act as trustee up to the time of the filing of the bill. We cannot understand upon what theory the city can claim a release from its indebtedness to the drainage fund by pleading its own neglect to revive the judgments, if the proceedings to revive were necessary to keep them in force. Such a pretension has neither the sanction of reason nor authority. On the contrary, the maxim, "*Contra non valentem*," is universally applied as between a trustee and an estate represented by him. And so in this state it has been held that neither a claim of an administrator against the estate he represents, nor the claims of the estate against him, are subject to prescription, as long as he remains a trustee. In *re Farmer*, 32 La. Ann. 1037; *McKnight v. Calhoun*, 36 La. Ann. 408. The reason given by the court for the application of the maxim in these cases is that an administrator, from the very nature of things, cannot sue himself, if a debtor to the estate, nor sue the estate, of which he is the sole representative, if he is a creditor. Moreover, it is doubtful whether statutory assessments of the character in question are subject to any prescription at all. Indeed, the supreme court of the state has held in *Reed v. His Creditors*, 39 La. Ann. 115, 1 South. 784, citing *State v. Jackson*, 34 La. Ann. 178, and *Davidson v. Lindop*, 36 La. Ann. 765, that, tax laws being *sui generis*, the prescription of the Civil Code does not apply to them, from which it may be taken, as a general rule in such matters, that, unless a law under which an assessment is levied provides a limitation, none exists.

On a full consideration of the case, we think the decree appealed from should be reversed, and that a decree should be entered by the circuit court in favor of the complainant for the sum of \$6,000, with 8 per cent. interest from June 6, 1876, as stipulated in the warrants sued on, and that an account should be taken of all the drainage assessments, including those reduced to judgments against the city as assessee of the streets, squares, and other public places, as well as the assessments against private property and persons, allowing credits for the amounts heretofore collected and properly expended, but without allowing for the bonds issued under the act of 1872. Opportunity

should be given the holders of outstanding purchase warrants of the character of those held by the complainant to come before the master on the invitation contained in the bill, and make proof of the amounts due them; and they should be admitted to share in the trust fund, upon offering to contribute to the cost and expenses of the litigation. In accordance with these views, and to prevent any unnecessary delay arising from a misunderstanding of the findings now and heretofore expressed by this court and the supreme court, the circuit court is directed to enter a decree as follows:

"(1) It is decreed that the city of New Orleans is a debtor to John G. Warner, complainant, in the sum of \$6,000, with 8 per cent. interest thereon from June 6, 1876, as stipulated in the warrants sued on, and that he is entitled to be paid said sum, in principal and interest, out of the drainage assessments set forth in the bill filed herein.

"(2) The said drainage assessments, including those against the defendant as assessee of the streets, squares, and public places, as well as those against the owners of private property, be, and the same are hereby, declared to constitute a trust fund in the hands of the city of New Orleans for the purpose of paying the claims of complainant and other holders of the same class of warrants issued under the act of sale from Warner Van Norden, transferee to said city, under authority of Act No. 16 of the legislature of the state of Louisiana, approved February 24, 1876.

"(3) That it be referred to one of the masters of the court to take and state an account of all said drainage assessments, and for that purpose he is authorized to require the production before him of the assessment rolls and other records appertaining to such drainage assessments, by any person having possession thereof, and to examine witnesses touching all such matters. In taking and stating such account the master is directed to charge the defendant as well with the amount of drainage assessments against the city, the area of the streets, squares, and public places, as with those against the owners of private property, with interest thereon as prescribed by law, and to give credit only for the sums already collected and properly expended by the defendant in the execution of the trust, but that no offset be allowed for the bonds issued in exchange for drainage warrants under the act of 1872.

"(4) It is further ordered that said master give 30 days' notice, by advertisement in a newspaper published in New Orleans, to all holders of warrants issued as aforesaid, to appear before him and establish their claims. And it is further ordered that said warrant holders be entitled to establish their claims before the master in the first instance, without being required to file formal interventions, or to obtain special leave of court, and that they be entitled, upon making satisfactory proof, to the full benefit of the proceeding.

"(5) It is further decreed that upon the coming in of the master's report, and its confirmation, the complainant and all those who have established claims under the fourth clause of this decree will be entitled to an absolute decree against the defendant for the amounts found due them, if the fund established by the accounting shall be sufficient, but, if not sufficient to pay such claims in full, then for the

proper pro rata thereof, and shall be entitled to have execution thereof. It is further ordered that the complainant and all other parties in interest have leave to apply to the court for such other and further orders as may be necessary, from time to time, to carry this decree into full effect, and that the defendant pay all costs of this suit."

For the purpose of awarding the relief to which the complainant is entitled, the decree appealed from is reversed, at the costs of the appellee, with directions to the circuit court to enter the decree herein prescribed, and otherwise to proceed in the cause in accordance with this opinion.

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GREEN v. CITY OF LYNN, MASS.

(Circuit Court of Appeals, First Circuit. April 1, 1898.)

No. 240.

**APPEAL AND ERROR—TIME OF TAKING PROCEEDINGS.**

Under Act March 3, 1891 (26 Stat. 829, c. 517, § 11), an appeal to the circuit court of appeals must be taken within six months after the entry of the decree sought to be reviewed. *Held*, that the filing of the petition for appeal, and assignments of error, in the office of the clerk of the circuit court within the statutory period, was not sufficient.

**Appeal from the Circuit Court of the United States for the District of Massachusetts.**

This case was heard in the circuit court upon the pleadings and proofs; and thereupon a final decree was entered on February 23, 1897, for the complainant, decreeing letters patent, reissue No. 4,372, dated May 9, 1871, to Nelson W. Green, for improvement in methods of constructing artesian wells, to be a good and valid patent, and that the complainant recover from the defendant, as profits from its infringement of said patent, \$11,423.87, with interest thereon from the date of the master's report to the date of the entry of the final decree, amounting to \$508.45, and costs of suit, amounting to \$2,407.52, and also decreeing letters patent No. 218,875, dated August 26, 1879, to Nelson W. Green, for improvement in water-supply system for cities, etc., to be void for want of novelty, and that the bill be dismissed as to that patent. The defendant, the city of Lynn, appealed from this decree of the circuit court; and its appeal was duly entered in this circuit court of appeals, and is here pending, being numbered and entitled: No. 220. *City of Lynn v. Green*, 34 C. C. A. 684, 93 Fed. 988. The complainant, Nelson W. Green, also appealed from the decree of the circuit court, and his appeal was duly entered in this circuit court of appeals, being numbered and entitled: No. 240. *Nelson W. Green v. City of Lynn*. This report relates only to the appeal of Nelson W. Green, No. 240. The record upon the appeal of Nelson W. Green was filed and the case docketed January 21, 1898, and was heard February 12, 1898, on motion to dismiss the appeal.

Bowdoin S. Parker, for appellant.

Robert F. Herrick and Guy Cunningham, for appellee.

Before WEBB, ALDRICH, and BROWN, District Judges.

**PER CURIAM.** We are of the opinion that this appeal was not taken within six months after the entry of the decree sought to be reviewed, as required by the act of March 3, 1891 (26 Stat. 829, c. 517, § 11), and that for this reason we have no jurisdiction thereof. The date of the entry of the decree in the circuit court was February

24, 1897. The six-months period expired August 24, 1897. The petition for an appeal, with the assignment of errors, was filed in the office of the clerk of the circuit court August 17, 1897. Nothing further was done within the six-months period. December 11, 1897, the following indorsement was made upon the petition: "Memorandum. This appeal is allowed, although I doubt whether it was seasonably perfected. W. L. Putnam, U. S. Circuit Judge." On the same day Judge Putnam signed a citation dated December 11, 1897, and approved an appeal bond dated November 2, 1897.

In *Barrel v. Transportation Co.*, 3 Wall. 424, a petition for an appeal had been filed in due time in the office of the clerk of the circuit court. Nevertheless the court said:

"The filing of it in the clerk's office, even if it could be regarded as addressed to the circuit court, would be of no avail, unless accompanied by an allowance of an appeal by that court."

See, also, *Pierce v. Cox*, 9 Wall. 786.

Though the supreme court has often said that signing a citation or approving a bond is equivalent in law to the allowance of an appeal, it has never said, so far as we can discover, that an allowance in some form could be dispensed with, nor intimated that the limitation of time could be disregarded, and allowance made after its expiration be effectual. The act of March 3, 1891, by its provisions recognizes the necessity for an allowance; and the uniform practice of filing both the petition and the allowance before the expiration of the statutory period seems to be in accordance with the views of the supreme court as to the essential requirements which must be complied with before an appeal can be said to be "taken." In *Farrar v. Churchill*, 135 U. S. 609, 10 Sup. Ct. 771, it is said:

"And so, when a cross appeal is allowed by a justice of this court, the petition and order of allowance must be filed in the court below, in order to the due taking of the cross appeal, under the statute."

See, also, *Credit Co. v. Arkansas Cent. Ry. Co.*, 128 U. S. 258, 261, 9 Sup. Ct. 107; *Edmonson v. Bloomshire*, 7 Wall. 306; *Evans v. Bank*, 134 U. S. 330, 10 Sup. Ct. 493; *Brooks v. Norris*, 11 How. 204; *The Dos Hermanos*, 10 Wheat. 306; *Seymour v. Freer*, 5 Wall. 822; *Yeaton v. Lenox*, 7 Pet. 220; *The Enterprise*, 2 Curt. 317, Fed. Cas. No. 4,497; *Warner v. Railway Co.*, 4 C. C. A. 670, 54 Fed. 920, 922.

The appeal is dismissed, and the costs of this court are adjudged to the appellee.

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#### TOURTELOT v. FINKE.

(Circuit Court, S. D. Ohio, W. D. June 21, 1898.)

##### 1. EXECUTORS—RESIDUARY LEGATEE.

By the general law, the title of an executor to decedent's personal property is the same as that of an administrator; and, under a will whereby the residuum of the testator's personal property is bequeathed, the legatee does not take title to the specific goods, but only to their proceeds on distribution.

##### 2. NATIONAL BANKS—ASSESSMENT OF STOCK—WHO ARE SHAREHOLDERS.

An executrix, who is also the sole devisee and legatee under a will, does not acquire title to national bank stock constituting part of the estate,

so as to prevent the estate from being liable to an assessment made by the comptroller of the currency, merely by the fact of having paid or secured all the debts owing by decedent, the estate still remaining unsettled.

This was an action by E. C. Tourtelot, receiver of the Second National Bank of Grand Forks, N. D., against Catherine M. Finke, executrix of the estate of John B. Finke, to recover an assessment on certain shares of the bank's stock which belonged to John B. Finke in his lifetime. The case was heard on demurrer to the complaint.

Craighead & Craighead, for plaintiff.

Oscar F. Davisson, for defendant.

SEVERENS, District Judge. The plaintiff in this suit, who is the receiver of an insolvent national bank, sued the defendant, as executrix of the estate of John B. Finke, to recover an assessment on certain stock of said bank, which he held in his lifetime, said assessment having been found necessary in liquidation of the affairs of the bank for the purpose of paying its debts. John B. Finke died two years or more before the failure of the bank, having left a will, wherein he made his wife, Catherine M. Finke, his sole devisee and legatee, subject, of course, to the payment of his debts, and made her the executrix of his will. The will was probated, and Catherine M. Finke was confirmed as executrix, qualified, and entered upon the discharge of her duties as such. By the second paragraph of her answer, she sets up in defense the matters above recited, and states that, upon having qualified as executrix, she at once entered upon, and has ever since been, and is now, discharging, the duties of said trust; that she duly elected to take under the will of her said husband, according to the law of the state of Ohio, instead of standing on her rights under the law of that state as the widow of the deceased; and that she took possession of the assets of the estate, converted them into money, and paid the debts of the estate,—that is to say, as must be inferred from that which next follows, she converted some of the assets into money, and paid the debts, for she further proceeds to state that she is now the "owner and holder, and entitled to, and in possession of, all the assets belonging to the estate of the said John B. Finke not heretofore disposed of by her; and that she is now, and was at the time of the appointment of the receiver of the Second National Bank of Grand Forks, N. D., and before said bank became insolvent, the owner and holder of the twenty-five shares of stock formerly owned by the said John B. Finke; and that all the indebtedness of the said estate not secured by mortgage on real estate was paid or secured to be paid by her long prior to the appointment of plaintiff as receiver." The plaintiff demurs to this paragraph of the answer, insisting that it does not set up a valid defense.

The decisive question in the case is: Who was the owner of this bank stock at the date of the failure of the bank and the order of the comptroller putting it in the course of liquidation? It is urged for the defendant by her counsel that, upon the facts stated in this paragraph of the answer, Mrs. Finke was the owner of it in her own

right, and that it was not then a part of the assets of the estate. On the other hand, for the plaintiff it is claimed that it is affirmatively shown that this bank stock was part of the estate of John B. Finke, and went into the hands of the executrix as such, and that the facts stated in the second paragraph of the answer do not show that it has ever ceased to be a part of the assets of the estate; or, to put it in another way, that the facts stated do not show that the title to the property has ever been transferred from her as executrix to herself as owner in her own right. The question is one of some difficulty, and although it is probable such cases must have occurred, no reported case has been brought to the attention of the court, or has been found, in which such a question has been determined. The allegation in this paragraph that Mrs. Finke has become "the owner and holder of the twenty-five shares of stock formerly belonging to the said John B. Finke" is the allegation of a legal conclusion, and the question must be resolved upon the facts upon which this conclusion is based.

By the general law prevalent in this country, the title of an executor to the decedent's personal property is the same as that of an administrator; and, under a will whereby the residuum of the testator's personal property is bequeathed, the legatee does not take title to the specific goods, but only to their proceeds. Unless there is some specific provision in the will to the contrary, the executor takes and holds the personal property, and, in due course, converts it into money, and, upon the settlement of his accounts, the proceeds, if the debts have been paid, are ordered to be paid over to the legatee. The only difference between the distribution when ordered to be made of testate personal property and that which is not testate is that in the former case the will stands for the law in directing the probate court in respect of its order for the disposition of the property, while in the latter case the statute of the state is the guide of the court in the matter. The contention of the defendant involves the idea that it was competent for her, as executrix, to turn this stock over to herself as an individual, and thereby detach it from the assets of the estate; but it is difficult to see how upon any possible conception of the situation it was competent for her to do that. It should be observed, however, that there is no distinct allegation in the second paragraph of the answer that even this was done, and the most that can be said is that she claims that it is a legal consequence of the facts which are pleaded. In some of the states, in Massachusetts for example, there has long been statutory provision giving the right to a residuary devisee and legatee who has become executor to give bond for the payment of debts and legacies; and, by express provision of the statute, the executor is not required to return any inventory, or to present any list of debts or claims, or to settle any account. The bond takes the place of the property, and thereupon the title of the legatee or devisee becomes complete and perfect. But no such statute in the state of Ohio has been brought to my attention, and I suppose none exists. It is not stated in the paragraph of the answer under consideration that such bond was ever given,

nor does it appear that, at the time when the bank became insolvent, all the indebtedness of the estate had been paid; for there is an exception in the allegation of the answer in that particular, which states that at that time "all of the indebtedness of the said estate not secured by mortgage on real estate was paid or secured to be paid by this defendant." This exception admits that the indebtedness had not all in fact been paid. The substance of the paragraph, taken as a whole, shows that the 25 shares of stock came to the executrix as assets, have ever since continued in the same plight, and that the estate has not been settled. Possibly, it may be competent for the probate court, when such final settlement takes place, to turn over in specie any particular articles of personal property, instead of their proceeds; but it is useless to speculate how this may be, and in this instance it will not be important, the stock being worthless. Upon general grounds of equity, it would seem that, as between an executor and a residuary legatee, the liability upon shares of stock in a national bank which was contingent in the lifetime of the owner, but becomes fixed during the course of administration, should be charged upon the assets of the estate. The residuary legatee has not yet either the title, possession, or control of the estate. I am unable to see any solid ground on which the receiver could bring suit against the legatee. If he were to obtain judgment, it must then be competent to seize the property of the legatee; and all this may happen before it is certain whether he gets anything substantial by his legacy or not. It is not necessary to determine how the matter might stand if the bequest were of specific articles which had, under some order of the court, been turned over in the course of administration to the legatee; but where, as here, the bequest is not specific, but is only of the ultimate assets of the whole estate, I think that, for aught that is set up in the second paragraph of the answer, the suit is rightly brought. The demurrer will be sustained, and order may be entered accordingly.

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## WILDER et al. v. CITY OF NEW ORLEANS.

(Circuit Court of Appeals, Fifth Circuit. April 12, 1898.)

## No. 409.

## 1. DRAINAGE WARRANTS—APPOINTMENT OF RECEIVER—LIABILITY OF CITY.

By Act La. No. 30, 1871, the board of administrators of the city of New Orleans was authorized to make and collect drainage assessments, and hold the amount collected in trust for the payment of warrants issued for drainage work done by parties to whom the whole drainage work was by said act intrusted. June 7, 1876, by authority of Act No. 16, 1876, the city purchased the drainage franchise and property for \$300,000, and issued drainage warrants therefor. In 1891 a receiver was appointed by the circuit court, to whom the city transferred the assets and property of the drainage fund. *Held*, that holders of warrants issued for such purchase are not restricted for their payment to funds in the hands of the receiver, but are entitled to a judgment against the city, to be paid out of the drainage taxes collected by it.

**2. APPOINTMENT OF RECEIVER—ABATEMENT OF PENDING ACTIONS.**

The appointment of a receiver of the property of a debtor does not abate personal actions pending against the debtor, and, as to such an action, the receiver has no status in court until made a party thereto on his own application; the plaintiff having a right to proceed to final judgment without him.

**In Error to the Circuit Court of the United States for the Eastern District of Louisiana.**

On June 5, 1886, plaintiffs brought an action at law for the recovery of \$7,000, with interest, the amount of two drainage warrants, one for \$2,000 and one for \$5,000, both dated June 6, 1876, executed by the administrators of public accounts and finances of the city of New Orleans. The petition alleged that the city of New Orleans was bound for the payment of these two obligations under the laws and ordinances under which they were issued, and the benefits derived by the city from the drainage work done under Act No. 30 of 1871. By Act No. 30 of 1871, the whole work of drainage was confided to the Mississippi & Mexican Gulf Ship-Canal Company, and all the moneys and assessments, real estate, books, plans, tableau, and judgments of the drainage commissioners were transferred to the board of administrators of the city of New Orleans, which was subrogated to all the rights and powers theretofore possessed by the said commissioners. By the same act the assessments made by the commissioners were expressly confirmed and made exigible; and the board of administrators were also authorized to make further assessment, and to collect all of such assessments, and hold the amount collected in trust for the payment of warrants issued as provided in the act for drainage work. The work was carried on by the canal company until 1872, after which, and until June 6, 1876, the work was prosecuted by Warner Van Norden, who had become the transferee of the franchise and property of the canal company. In 1876 the legislature passed Act No. 16, authorizing the city of New Orleans to purchase the franchise, dredge boats, etc., from Van Norden, transferee of the canal company, upon a valuation to be fixed by the appraisers appointed by it, and to issue drainage warrants in discharge of the price, payable out of the drainage taxes. Pursuant to this authority, the city, by notarial act dated June 7, 1876, made the purchase upon a valuation of \$300,000, and issued drainage warrants for that amount to Van Norden. Among those thus issued were the two sued on in this case. The city filed an exception and answer to the plaintiffs' second amended petition—First, "setting up as an exception that all powers and liabilities of the city appertaining to the drainage fund or tax had been withdrawn, and vested in a receiver appointed by decree in the suit of Peake against the city, No. 12,008 on the docket of the circuit court, and that since said decree it is without authority to stand in judgment, and that the suit should be prosecuted against the receiver"; second, "that, in case the exception should be overruled, then the city, answering, said that all drainage warrants that may have been issued by the city were issued, not as a municipal corporation, but as a statutory trustee of the drainage fund, which trust terminated when the assets and property of the drainage fund were turned over to the receiver, and the city was without authority and liability to stand in judgment. The prayer is that the plaintiffs' demand be rejected, and that, should there be judgment, it should be restricted to payment to the funds in the hands of the receiver." The defendant's exceptions were first heard by the court, and overruled upon an agreed statement of facts, admitting that a receiver was appointed June 13, 1891, by order of the circuit court in Peake against the city of New Orleans, with the powers conferred by the order, and that the city had made the transfer of the assets set out in the deed. The case was then tried before a jury practically upon the same issue set up in the exception, which had been overruled; plaintiffs offering in evidence the act of sale from Van Norden to the city of the drainage plant and franchises, and the warrants sued on which were issued in part payment of the price, and the defendant offering the bill of complaint in the case of Peake against the city, and the order appointing a receiver,

and the various acts of the legislature, and the decision of the supreme court in the case of *Peake v. U. S.*, 139 U. S. 349, 11 Sup. Ct. 541, also the agreed statement of facts on the trial of the exceptions. It was also mutually conceded that the city submitted to the appointment of a receiver, without opposition or argument; that no proof was introduced showing or tending to show that she had accounted to the receiver other than as shown by her deed of transfer to him, or that he had sued the city touching its trust under the drainage laws. This being the entire evidence adduced in the case, as shown by the bill of exceptions, the plaintiffs asked the court to instruct the jury to find a verdict in their favor. This the court refused to give, but, instead, directed a verdict for the defendant, for the reasons given in his written opinion on file, to which exception was duly taken.

The case comes to this court upon the following assignments of error: (1) "The judge of the said circuit court erred in not directing the jury to find a verdict in favor of the plaintiffs upon the undisputed facts set forth in the bill of exceptions filed in the record, and in directing a verdict for the defendant upon the same facts." (2) "The said judge erred in ruling that plaintiffs were not entitled to a verdict and judgment against the defendant, payable out of the drainage tax fund created by the various acts of the legislature of the state of Louisiana, as prayed in their petition." (3) "That the said judge erred in ruling that the appointment of a receiver in the case of James W. Peake against the city of New Orleans, No. 12,008 of the docket of the circuit court of the United States, operated as a bar in this suit, and directing, in consequence thereof, a verdict for defendant, and entering an absolute judgment against the plaintiffs on their demand." (4) "The warrants sued on in this case having been given by the defendant in payment of the price of property purchased by her from W. Van Norden in the act of sale of June 7, 1876, as a voluntary trustee, and not for work, while the city of New Orleans was an involuntary and noncontractual trustee, the said judge erred in not distinguishing this from the *Peake Case*, reported in 139 U. S. 349 [11 Sup. Ct. 541]."

Chas. F. Rice, Richard De Gray, John D. Rouse, and Wm. Grant, for plaintiff in error.

S. L. Gilmore and Branch K. Miller, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

SWAYNE, District Judge (after stating the facts). The ruling and decision of the circuit court upon which the jury was directed to find a verdict for the defendant, as appears from the opinion of the learned judge who presided at the trial, were based upon two propositions of law: First, that the city was a naked statutory trustee of the drainage fund, without any direct personal liability to the holders of warrants drawn against that fund; and, secondly, that the appointment of a receiver of that fund in the *Peake Case*, in 1891, operated as an abatement of this suit, which was filed in 1886, or five years before said receiver was appointed. These are the only issues before the court, and we propose to discuss them in the order stated.

The first relates to the second and third assignments of error, and involves the question whether the plaintiffs are not, as holders of warrants issued by the city in payment of the price of the dredge boats, machinery, and franchises purchased from Van Norden, entitled to a qualified judgment at law against the city, payable out of the drainage assessments and taxes. In construing the *Peake Case*, the presiding judge below seemed to assume that, be-

cause the supreme court in that case treated the city as a mere statutory, compulsory, and noncontractual trustee of the drainage taxes, it necessarily follows that she rests under no legal obligation to pay any warrants out of those taxes, even if she had collected them. We do not think the case referred to, upon careful study, can support any such construction. It indicates the right of all warrant holders to recover a judgment at law, payable out of the drainage taxes. Speaking of the judgment at law in the Peake Case, the court, on page 349, 139 U. S., and page 544, 11 Sup. Ct., by Justice Brewer, announces the following:

"That judgment determined the direct liabilities between the parties. It absolved the defendant from any primary obligation of debtor to creditor. It left it chargeable only as a trustee of a fund out of which plaintiff's claim was to be paid. It was like a judgment which in fact, against an estate, is nominally entered against the administrator thereof, to be satisfied out of the property of the estate, and not out of the individual property of the administrator. The propriety of this judgment has not been questioned. \* \* \* It has been accepted by the complainant as a correct adjudication of the rights between the parties; and, in passing, it might be observed that its adjudication of rights was unquestionably correct."

While the supreme court thus approved the qualified judgment at law, it found, upon an accounting of the fund called for in the supplemental proceedings filed to aid its execution, that the city had discharged her liability to contribute to that fund for the purpose of paying the warrants involved in that suit, which were warrants given for drainage work done while the city was an involuntary trustee. The decision puts an end to all possible claims of holders of that class of warrants by denying their validity against the fund, for reasons stated by the court. But the plaintiffs in this case are not holders of warrants given by the city in such capacity mentioned above, but the warrants here sued on were issued by the city as a voluntary contractual trustee, for the price of the dredge boats, etc., purchased of Van Norden after her compulsory trusteeship had terminated. There would seem to be a wide distinction between the two classes of warrants, which we think is fully recognized by the supreme court in *Warner v. New Orleans*, 167 U. S. 467, 17 Sup. Ct. 892. In that case the issue was directly presented to this court whether the purchase warrants were governed by the decision in the Peake Case, and the court certified the following question, upon which the advice of the supreme court was requested:

(1) "Is the city of New Orleans under the warranties, express and implied, contained in the contract of the sale of June 7, 1876, by which she acquired the property and franchise from Warner Van Norden, under the averments of the bill, estopped from pleading against the complainant the issuance of the bonds to retire \$1,672,105.21 of the drainage warrants, issued prior to said sale, as a discharge of her obligation to account for drainage funds collected on private property, and as a discharge from her own liability to that fund as assessee of the streets and squares?" (2) "Should the decision in the case of *Peake v. New Orleans*, 139 U. S. 342, 11 Sup. Ct. 541, be held to apply to the facts of this case, and operate to defeat the complainant's action?"

After reciting the history of the drainage work, and the condition of the drainage fund, Mr. Justice Brewer, speaking for the court, in answer to the first question, said:

"Now, the question is whether the city is not estopped to plead in defense of liability on these drainage warrants the fact of the prior issue of the bonds to a larger amount than that assessed against the areas of its streets and squares, and collected from private property. We think this question must be answered in the affirmative. The city, in respect to the purchase of this property from the canal company and its transferee, and in the obligation assumed by the warrants issued, acted voluntarily. It was not, in reference to these matters, as it was to those considered in *Peake v. New Orleans*, 139 U. S. 342, 11 Sup. Ct. 541, a compulsory trustee, but a voluntary contractor; and the proposition which we affirm is that one who purchases property, contracting to pay for it out of a particular fund, and issues warrants therefor payable out of the fund,—a fund yet partially to be created, and created by the performance by him of a statutory duty,—cannot deliberately abandon that duty, take active steps to prevent the further creation of the fund, and then, there being nothing in the fund, plead defense to a liability on the warrants drawn on that fund, that it had prior to the purchase paid off obligations theretofore created against the fund. Whatever equity may do in setting off against all warrants drawn before this purchase from the canal company and its transferee the bonds issued by the city, \* \* \* it by no means follows that the city can draw new warrants on the fund in payment for property which it voluntarily purchases, and then abandon the work by which alone the fund could be made good, resort to means within its power to prevent any payment of assessments into that fund, and thus, after violating its contract promise not to obstruct or impede, but, on the contrary, facilitate by all lawful means, the collection of the assessments, plead its prior issue of bonds as a reason for evading any liability upon the warrants. One who purchases property, and pays for it in warrants drawn upon a particular fund, the creation of which depends largely upon its own action, is under an implied obligation to do whatever is reasonable and fair to make that fund good. He cannot certainly so act as to prevent the fund being made good, and then say to his vendor, 'You must look to the fund, and not to me.'"

This court, on return of the opinion from which the above is a selection, announced the following decision (26 C. C. A. 513, 81 Fed. 650):

"*Per Curiam.* The city of New Orleans, under warranties, express and implied, contained in the contract of sale of June 7, 1876, by which she acquired the property and franchise from Warner Van Norden, and under the averments of the bill, is estopped from pleading, against the complainant below and appellant here, the issuance of the bonds to retire \$1,672,105.21 of drainage warrants issued prior to said sale, as a discharge of her obligation to account for drainage funds collected on private property, and as a discharge from her own liability to that fund as assessee of the streets and squares. *Warner v. City of New Orleans*, 167 U. S. 467, 17 Sup. Ct. 892. On the case made by the bill of complaint, the decision of the supreme court in the case of *Peake v. City of New Orleans*, 139 U. S. 342, 11 Sup. Ct. 541, does not necessarily apply to the facts in this case, nor operate to defeat the complainant's action. It follows that the circuit court erred in sustaining the demurrer to the complainant's bill. The decree of the circuit court is reversed, and the cause is remanded, with instructions to overrule the demurrer to the complainant's bill, and thereafter proceed as equity and good conscience may require."

Another ground on which the circuit court directed a verdict for the defendant was that a receiver had been appointed in the case of *J. W. Peake* against the city of New Orleans, and that he alone could sue the city for an accounting of the drainage fund. An exception had previously been filed setting up this fact in abatement of the suit, and had been overruled; but, without reinstating it, the court ordered a verdict for the defendant for the same cause, and entered an absolute judgment thereon against the plaintiffs, upon the

merits, instead of ordering the suit dismissed as in the case of abatement.

The circuit court below seems to have been of opinion that, whenever a receiver is appointed over the property of a debtor, the appointment instantly abates all personal actions pending against him, and vests all the rights of all his creditors in the receiver, who thereafter alone has authority to bring suits to enforce them, without regard to the character of those rights. A receiver is merely an officer of the court appointing him, to hold possession of property until the rights of the parties to the suit in which he is appointed can be determined. He represents neither of the parties to the suit, nor any one else, and has only such powers as the court may confer upon him. And in reference to the actions already begun, as in this case, the receiver has no status in court until he has made himself a party upon an application made by him.

In the case of *Mercantile Trust Co. v. Pittsburg & W. R. Co.*, 29 Fed. 732, the court says:

"The appointment by this court of the receivers did not oust the jurisdiction which the court of common pleas had previously acquired of the proceedings against the railroad company, instituted by the petitioner for the ascertainment of his damages; nor did it operate as a stay thereof. Neither was the petitioner bound to bring in the receivers, as defendants, as he was seeking no relief against them. It was their business to intervene, and take defense, if they wished to do so. High, Rec. §§ 258-260; *Tracy v. Bank*, 37 N. Y. 523. The master was therefore correct in his determination that the petitioner's rights as a judgment creditor are not to be denied recognition, simply because he proceeded in the prosecution of this suit without making the receivers parties, or notice to them, and without leave of court."

And it is here to be observed that there was no proof in that case that the city had ever accounted for the drainage fund, or had been discharged as a trustee of that fund, or had even been asked by the receiver for an account and settlement of said fund. In fact, her relation to that fund had not terminated, and could not terminate, until she had so accounted and been discharged.

The court appointing a receiver, apparently acting upon consent, appointed J. W. Gurley receiver "of all property, interests, things in action, and effect of the drainage fund held by the defendant in trust," and vested him with all the rights and powers of a receiver in chancery, but did not vest him with authority to sue for and collect the drainage taxes,—a power which the supreme court had decided did not exist in a court of chancery.

In the case of *Heine v. Commissioners*, 19 Wall. 655, an effort was made to have the court assess and collect a tax to pay certain bonds, of which the court, at page 660, said:

"The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty,—state or national. In the case before us the national sovereignty has nothing to do with it. The power must be derived from the legislature of the state. So far as the present case is concerned, the state has delegated the power to the levee commissioners. If that body has ceased to exist, the remedy is in the legislature, either to assess the tax by special statute or vest the power in some other tribunal. It certainly is not vested, as in the exercise of an original jurisdiction, in any federal court. It is unreasonable to suppose that

the legislature would ever select a federal court for that purpose. It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the federal government of the legislative functions of the state government. It is a most extraordinary request, and a compliance with it would involve consequences no less out of the way of judicial procedure, the end of which no wisdom can foresee. See, also, *Thompson v. Allen Co.*, 115 U. S. 550, 6 Sup. Ct. 140, and *Meriweather v. Garrett*, 102 U. S. 472."

It may happen that the plaintiffs cannot levy an execution on the property of their debtor, and take it out of the hands of the receiver, and that they will be forced to file a bill to reach property so situated; but the supposed difficulties of obtaining satisfaction are matters that in no way concern the defendant in error, and afford no legal reason why plaintiffs should not recover a judgment for their debt.

We think it therefore clear that the collection of the drainage tax after as well as before the appointment of a receiver remained solely in the city of New Orleans, notwithstanding the appointment of said receiver, and that a judgment against the city, to be paid out of the fund,—a fund which the city alone can collect,—is proper to be rendered in this suit. The judgment of the court below is therefore reversed, and the cause remanded, with instructions to award a new trial.

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VALLEY RY. CO. v. KEEGAN.

(Circuit Court of Appeals, Sixth Circuit. April 5, 1898.)

No. 485.

**1. MASTER AND SERVANT—RAILWAY EMPLOYEE—MAINTAINING SAFE ROADBED.**

No general duty rests upon a railway company to lay planks between the rails of its tracks; but if, for any reason, it does so, the work must be done and maintained in such a way as to be reasonably safe for persons rightfully upon the tracks and in the exercise of due care.

**2. SAME—EVIDENCE.**

Where a railway company has accepted its street rights on condition that it will plank between its rails those portions of the public streets used by it, and one of its employes is injured by reason of an alleged defect in the planking, it is not reversible error to admit evidence of the condition upon which the company acquired its street rights.

**3. SAME—ASSUMPTION OF RISK.**

Where a railway employé, whose duties for two months have been to couple cars in a railway yard a mile long and containing 22 tracks, was injured through catching his foot in a hole between the rails, which hole had existed for two months, the court is not, under the facts of this case, justified in holding, as a matter of law, that he had assumed the risk incident to such defect.

**4. SAME.**

Before a court may presume, as a matter of law, that an employé assumes the risks incident to defective machinery or roadbed, it must appear that he accepted employment with actual knowledge of such defect, or continued in service after he knew or should have known of the danger.

**5. SAME—PRESUMPTION OF KNOWLEDGE.**

To justify the presumption that a railway employé knew of a dangerous defect in the roadbed, it must appear that the defect and its danger were obvious to one at all attentive.

**6. SAME—FACTS TO BE CONSIDERED BY JURY.**

If defects similar to the one complained of existed at all similar places in the same railway yard, that fact should be considered by the jury as

bearing upon the question whether an employé was chargeable with knowledge of such defect.

**In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.**

This is an action of tort for personal injuries sustained by the defendant in error while in the employment of the plaintiff in error. At the trial it appeared that the defendant in error, William J. Keegan, was a brakeman, and as such was a member of a switching crew employed in the yard of the railway company at Cleveland, Ohio. While engaged in making a coupling, his foot was caught in a hole between the rails, and before he could extricate himself he was knocked down and run over. Keegan had been employed in the yard of the railway company in different capacities for several years before this injury. The yard of the company was very extensive, having a length of about six miles, and was occupied by several hundred tracks, including spurs, switches, and dock tracks. For some two months prior to this accident he had been a brakeman for a switching crew employed at a particular part of the general yard, called the "Island Yard," though this also was quite extensive and contained about 22 tracks, great and small. Two of the principal of these "Island Yard" tracks occupied portions of a public street called "West River Street." The injury to Keegan occurred where these tracks crossed the sidewalk of the street. At this crossing, and in the street, the tracks were planked between the rails. Just at the outer side of the sidewalk there was a space between this planking and the rail of between three and three-quarters and four inches in width at its widest part and a depth of seven inches. Keegan's business was to make all couplings which fell to his crew. He was at this time engaged in coupling a stationary car which stood just at the edge of the sidewalk to some cars which had been started by gravity towards the standing car, and were approaching at a speed of about two miles per hour. The evidence tended to show that there was a link and pin in each of these opposing drawheads. Finding the pin fast in the stationary car, he walked towards the moving car, removed the link, and set the pin, and then undertook to step out from between the cars, intending to guide the link of the stationary car from the outside. As he stepped to one side, his foot was caught in the space between the planking and rail so tightly that with his utmost exertion he could not remove it before it was run over and crushed.

At the conclusion of all the evidence the plaintiff in error requested the court to instruct the jury to find for the defendant. This was refused. It also preferred a number of other requests. Among them were two numbered 10 and 11, which were refused. These requests involve the principal question upon which the case must turn, and are as follows:

"(10) Defendant further requests the court to instruct the jury that if they shall find that the plaintiff was employed as brakeman by the defendant, and as such brakeman charged with the duty of coupling and uncoupling cars at the time he was injured; that he had been engaged in service of the defendant, the Valley Railway Company, in the yards of said company in the city of Cleveland, as brakeman or conductor, for three years prior to the accident, and in the yard where the accident happened for two months immediately preceding said accident; that during said two months the space between the planking and the rails in said yard was not blocked; that the planking of which the plaintiff complains was, during said time, in the same condition and position as at the time of the injury; that during said two months the plaintiff frequently passed over and along the place where he was injured; that the condition and position of the planking was plainly visible, and the space between it and the rail in plain sight,—he will be conclusively presumed to have had knowledge of the condition of said track and planking, and must be held to have assumed the dangers and risks incident to the use thereof.

"(11) Defendant further requests the court to instruct the jury that the plaintiff assumed all the risks and dangers incident to the business of the defendant which were obvious and apparent, or of which he was advised,

or of which in the exercise of ordinary care on his part he might have known, and if the plaintiff continued in the employment of the defendant with the knowledge or with the reasonable opportunity of knowing that the defendant had not blocked the space between the planking and the rails, and that the plank in question was from three and one-half to four inches removed from the rail next adjacent thereto, and that it was warped, rotten, or out of repair, he assumed the risks attendant upon the use of such planking and track, and cannot recover in this action."

There was a jury, who found a verdict for Keegan, and the defendant has sued out this writ of error from the judgment thereon.

Kline, Carr, Tolles & Goff, for plaintiff in error.

Meyer & Mooney, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

While there is no general duty to plank between the rails, yet this railway company accepted its street rights on condition that it would plank between its rails those portions of the public streets used by it. This duty was undoubtedly imposed for the benefit of the public, who had an equal right to the use of the street. Nevertheless, if the railway company undertook to plank between the rails, it was under a duty to so put down the plank, and so maintain them when down, as that they should be reasonably safe to its employes who might be required to work thereon. This action is not for a failure to put down planking, but is for original negligence in construction or negligent maintenance when down. The company may have been under no obligation to its employes by reason of its contract with the city of Cleveland for failing to plank as required by that contract. But it was under obligation, if it did plank between its rails at street crossings, to so do the work and so maintain it when down as that it should be reasonably safe to its employes who might be required to pass over it in the discharge of their duties, provided they themselves were in the exercise of due care. It was a question for the jury, under the facts in evidence, to say whether the hole in which the foot of defendant in error was caught was a dangerous defect in the roadbed. *Hannah v. Railroad Co.*, 154 Mass. 529, 28 N. E. 682. It was not reversible error, therefore, to admit evidence of the condition upon which the company had acquired its street rights.

Was the hole in which Keegan's foot was caught such an obviously dangerous defect in the roadbed as that, in view of Keegan's long employment in this yard, the court should have directed a verdict against him or given the special instructions asked by plaintiff in error which have been set out in the statement of the case? The learned trial judge who heard all of the evidence, and who has had much experience in such trials, was not satisfied that this question should be taken from the jury. After speaking of the duty of the railway company towards the public who might use the street occupied or crossed by the company's tracks, he instructed the jury as follows:

"As to the employes of the defendant company, it did owe the same duty as to the public. As to the employes, even if you find the original construc-

tion was not reasonably safe, or, as maintained at the time of the accident, if you find it was not reasonably safe, yet, if you further find that the employé knew of such defective or dangerous condition, or if you find the condition was obvious and patent, and could have been seen by the employé by the exercise of ordinary care, or that the employé, by the exercise of ordinary care, should have known of it, and, notwithstanding such knowledge or opportunity for knowledge, still continued in the service of the defendant, then he assumed the risk of an accident from such defective condition, and cannot recover. It becomes, therefore, important for you to determine whether or not this was such an obvious defect as the plaintiff ought to have observed. In determining this question, you will look to how patent and open it was; how easily it could be seen; what opportunities the plaintiff had for seeing it; how long he served in the yard or in the neighborhood of the yard; under what circumstances he passed over the place; whether he passed over and around and about this crossing; when he had opportunities for observing it; or when he should have observed it, knowing how often his work would bring him there; or whether he was only about it when in the performance of his duty; and whether that duty was of such a character as to make it unlikely that he would have a chance to notice this obvious defect. All these are facts which you must consider in determining whether or not this was an obvious and patent defect, of which the plaintiff had notice, or of which he ought to have had notice by the exercise of ordinary care. And in this same connection you will remember that it is claimed that the proof shows that upon all the curves on these switches in and about this yard the defendant laid a straight-edged plank near the rail, so that, while the ends of the plank were from two to two and one-half inches from the inside of the rail, the center of the plank was three and one-half to four inches from the inside of the rail. This is an important fact for you to consider in determining whether or not the plaintiff knew or ought to have known of this obvious defect, because if all the planks were laid in that way, and that was the defendant's standard of construction, then there is all the more reason why the plaintiff ought to have had knowledge of that fact. If it was only one plank that was laid that way, he might not be expected to observe that particular place and location; but if all the planks were laid that way, and he knew it, then there was the more reason why he should have known of this particular defect, and have been on his guard. If you find from the proof that the defendant did not lay this plank in a manner to make it reasonably safe for employés, and that such defect was not an obvious one, and the plaintiff did not know of it, or by the exercise of ordinary care could not have known of it, then the defendant will be liable, and you should find a verdict for the plaintiff. But even if you find that the plank was not laid so as to be reasonably safe, but yet further find that the plaintiff knew of that fact, or by the exercise of such care as I have described ought to have known of it, and notwithstanding that defect continued in the service of the defendant, then he cannot recover. Or, if you find that the defendant did not lay this plank so as to make it reasonably safe, and yet further find that the plaintiff in coupling said car did not exercise the care that a prudent man would do under the circumstances,—that is, that he did not look where he was stepping,—and that the want of such care was the proximate cause of the injury, so that he thereby contributed to his injury, then the plaintiff cannot recover."

We have given careful attention to the facts which relate to this branch of the defense, and have reached the conclusion that there was no error in refusing to direct a verdict, and none in declining the instructions asked as to the obviousness of the defect in the roadbed which was the occasion of Keegan's hurt. The circumstances were such as to make the question one proper for the jury, and the charge on this subject was a clear and full exposition of the law, and quite as favorable as the plaintiff in error was entitled to have.

The argument in favor of the contention that the hole in which

Keegan's foot was caught was an obviously dangerous defect has chiefly been rested upon the claim that it was not an unusual or isolated space, but such a one as existed at all of the curves in the yard, and was a fault, if any, in original construction, due to the placing of straight-edged planking between curved rails, causing thereby a wider space between the plank and the rail at the center of the plank than at its ends. Of course, if such spaces existed at the center of all planks laid between curved rails in this yard, the obviousness of the existence of such spaces, and their dangerous character to employés compelled to pass frequently over them, would be much more maintainable than if this particular hole was an isolated instance. The trial judge gave attention to this fact, and instructed the jury that, if all planks at curves were laid as this one and exhibited same width of space, there would be much greater reason for charging the plaintiff, Keegan, with knowledge of the fact. There was, at least, a conflict of evidence as to the origin of the space into which Keegan fell, and as to its correspondence in character with other spaces due to planking between curved rails. There was evidence that the flange of the wheels required a space between the planks and the rail of  $2\frac{1}{2}$  inches, and that the spaces thus left in the yard had never been blocked. The evidence as to the width of the space in which Keegan's foot was caught was conflicting. Some witnesses, who took no measurements, estimated it at 3 inches in width at the place of the accident. Others who did measure it, in one way or another, stated it to be  $3\frac{1}{2}$  inches, while still others found it  $3\frac{3}{4}$  and 4 inches. There was no measurement of spaces in other localities. Several servants of the company, testifying for it, stated that they had not noticed the width of this particular space until after Keegan was hurt. The section foreman, in charge of repairs and maintenance of track and roadbed in this yard, the witness who testified that all planks at curves were laid straight-edged, and not cut to correspond with curvature of the rail, said he had not known the width of this space until he examined it after the accident. Witnesses for the defendant in error testified that this plank was warped; some said it had "humped" in the middle. One or more said it was decayed and loose, the spikes having pulled out. In this conflicting state of the evidence, it would have been error to assume that the space in question was one of original construction, or was of the same character as the spaces in all other planks between curved rails. The jury might on the evidence infer that this was a wider space than usual, at other curves, and was the result of warping or decay, though the weight of evidence seems to be that the plank was sound and tightly spiked.

The evidence tended to show that this dangerous space had existed for not less than two months, and that during that time Keegan had been constantly employed in the part of the yard called the "Island Yard," and that his duties had called him to pass over or alongside of this defective roadbed many times each day for the preceding two or three months. But this "Island Yard" was about a mile in length, and contained 22 tracks, long and short, though the greater part of his

work was done on this defective roadbed. Keegan's duties were to couple for his crew. In this work he was called from one part of this yard to another. He rode as often as he walked, and when on the ground was there for the purpose of making a coupling, a duty which required active work and great attention. He says that he had not noticed this space. No one says he had. The circumstances of his employment were such that we cannot say that he was inexcusably ignorant of the dangerous character of this space.

That unblocked spaces existed between the rails and planked portions of the track was something so long existing and so general in this yard that he may well be held to have notice of that fact. But a space of  $2\frac{1}{2}$  inches was not an obvious danger. It was not a danger at all. A space of 3 inches was almost equally unlikely to be a source of danger. But a space of 4 inches was a trap into which most feet might fall. Whether this space was wide enough to be obviously dangerous to persons whose occupation required them to frequently pass it would depend much more upon the closeness with which it was observed and the accuracy of the eye in estimating its width. The actual test of measurement was in more than one instance a surprise to witnesses who estimated its width by the eye. This was notably the case with John White and W. W. Plummer, witnesses for the plaintiff in error. Others, notably witnesses for the defendant in error, had from mere testimony of the eye regarded it as a dangerous space. On a matter so easily determined as the relative height of the planking and top of the rail, there was a wide difference of statement. Witnesses on both sides said the plank at the point where Keegan was hurt was from one-half to one inch higher than the top of the rail. Others for the plaintiff in error said it was about an inch below the top of the rail. As the rail was shown to be four inches in thickness, and the planking not over three inches, and both spiked to the ties, it is clear that either these witnesses were bad judges of such slight differences, or that this particular plank had "humped," and was warped, as claimed for defendant in error. The circumstances clearly make a case in which the evidence is so in conflict upon matters of fact important in determining whether the existence of a dangerous space was so obvious as to make Keegan's ignorance inexcusable as to require its submission to a jury.

The case of *Gleason v. Railroad Co.*, 159 Mass. 68, 34 N. E. 79, has many features in common with this case, and therefore has been much relied upon by plaintiff in error. But in that case there was no conflict as to the facts from which knowledge was to be presumed. The exception assumed the existence, at the time of Gleason's employment, of a space of three and one-half inches in the planking of a track in a yard over a waterway. This space was near a switch which was tended by Gleason in a yard only 500 feet long and 40 feet wide. On these admitted facts, Gleason was presumed to have accepted the risk. The case is possibly an extreme one. To reverse in this case would require us to go even beyond that ruling. On this record we could not justifiably assume the existence of this hole when Keegan accepted employment. Knowledge of the existence of such a hole in the roadway might be presumed as matter of law from employment in a yard 500

feet long and 40 feet wide, which would be unjustifiable in a yard a mile long and containing 22 tracks. Neither do we think that cases are controlling which turn upon the circumstances under which an employé will be held to have accepted the risk from unblocked frogs or switches. Questions of this kind must mainly turn upon the facts of a particular record. Before a court is authorized to presume, as matter of law, that an employé accepts the dangers incident to defective machinery or roadbed, it must appear that he accepted employment with actual knowledge of such defect and its dangers, or that he continued in the service after he acquired knowledge, or by due care and reasonable attention might have known of the danger. To justify a presumption of knowledge, the defect must be obvious and its danger equally plain to one at all attentive. The facts here do not make a case where the court could justifiably say that Keegan's ignorance of the dangerous character of this space in the roadbed was unjustifiable in law and his acceptance of the risk presumed.

Other matters have been presented by the assignment of errors. They have received attention. None of them are well taken. The judgment must be affirmed.

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YAZOO & M. V. R. CO. v. WAGNER.<sup>1</sup>

(Circuit Court of Appeals, Fifth Circuit. April 12, 1893.)

No. 601.

1. TRIAL—INSUFFICIENT PLEADINGS—CURED BY EVIDENCE.

After the court has been called upon to hear and pass upon testimony, it will adjudicate on the facts shown, though not strictly within the pleadings, as it is well settled in Louisiana that parties are bound by the evidence introduced by them on a material point, though not strictly presented by the pleadings.

2. WITNESSES—REBUTTAL—TESTIFYING TO NEW MATTER.

It being customary to allow considerable latitude in the manner in which witnesses shall be called for examination, a judgment will not be reversed merely because a witness, in rebuttal, after the close of defendant's case, was allowed to testify to new matters.

Pardee, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

This was an action brought in the circuit court for the Eastern district of Louisiana by John Wagner, a subject of the emperor of Germany, against the Illinois Central Railroad Company, a corporation created by the state of Illinois, to recover damages for personal injuries sustained by him in being kicked off a freight train by an employé of said company on the night of the 26th of February, 1893, in the suburbs of the city of New Orleans. After answer filed by said company, defendant in error filed a supplemental petition making the Yazoo & Mississippi Valley Railroad Company, a corporation of the state of Mississippi, a party, and alleging that the Illinois Central Railroad Company is liable in solido with the Yazoo & Mississippi Valley Railroad Company, because the Yazoo & Mississippi Valley Railroad Company was owned and operated by the Illinois Central Railroad Company. The Mississippi Company appeared and filed answer, and denied generally the allegations in the petition, and alleged that the plaintiff's injuries were due to his own negligence, and occurred by falling off defendant's train while unlawfully attempting to steal a ride thereon. No answer was filed by the Illinois Central Railroad Com-

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<sup>1</sup> Rehearing denied May 18, 1898.

pany to the supplemental petition. All the parties went to trial upon the issues as thus made, and there was a verdict for the defendant in error, in the sum of \$1,000, against the Yazoo & Mississippi Valley Railroad Company, and a verdict in favor of the Illinois Central Railroad Company, on November 19, 1896. This verdict was, on motion, duly set aside by the court, and a new trial awarded to the Yazoo & Mississippi Valley Railroad Company, the plaintiff in error, and a final judgment entered and signed in favor of the Illinois Central Railroad Company. At a subsequent trial, verdict was rendered against the Yazoo & Mississippi Valley Railroad Company in the sum of \$5,500 on February 4, 1897. Upon this verdict the court entered judgment, which was made final on March 29, 1897, whereupon the plaintiff in error filed its petition for writ of error, to operate as a supersedeas, its assignments of error, and its bond, and removed the cause into this court. Assignment of errors: First. "The circuit court erred in refusing to instruct the jury at the trial, as a matter of law, to wit: 'That the petition and supplemental petition do not state upon their face any legal cause of action, or any right to recover, as against the Yazoo & Mississippi Valley Railroad Company,—it not being alleged either in the petition or in the supplemental petition that any employé or servant of the Yazoo & Mississippi Valley Railroad Company kicked or shoved the plaintiff, or forced him to alight, from any train of said company while said train was in motion, or that his injuries were in any wise caused by any of the servants or employes of said Yazoo & Mississippi Valley Railroad Company,—and that the jury should therefore find a verdict for the defendant the Yazoo & Mississippi Valley Railroad Company.'" (Bill of exceptions No. 1.) Second. "That there is error patent on the face of the record, in that the petition and supplemental petition do not set forth any legal cause of action against the Yazoo & Mississippi Valley Railroad Company, and the face of the record does not justify any verdict or judgment as against the Yazoo & Mississippi Valley Railroad Company." Third. "The said circuit court erred in allowing the plaintiff, at the trial, to impeach the testimony of Lindsay Banks, a witness recalled by the plaintiff as a witness in rebuttal after the close of the defendant's evidence, and which witness was then and there examined before the jury as to new matters and things by plaintiff's counsel, which said new matters and things in rebuttal had not been elicited or in any wise inquired into by defendant's counsel when said Lindsay Banks was examined by defendant's counsel before the jury as defendant's witness; and the court erred then and there in allowing the witness Charles Delaney, also a witness for the plaintiff in rebuttal, to give testimony, over the objection of defendant's counsel, tending to impeach the witness Lindsay Banks as to new matters and things testified to by Lindsay Banks in rebuttal when recalled by plaintiff." (Bill of exceptions No. 3.) Fourth. "The said court erred in refusing to instruct the jury, at the close of all of the evidence, to peremptorily find a verdict for the defendant, upon the ground that the plaintiff's evidence was too slight to justify a verdict in his favor, and that, if such verdict was rendered, it would be the duty of the court to set it aside, upon the authority of *Randall v. Railroad Co.*, 109 U. S. 482, 3 Sup. Ct. 322." (Bill of Exceptions No. 2.)

Girault Farrar, for plaintiff in error.

W. S. Parkinson and A. B. Phillips, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

SWAYNE, District Judge, after stating the facts as above, delivered the opinion of the court.

We think the question of law raised by the first and second assignments of error is well settled in Louisiana,—that parties are bound by the evidence introduced by them on a material point, although not strictly presented by the pleadings, and that, after establishing the facts at a trial, they cannot be permitted to close to their adversary the door which they themselves have opened; and the court, after hav-

ing been made to hear and pass upon testimony introduced by the respective parties either under the allegations which are actually made, or which might have been conducive to the final determination of the object of the controversy, should adjudicate on these facts as fully as if received under specific averments. A judgment rendered under such circumstances becomes a conclusive bar to a reinvestigation of the matter. It has grown customary to allow considerable latitude at the trial, from the ordinary and strict rulings of evidence, in the manner and the time at which witnesses should be called for examination and cross-examination; and the circumstances of each case should, to a large extent, regulate the ruling of the judge in the exercise of his discretion in the matter. We sympathize very strongly with the plaintiff in error in the comments made upon the testimony in reference to the other question raised by the fourth assignment of error, but, upon inspection of the record, we believe that the court below was not only justified, but compelled, to submit the testimony to the jury, although some of it seems to us of a very doubtful character. Upon careful inspection of all the record, we do not find the errors assigned to be sustained. The judgment rendered herein is therefore affirmed.

PARDEE, Circuit Judge, dissents.

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UNITED STATES v. STOCKING.

(District Court, D. Montana. May 20, 1898.)

No. 321.

1. INDIANS—REMOVAL OF PERSONS FROM INDIAN COUNTRY—PENALTY FOR RETURNING.

By the act of June 30, 1834 (4 Stat. 730, § 10), the superintendent of Indian affairs and Indian agents and subagents are empowered to remove from the Indian country any persons found therein contrary to law. By the act of August 18, 1856 (11 Stat. 80, § 2), it is provided that any person thus removed who shall return shall forfeit \$1,000. *Held*, that the latter act is not an amendment, but is a supplement, to the former one.

2. SAME.

The act of June 30, 1834 (4 Stat. 730, § 10), authorizing the removal of persons from the Indian country, was supplemented August 18, 1856 (11 Stat. 80, § 2), by an act prescribing a penalty upon any person so removed who should return thereto. The act of 1834 also provided (4 Stat. 733, § 27) that all penalties provided for by the act should be collected in an action of debt at the suit of the United States, etc. *Held*, that the latter provision did not apply to the act of 1856.

3. SAME—REVISION OF STATUTES.

The act of June 30, 1834 (4 Stat. 733, § 27), provided for the collection of all penalties accruing under "this act" by an action of debt, etc. The act of August 18, 1856 (11 Stat. 80, § 2), provided a penalty for an infraction of the act of 1834. Upon revision the act of 1856 was printed under the same title with the act of 1834, as section 2148 of the Revised Statutes. The section providing for the collection of the penalty (Rev. St. § 2124) was changed to provide for the collection of penalties under "this title" instead of under "this act." By Rev. St. § 5600, it is provided that no presumption of a legislative construction shall be drawn by reason of the title under which any particular section is placed by the revision.

*Held*, that section 2124 does not limit the right of the United States to an action of debt to recover the penalty prescribed in section 2148.

4. **PENALTIES—HOW COLLECTED.**

When a statute creating a forfeiture does not prescribe the mode of collecting it, either debt, information, or indictment will lie.

5. **SAME—CONSTRUCTION OF STATUTES.**

Rev. St. § 3124, providing "that all penalties which shall accrue under this act shall be sued for and recovered in an action of debt in the name of the United States before any court having jurisdiction of the same in any state or territory in which the defendant shall be arrested or found, one half to the use of the informer, and the other half to the use of the United States; except when the prosecution shall be first instituted on behalf of the United States, in which case the whole shall be to their use," was not intended to limit the United States to an action of debt to collect the penalties provided, but prescribed the procedure in cases where the penalty was sought to be collected by an informer.

6. **INDIANS—PENALTY FOR RETURNING TO INDIAN COUNTRY AFTER REMOVAL.**

Indictment will lie to recover the penalty provided by Rev. St. § 2148, for the return to the Indian country of a person removed therefrom by the superintendent of Indian affairs or Indian agent.

H. B. Rodgers, U. S. Atty.  
Albert I. Loeb, for defendant.

KNOWLES, District Judge. The defendant, Charles Stocking, was indicted by a grand jury impaneled in the district court for this district of the offense of returning to the Crow Indian reservation after having been legally removed therefrom. The defendant interposed a demurrer to the indictment, and presented the question as to whether the said defendant could be prosecuted by indictment for the offense named. The claim was made that he would be liable only in a civil action in the nature of an action for debt for the penalty of \$1,000, named in the law. By the act of June 30, 1834 (4 Stat. 730, § 10), it is provided:

"That the superintendent of Indian affairs and Indian agents and sub-agents shall have authority to remove from the Indian country all persons found therein contrary to law, and the president of the United States is authorized to direct the military force to be employed in such removal."

By the act approved August 18, 1856 (11 Stat. 80, § 2), it is provided:

"That if any person who has been removed from the Indian country under the provisions of the tenth section of the act of congress approved the 30th of June, eighteen hundred and thirty four, entitled 'An act to regulate trade and intercourse with the Indian tribes, and preserve peace on the frontier,' shall thereafter at any time return or be found within the Indian territory, such offender shall forfeit and pay the sum of one thousand dollars."

It is urged that this latter statute is an amendment to the former. This, I conceive, is not the case. It does not correct or change the statute of June 30, 1834. In those states where there is a constitutional provision which provides that no act shall be amended by reference to its title only, but the section altered or amended shall be enacted or published at length, it is held that a supplemental act does not fall within this provision. 23 Am. & Eng. Enc. Law, tit. "Statutes," 281. This latter statute must be called a "supplemental act."

In the said act of June 30, 1834, this section is found (section 27, 4 Stat. 733):

"That all penalties which shall accrue under this act shall be sued for and recovered in an action of debt in the name of the United States before any court having jurisdiction of the same in any state or territory in which the defendant shall be arrested or found, one half to the use of the informer, and the other half to the use of the United States; except where the prosecution shall be first instituted on behalf of the United States, in which case the whole shall be to their use."

It will be observed that the reference in this section is to the act of which it forms a part. The section may be termed a "penal statute," and should be strictly construed.

Endlich on Interpretation of Statutes (page 42), when considering the rules pertaining to the construing of two statutes as one, says:

"But this rule does not extend to penal statutes, the construction of which, upon a principle which will be hereafter discussed, is to be confined to the more literal meaning of the language. Hence in such acts the term 'this act' bears its literal significance, and refers only to the act itself in which it occurs, though the act is made part of another, and to be construed with it."

It must be conceded that, under this rule of construction, section 27 of said act of June 30, 1834, did not apply to the one of August 18, 1856. In the revision of United States statutes, this act of 1856 was incorporated into the Revised Statutes, as section 2148. There was some change in the language of the statute, but none, I think, which would change its legal construction. The said section 27 of the act of June 30, 1834, was by said revision incorporated into the Revised Statutes, as section 2124. This section was changed so as to read "this title" instead of "this act," and the suit for the penalty was to be an action in the nature of an action for debt.

It is contended that, since the incorporation of these sections under one title in the Revised Statutes, the said section 2124 does apply to section 2148, and establishes the remedy, and the only remedy, for the recovery of the penalty in the last-named section. Section 5600 of the Revised Statutes provides:

"The arrangement and classification of the several sections of the revision have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no reference or presumption of a legislative construction is to be drawn by reason of the title under which any particular section is placed."

It will be observed that the claim that the mode of collecting the penalty named in said section 2148 as in the said section 2124 provided is mainly supported because the first-named section is found arranged under the head of title 28, Rev. St., and because the term "this act" has been changed to "this title."

In considering the effect of the revision of the United States statutes, the supreme court, in *McDonald v. Hovey*, 110 U. S. 619, 629, 4 Sup. Ct. 142, 146, said:

"So, upon a revision of statutes, a different interpretation is not to be given to them without some substantial change of phraseology, some change other than what may have been necessary to abbreviate the form of the laws."

In support of this view, the court quotes the following from the case of *Taylor v. Delancy*, 2 Caines, Cas. 143:

"When the law, antecedently to the revision, was settled either by clear expressions in the statute or adjudications on them, the mere change of phraseology shall not be deemed or construed a change of the law, unless

such phraseology evidently purports an intention of the legislature to work a change. \* \* \* The construction will not be changed by such alterations as are merely designed to render the provisions more precise."

This view is also sustained in *U. S. v. Ryder*, 110 U. S. 729, 740, 4 Sup. Ct. 196, 201, and the following language used:

"It will not be inferred that the legislature, in revising and consolidating the laws, intended to change their policy unless such intention be clearly expressed."

It must appear from what was said heretofore that by no proper construction could section 27 of the said act of June 30, 1834, have controlled or modified the said act of August 18, 1856, until the Revised Statutes went into effect, December 1, 1873. Up to that date the United States was not limited in the remedy it could resort to in collecting the penalty or forfeiture named therein.

In the case of *Adams v. Woods*, 2 Cranch, 336, Marshall, C. J., said:

"Almost every fine or forfeiture under a penal statute may be recovered by an action of debt, as well as by information."

Again: "In this particular case the statute which creates the forfeiture does not prescribe the mode of demanding it. Consequently, either debt or information would lie."

The statute of August 18, 1856, did not provide in what manner the forfeiture therein named should be demanded. It might be collected in an action in the nature of an action of debt or information. Where an information could be filed, indictment would lie. Before the revision of the statutes, and up to the present time, I feel confident that the offense named in said act of August 18, 1856, was prosecuted in courts of this district having jurisdiction of the offense by indictment. It would appear that such was the practice in the district at least of Oregon. It has not been the opinion of such courts that the change of the term "this act" to that of "this title" was intended to change the policy of the United States in regard to this offense. To those acquainted with the facts, it is evident that the suit for debt would be a very inadequate remedy in protecting Indian reservations from unlawful intruders. I am still of the opinion that this change does not clearly show that the law was changed. Much of the trouble in regard to this section 2124, I think, has been occasioned by a lack of a careful examination of its language, and a correct interpretation of its meaning. It is provided in the first clause of this section that all penalties which shall accrue under the provisions of this title shall be sued for and recovered in an action in the nature of an action of debt in the name of the United States. For what reason was it necessary to provide that the action should be in the name of the United States? If the suit was instituted by the United States, in what other name could it be brought? This suit in the name of the United States is to be prosecuted for the benefit of the informer to the extent of one half of the penalty; the other half to the use of the United States. The second clause in this section is: "Except when the prosecution shall be first instituted on behalf of the United States, in which case the whole shall be to their use." The action referred to in the first clause of this section does not refer, then, to an action commenced by the United States or on

its behalf. If the action is prosecuted for the benefit of the United States, the informer receives no part of the penalty. This leads to the inquiry as to what was the true import of the language used in that part of said section.

At common law, suits for penalties were often prosecuted by informers. Some of these were called "common informers." Bl. Comm. bk. 3 (Cooley's Ed.) 160; *Pollock v. The Laura*, 5 Fed. 133. These informers were empowered to bring actions for penalties established by law in their own names, and, if part of the amount to be recovered was for the benefit of the king, the action was called a "qui tam action." 18 Am. & Eng. Enc. Law, 276, note 1.

In *U. S. v. Griswold*, 5 Sawy. 25, Fed. Cas. No. 15,266, it was held:

"When, as in this case, a statute imposed a penalty for the commission of an act, and also gave such penalty in part to whoever would sue for it, and the remainder to the king or other public use, the action to recover such penalty, if brought by a private person, was brought in his own name, and subject to his control."

The case of *Adams v. Woods*, 2 Cranch, 336, above cited, was a qui tam action brought in the name of what would be termed an "informer." The statutes of the United States recognize informers and their right to institute suits. Section 975, Rev. St., provided:

"If any informer or plaintiff on a penal statute to whom the penalty or any thereof if recovered is directed to accrue discontinues his suit or prosecution, or is nonsuited therein, or if upon trial judgment is rendered in favor of the defendant, the court shall award the defendant his costs," etc.

It would appear as if in this statute the right of an informer to sue in his own name for a penalty was recognized. The suit is called his suit.

Section 976, Rev. St., provides that:

"If any informer in a penal suit \* \* \* discontinues his suit or prosecution, \* \* \* he alone shall be liable to the clerk, marshal and attorney for the fees of such prosecution unless certain named contingencies are presented."

There are authorities, however, which maintain that, unless authorized by statute, an informer cannot sue in his own name for a penalty. 18 Am. & Eng. Enc. Law, 276, 277. The provision, therefore, of section 2124, that the suit shall be in the name of the United States, was intended to settle this dispute. Upon the examination of title 28, I find no express provision that an informer would be entitled to any portion of the penalties named therein. Under the provisions of said section 2124, an informer is entitled to one-half of the penalty sued for, unless the action is first prosecuted by the United States. Any words of a statute which show that a part of the penalty named therein shall be for the use of an informer will entitle him to maintain an action therefor if he complies with the conditions of the statute. 18 Am. & Eng. Enc. Law, 276, and notes 1 and 2. While there is no express provision of the Revised Statutes which has come under my observation which gives an informer any part of the penalties named in title No. 28, Rev. St., yet I think the provisions of section 2124 impliedly give him one-half of the said penalties. If he has this right, then this section gives him, in my judgment, the right to sue therefor in the name of the United

States. It was a rule of the common law, if the king first instituted suit for a penalty, the whole penalty recovered would be for his use. Bl. Comm. bk. 3 (Cooley's Ed.) 160. If an informer is given no rights under and by virtue of said section 2124, it is difficult to discover its meaning. Considering the above propositions, I think I am able to interpret that section. The first clause refers to an action by an informer, and should read:

"All penalties which shall accrue under this title shall be sued for and recovered by any informer in the name of the United States in an action in the nature of an action of debt before any court having jurisdiction of the same in any state or territory in which the defendant shall be arrested or found, the one half to the use of the informer, and the other half to the use of the United States."

This should be considered the informer's suit, and he would be subject to the provisions of sections 975, 976, Rev. St. This construction of said section would bring it into accord with the rules of the common law. The last clause would show that it was the intention of congress to recognize the common-law rule that, when the prosecution is instituted by the government, the penalty recovered shall be for the benefit of the government, and not for that of the informer. The general rule has been that, when the United States seeks to enforce a penalty, it is not limited to any one remedy. This was the view entertained by Judge Deady in the case of *U. S. v. Howard*, 17 Fed. 638. In order to justify a court in holding that congress has by any act narrowed the rights of the United States in any particular as to any remedy, that intention ought to clearly appear. The cases of *U. S. v. Payne*, 22 Fed. 426, and *In re Seagraves* (Okl.) 48 Pac. 272, are based upon the view that section 2124 applies alone to an action by the United States, and does not establish the rights and remedy of an informer, and that the United States alone can maintain the action named therein. I do not believe a correct interpretation of that section will support this view. The first clause of that section evidently refers to what is termed a "qui tam action," and the government does not maintain qui tam actions. *McNair v. People*, 89 Ill. 444, 445.

If the claim that section 2148 is brought within the provisions of section 2124 is maintained, the only effect would be that an informer would be entitled to one-half the penalty named therein if he maintained his suit therefor. At one time informers performed an important part in the collecting of the penalties provided in penal statutes, but, even at the time of the revision of the United States statutes, they rarely appeared in such cases, and have now about disappeared in penal litigation. Practically, then, the change claimed in the law would amount to but little. For the reasons above, the demurrer in this case is overruled, and the defendant directed to plead.

## WISE v. SOUTHERN PAC. CO.

(Circuit Court of Appeals, Ninth Circuit. May 9, 1898.)

No. 408.

## CUSTOMS DUTIES—CLASSIFICATION—LIQUID CREOSOTE.

The liquid creosote of commerce is not a "distilled oil," subject to duty, under Act Aug. 27, 1894, par. 60, but is a "product of coal tar" not specially provided for in said act, and entitled to free entry, under paragraph 443 thereof. 82 Fed. 311, affirmed.

Appeal from the Circuit Court of the United States for the Northern District of California.

Samuel Knight, Asst. U. S. Atty., for appellant.  
Frederick B. Lake, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The merchandise in question, consisting of 2,200 barrels of an article described in the invoices as "liquid creosote," was imported from London, England, into the United States, at the port of San Francisco, on the 19th day of March, 1895, by the Southern Pacific Company, and was thereupon entered at the custom-house for immediate consumption. Upon the return of the appraiser of the port, it was classified by the collector as "distilled oil," dutiable at the rate of 25 per cent. ad valorem, under paragraph 60 of the tariff act of August 27, 1894 (28 Stat. 509). The entries were liquidated in accordance with this classification, and the duty upon the merchandise, amounting to \$1,472, was levied and collected by the appellant as collector. Thereupon the appellee appealed to the board of general appraisers, on the ground that the merchandise was not a distilled oil, but was entitled to free entry, under paragraph 443 of the act of August 27, 1894, as a product of coal tar, not specially provided for. The board sustained the decision of the collector, whereupon the importer applied to the court below for a review of the questions of law and fact involved in the decision of the board of general appraisers, under the customs administrative act of June 10, 1890. The court reversed the decision of the board, and held the merchandise to be a product of coal tar, not known as a distilled oil, and therefore governed exclusively by paragraph 443 of the act of 1894. 82 Fed. 311. From that decision the collector brings the present appeal.

Articles embraced by paragraph 443 of the act of August 27, 1894, are by the provisions of that act entitled to free entry. They are thus described: "Coal tar, crude, and all preparations and products of coal tar, not colors or dyes, not specially provided for in this act." The evidence clearly shows, and the court below so found, that the merchandise in question is a product of coal tar, obtained therefrom by fractional distillation. The first of the two points made by the counsel for the government is that products of coal tar are not entitled to free entry. Certainly, under the above-quoted paragraph, all

products of that article that are not colors or dyes, and that are not specially provided for in the act of 1894, are entitled to such entry; for such is the clear and express language of the paragraph. It is not claimed that the article in question is a color or dye, and the only "special" provision relied upon by the appellant is paragraph 60 of the same act, which reads as follows: "Products or preparations known as alkalies, alkaloids, distilled oils, essential oils, expressed oils, rendered oils, and all combinations of the foregoing, and all chemical compounds and salts, not specially provided for in this act, twenty-five per centum ad valorem." The contention on the part of the government is that the merchandise in question is a product or preparation known as "distilled oil." The court below found, as matter of fact, "that said merchandise was not, nor is it, a product or preparation commonly or commercially or chemically or otherwise known as a 'distilled oil,' but was and is a product of coal tar, not a color or dye, and not otherwise specially provided for in said act." It is earnestly contended by appellant's counsel that the evidence does not justify this finding, and that, since it was all given by deposition or other writing, this court has the same advantages for correctly weighing the evidence as the trial court had. A careful consideration of the evidence, however, does not satisfy us that the court below was in error in its finding of fact. The merchandise in question, being an oil, and being derived from coal tar by the process of fractional distillation, is undoubtedly, in one sense, a distilled oil. But the weight of the evidence is to the effect that it is known as "dead oil" and "creosote oil," both commercially and chemically. The same conclusion was reached in the recent case of *U. S. v. Warren Chemical & Manufacturing Co.*, 28 C. C. A. 500, 84 Fed. 638, decided by the circuit court of appeals for the Second circuit. Other reasons might be given why we think the judgment of the court below correct, but we deem it unnecessary to pursue the subject further. The judgment of the circuit court is affirmed.

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**ANHEUSER-BUSCH BREWING ASS'N v. FRED MILLER BREWING CO.**

(Circuit Court, E. D. Wisconsin. June 13, 1898.)

**TRADE-MARKS AND TRADE-NAMES—UNFAIR COMPETITION.**

The mere use of a geographical name, in which there can be no technical trade-mark, unaccompanied by any imitation of labels, or other indicia, may constitute unfair competition, when adopted for the purpose of taking away another's business and good will.

This was a suit in equity by the Anheuser-Busch Brewing Association against the Fred Miller Brewing Company to enjoin the use of a trade-name.

Rowland Cox and Hugh Ryan, for complainant.

E. F. H. Goldsmith and N. Pereles & Sons, for defendant.

SEAMAN, District Judge. The bill seeks to enjoin the defendant from using the name "Budweiser" as the designation of a brand or brew of beer manufactured by it; and no ground for re-

lief is established by the testimony, unless it may be found within the equitable doctrine relating to unfair competition in trade. Although it is undisputed that this designation has been employed by the complainant and its predecessor in business, for about 20 years, as the name of a special manufacture of beer, for which wide reputation and extensive trade has been obtained throughout this country and abroad, the name is distinctively geographical (referring to a place in Bohemia, Austria, called "Budweis"); and it is both conceded and indisputable that this use confers no property right or monopoly in such name, as a trade-mark. On the other hand, the allegations on the part of the complainant, that it has thus established a business and good will in the sale of Budweiser beer, of great extent and value, are well supported, and not controverted. There is, however, no foundation for the further allegation that the beer manufactured and sold by the defendant under this name is of an inferior quality, or "an ordinary American beer," and there is no testimony which even tends to impugn its actual quality as a beverage. Nor is the name or place of the defendant, as the manufacturer of its Budweiser, in any manner disguised, nor is there simulation of the appearance of complainant's bottles or labels in those now used by the defendant, to constitute on their face a means to palm off the article upon the public as the actual production of the complainant, except so far as the name "Budweiser" is used, and is identified as exclusively of its production. So that no case is presented which is literally within the well-settled line of authorities in respect of such impositions upon the public, nor is it brought directly within the rule stated in the recent and well-considered opinion of Judge Bunn, speaking for the circuit court of appeals, in *Flour-Mills Co. v. Eagle*, 86 Fed. 608, relating to false pretense as to the place of manufacture, as neither the complainant nor the defendant is located in Budweis, and neither holds forth a pretense of such location, in any respect. The purport of the name, as asserted by each, is to designate this brand of beer as made "according to the Budweiser process," namely, that in the ingredients and brew it conforms to the special production of beer at Budweis. Therefore the issue is purely one of a fraudulent appropriation of this name, without foundation in fact, under circumstances which both intend and cause imposition, to the injury of the complainant's business and good will. With no property right existing in the name "Budweiser," it is clear that the defendant cannot be precluded from using it to designate its special brew, if necessary for accurate description, or even if such use is "truthful," as alleged in the answer, and is also honest and ingenuous. But if the manufacture of beer was not of such character as to make this name specially applicable, and it was selected arbitrarily, and for the purpose of taking advantage of the established reputation of the complainant's Budweiser, and with the effect of disturbing its trade therein, such use constitutes unfair competition,—is "unfairly stealing away another's business and good will,"—and must be regarded, in equity, as fraudulent. As remarked in *Thread Co. v. Armitage*, 67 Fed. 900:

"This good will is the complainant's inheritance, and its property. It is as much a part of its assets as its mill or its counting house. No one has a right to destroy it, except by fair and honest competition."

In *Conrad v. Brewing Co.* (decided in 1880) 8 Mo. App. 277, there was a strong adjudication in favor of the complainant's predecessor, respecting a fraudulent use of this particular trade-name. While no other case of the numerous citations by counsel can be said to pass upon the question in the form here presented, I am of opinion that the proposition above stated, as to fraudulent use of a name which would otherwise be open to all users, is clearly within the uniform line of decisions in equity, distinguishing honest competition from that which is unfair and illegitimate, and granting relief against devices and means of the latter class which cause imposition, whatever the form. In this view of the law, the facts, so far as material to the controversy, are well established, by admissions, and by testimony which is practically undisputed, as follows:

1. The predecessor of the complainant, Mr. Conrad, commenced the manufacture of a beer of distinctive character and excellence about the year 1876, through Anheuser & Co., as brewers. This product was originally made of materials, imported for the purpose, similar to those used in a certain brewery at Budweis, and by the same process which was there employed; and the beer so produced was thereupon named "Budweiser," constituting the first adoption of such title for any manufacture of beer in this country. If the beer made at the Budweis brewery was ever brought to this country in any quantity, either under the name of "Budweiser," or other designation, it is not shown by competent evidence; and the only inference which can be drawn from the testimony in that regard is that the name was introduced and became known to the trade in this country solely through this St. Louis production. As to the name by which the original manufacture at Budweis was known, the defendant introduced, without proper identification, and under objection, a label which shows the name "Budweiser Beer" on a purported importation in New York from Budweis; and a witness who formerly resided at Budweis states that two grades of beer were produced there, one of which was known as "Budweiser Common Beer," and the other as "Budweiser Lager Beer." The label was clearly insufficient for any purpose, and the testimony as to local name, if otherwise satisfactory, cannot affect the present inquiry. The main ingredients which were peculiar to this beer, as originally made, were (1) Saazer hops, (2) a fine quality of Bohemian barley, supplemented by (3) Bohemian pitch, and (4) Bohemian yeast; the latter two imparting, as claimed, peculiar flavor and quality. The details of the process are not disclosed, for reasons which are probably justifiable, but it is positively asserted that the brew uniformly conforms to the Budweis process; and sufficient facts appear to show that it is, on the whole, distinctive as a process.

2. The complainant, as successor to the brewers, Anheuser & Co., and by transfer from Conrad, subsequently continued the manufacture on its own account, following strictly the same process and care, and employing the same material, except that the finest quality

of American barley, either Canadian or domestic, selected for the purpose, is stated to have taken the place of the imported article after the first year or two, because it was found that equal or superior quality could thus be obtained, while the beer retained its distinctive character, and resemblance to the original Budweis production, unaffected by such change. This substitution appears to have been recognized on the labels, by stating the use of the "finest barley," in place of the previous wording, "Bohemian barley."

3. The beer thus produced was of distinctive character, especially in its light color and its flavor, and it appears that such distinction has been uniformly maintained from the outset. Under the name of "Budweiser," it attained popularity and extensive market, throughout the United States, at least, during the introductory term of Conrad; and in the hands of the complainant the trade and celebrity became greatly extended. Although other brands of beer were manufactured by the latter at their great plant in St. Louis, the testimony shows that Budweiser was the production for which they were generally known elsewhere, was practically and substantially their exclusive possession by way of good will, and, through advertising and trade, has constituted the main ground and token of such celebrity as has been attained by the complainant in this country and abroad,—to some extent, at least, overshadowing the name of the brewers, so that, as stated by the president of the company, he is "very often greeted as Mr. Budweiser, instead of Mr. Busch." In other words, the production is known rather by its name, "Budweiser," than by the name or place of the brewers, and in this they have a good will of great value.

4. The defendant entered the field in 1891 with a new brew of beer, of special excellence, and closely resembling that of the complainant, especially in the light color. To some extent, at least, it became a rival of complainant, but thus far was clearly within the rights of the defendant, and entitled to encouragement. The adoption, however, of the name for this new production, presents a different aspect, as the intention is manifest, in the light of the circumstances and testimony. It was not called "Budweiser" in good faith, and ingenuously. The name was no more applicable to this special brew, if applicable at all, in strict sense, than many others which were open for selection, and its value for the purpose rested in the use and popularity made for it by the efforts of complainant; but it appears to have been the object of the christening to take the benefit of the reputation so established in the United States, or in the territory sought by the defendant, for beer so named, of like appearance and quality, and in that guise to invade the complainant's trade by unfair competition. In 1890 and 1891, just prior to this new venture, the defendant was carrying on the agency or business of selling the complainant's Budweiser beer to the customers of the latter in the Lake Superior territory,—presumably, in connection with the sales by defendant of its own brews, which were different in their appearance and character. A letter from the defendant to the complainant, dated January 22, 1891, speaks for itself as to the introduction of the new beer, in answer to an

inquiry regarding rumors that the former designed "giving up handling" the Budweiser of the complainant. It reads:

"Permit us to say that thus far we haven't any such intention. On the contrary, we purpose to sell your Budweiser bottled beer so long as there is but a little profit in it. You have certainly been misinformed on this point."

Following this, the defendant proceeded to make its new brew of so-called "Budweiser," with which it entered the same market so held for and through the complainant, with bottles and labels in obvious departure from those previously used for its own production, and in which there were then marked points of similitude to those of complainant, although since discarded. And the attempted explanations on behalf of the defendant as to the reasons for selecting this name tend to confirm the view I have indicated, rather than an ingenuous choice, as argued on behalf of defendant.

5. The answer of the defendant distinctly "alleges that it applied said designation to beer brewed according to the Budweiser process in order to designate the manner of brewing said beer, and to show its quality"; but the testimony introduced on its behalf denies the fact of any such distinctive process, and explains that the reference in the answer was to the general European process which prevails in Vienna, Berlin, Pilsen, and elsewhere; being "a different process than that in America," and not applicable to Budweis distinctively, because, as stated by Mr. Miller, there is no "such thing known in the brewing world as the 'Budweiser process.'" Therefore the attempted justification of truthful use of the name clearly fails. On the other hand, the denials of the existence of such process are not founded upon personal knowledge, and are entitled to no weight as against the positive testimony on the other side. Assuming a belief on its part that there was no Budweiser process, the defendant committed a wrong in adopting the name, under the circumstances. With the process existing as shown on behalf of the complainant, the defendant neither conforms to it in fact, nor attempts conformity, and the name is not truthfully applied. In either view, the bill must be sustained.

The objection by defendant to the testimony introduced by complainant in rebuttal does not seem to be well taken, if material. The other objections are also overruled, and decree will be entered for complainant in accordance with this opinion.

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#### ROWE v. BLODGETT & CLAPP CO.

(Circuit Court, D. Connecticut, June 15, 1898.)

No. 936.

##### 1. PATENT SUITS—DEMURRER TO BILL.

On demurrer to a bill for want of invention, appearing on the face of a patent, it is not the duty of the court to investigate the prior art.

##### 2. SAME—DESIGN FOR HORSESHOE CALK.

The Rowe patent, No. 26,587, for a design for a horseshoe calk, is not, on its face, so manifestly lacking in invention as to be declared invalid on demurrer to a bill for infringement.

This was a suit in equity by Allen H. Rowe against the Blodgett & Clapp Company for alleged infringement of a design patent for a horseshoe calk.

W. E. Simonds, for complainant.

L. P. N. Marvin, for defendant.

TOWNSEND, District Judge. To this bill in equity for infringement of patent No. 26,587, granted to complainant February 2, 1897, for a design for a horseshoe calk, defendant demurs on the ground that said design "is the product of mere mechanical skill, not amounting to a patentable invention." The defendant, in his brief, cites a number of patents, and asks the court to take judicial notice thereof, and thereupon to hold that the configuration claimed in the patent in suit is lacking in originality and beauty. The court has no personal knowledge as to these matters, and does not understand that, in a hearing on a demurrer, it is its duty to investigate the prior art. As a matter of fact, the writer supposed that the ordinary horseshoe calk was an integral part of the horseshoe, hammered to a point by a blacksmith. It is perhaps possible that evidence might be introduced to show that said design was patentable, as a "new and original shape or configuration of an article of manufacture." The demurrer is therefore overruled.

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PELZER v. GEISE. SAME v. ACME GAS FIXTURE & METAL CO. SAME  
v. BUCK. SAME v. HORN & BRANNEN MFG. CO.

(Circuit Court, E. D. Pennsylvania. June 25, 1898.)

Nos. 37-39, 41.

**PATENTS—PRELIMINARY INJUNCTION—EFFECT OF PRIOR DECISIONS.**

The circuit court and the circuit court of appeals for the Third circuit held that several claims of an original patent were invalid. Thereafter the circuit court of appeals in the Second circuit, after duly considering such prior decision, sustained the validity of a reissue of the patent. *Held* that, in a subsequent suit in the circuit court of the Third circuit on the reissue, the court, on motion for a preliminary injunction, would regard the decisions in the Second circuit sustaining the reissue as controlling upon it.

These were four suits instituted by complainant, Pelzer, against different defendants for alleged infringement of a patent for improvements in electrical fixtures. The causes were heard on motions for preliminary injunction.

Richard N. Dyer, for complainant.

Hector T. Fenton, Theodore F. Jenkins, and Samuel Gustine Thompson, for respondents.

DALLAS, Circuit Judge. The above-stated cases are suits upon reissued letters patent No. 11,478, granted March 12, 1893, to Luther Stieringer, for an improvement in electrical fixtures. The original (No. 259,235) was dated June 6, 1882, and was applied for March 15, 1882. A motion for a preliminary injunction has been made in each case. These motions were argued at the same time,

and may be disposed of together. The defenses are not, in some particulars, precisely identical, but the point which has been chiefly relied upon is common to all the cases, and presents the only question which, on full consideration of the proofs, seems to me to be a serious one.

In the case of *Maitland v. Archer & Pancoast Co.*, 72 Fed. 660, the circuit court for the Southern district of New York sustained the first claim of the reissued patent here sued upon, and in the case of *Maitland v. Manufacturing Co.*, 29 C. C. A. 607, 86 Fed. 124, the circuit court of appeals for the Second circuit also upheld that claim. It is contended that the peculiar circumstances under which these decisions were rendered make the general rule, which would require them to be followed, inapplicable. The learned counsel for the defendants in the present suit against the Horn & Brannen Manufacturing Company conceded (as must necessarily be conceded) that a prior adjudication, made in a contested case, and after a full and final hearing, must be regarded, upon a motion for preliminary injunction, as decisive, or at least as *prima facie* controlling, with respect to the validity of the patent; but it is insisted that this case is an exceptional one, for the reason about to be referred to. When the original patent to Stieringer was before the court of appeals for this circuit in the case of *Maitland v. Gibson*, 11 C. C. A. 446, 63 Fed. 840, several of the claims of that patent were held to be invalid, and it is now argued that the courts in the Second circuit either disregarded or misunderstood that prior judgment. If this were plainly evident, it would, I think, be incumbent upon this court to adopt as authoritative the decision of the court of appeals for this circuit. But this is not plainly evident. In both of the courts of the Second circuit the decision in this one was fully considered, and the question whether or not they properly interpreted it is one which, in my opinion, should be left for determination by the court which made it. The fact that the judgment of the court of appeals for the Third circuit was in accord with that of this court, as it is now constituted, should not, I think, induce me to enter upon an inquiry as to the purport and scope of that judgment. The courts of the Second circuit did not overlook it, and for the present purpose it is, I think, incumbent upon me to accept their conclusion, which is certainly not manifestly erroneous, without cavil or criticism. The application of the rule of comity, as it is called, is not, however, to be extended to anything more than was actually adjudged; and, as only the first claim of the reissue was passed upon, there will be a decree in each of these cases for a preliminary injunction so far as respects that claim, but not as to any of the others.

TABER BAS-RELIEF PHOTOGRAPH CO. et al. v. MARCEAU et al.

(Circuit Court, N. D. California. May 17, 1898.)

No. 12,258.

1. PATENTS—IMPROVEMENTS—CONSTRUCTION OF CLAIMS.

Where the parties to a suit are operating under different patents, each of which is for a mere improvement in a well-known art, each must be confined to the precise method mentioned in its claims.

2. SAME—INFRINGEMENT.

Infringement is determined, not by the result accomplished, but by the means employed in attaining that result.

3. SAME.

The only material difference between two patents for producing embossed pictures or photographs was that in one the picture was transferred to the block, and then carved out therein, while in the other the outline was cut on the block, and the picture then carved out, following a picture set up in front of the carver. *Held*, that there was no infringement, each patent being for a mere improvement.

4. SAME—EMBOSSSED PHOTOGRAPHS.

The Taber patent, No. 556,591, for improvements in methods of producing embossed photographs, is not infringed by the process described in the Marceau patent, No. 567,748, for a process of producing photographs in relief.

This was a bill in equity by the Taber Bas-Relief Photograph Company and others against Theodore C. Marceau and others for alleged infringement of a patent covering a method of producing embossed photographs.

John H. Miller, for complainants.

John L. Boone, for defendants.

MORROW, Circuit Judge. This is a suit in equity for infringement of letters patent No. 556,591, dated March 17, 1896, issued to Freeman A. Taber, for "improvements in methods of producing embossed photographs." It is conceded that the patent was assigned to the Taber Bas-Relief Photograph Company, and that the Taber Photographic Company is the licensee of the former. The only party defendant is Theodore C. Marceau, the other defendants being fictitious parties. The defendant, Theodore C. Marceau, denies, in his answer, any infringement of the Taber patent, but admits that he has been engaged in the production and sale of photographs in bas-relief, and in that connection avers that he is the inventor and patentee of a novel process and method of producing such photographs, which is protected by letters patent No. 567,748, dated December 15, 1896, issued to him, for a "process in producing photographs in relief." At the hearing the complainants introduced the letters patent under which they claim an infringement, and several exhibits, to illustrate their method of producing embossed pictures or photographs. They also introduced the deposition of a witness as expert testimony in their behalf. The defendant presented no evidence, beyond introducing in his behalf the file wrapper of his patent. No specific act of infringement has been shown. In fact, the question of infringement resolves itself into a consideration of whether or not the defend-

ant, in producing and selling photographs in bas-relief under his patent, is guilty of infringement. The witness called as an expert by the complainants testified to the effect that he was a solicitor of patents, and that he had examined the two letters patent introduced in evidence, viz. that of the complainants and of the defendant, and that the invention of the defendant was, in his opinion, an infringement of the complainants'. Whatever weight may be given to this expression of expert opinion, the question of infringement is one for the court, to be exercised upon its own independent judgment, and upon a comparison of the two patents. An examination of both patents shows that each purports to be for improvements in the method of producing embossed photographs, or photographs in bas-relief. Neither of the patentees is a pioneer in the art of producing photographs in bas-relief. The following patents show that the same method is substantially covered: United States letters patent No. 242,414, issued to William H. Guilleband, of Hoboken, N. J., dated May 31, 1881, entitled, "Process of Producing Photographs in Relief;" United States letters patent No. 520,707, issued to Mario Russo, of Rome, Italy, dated May 29, 1894, entitled, "Art of Reproducing Objects in Relief or Intaglio by the Aid of Photography;" United States letters patent No. 298,921, dated May 20, 1894, issued to Savillion Van Campen, of Jersey City, N. J., entitled, "Decorative Tile." Each of the patentees in the present suit is therefore but an improver in the art. It follows that this is a case where, in view of the state of the art, a patentee is only entitled, at the most, to the precise method mentioned in his claim. *Boyd v. Tool Co.*, 158 U. S. 260, 261, 15 Sup. Ct. 837. There is but one claim in the Taber patent, which is as follows:

"The method of embossing photographs, which consists in transferring a print to the surface of a block, forming an embossing mold in said block in conformity with said print, providing the block with a frame to form the register for the prints and mold, trimming the prints to fit within said frame, and pressing the print into the mold, substantially as set forth."

The claims of the Marceau patent are as follows:

"(1) The method herein described for preparing intaglio blocks for the purpose of forming relief pictures, consisting in cutting an outline of the picture to be thrown up in relief, pasting the same upon the inner surface of the glass or other smooth-surfaced mold, filling the mold with a plastic substance which will afterwards set and harden, then removing the hardened material from the mold, disengaging the picture from its surface, and engraving the surface to correspond with the portions of the picture which are to be thrown up into relief. (2) The method of throwing photographic pictures up into relief, consisting in cutting out one of the set of pictures, fixing it upon the inner surface of a mold, filling the mold with a plastic material which will afterwards set and harden, removing the hardened block from the mold and disengaging the picture therefrom; engraving an intaglio to correspond with the outline left by the removed picture, then using the outer portion from which the picture has been cut as an outline by which the other pictures are accurately registered upon the engraved block, and pressing the portions coincident with the engraved surface thereinto so as to throw them up into relief when removed from the block. (3) The method of forming photographic pictures in relief, consisting in cutting out one of a set of pictures, and outlining it upon a block formed by hardening a plastic mass within a mold, engraving an intaglio upon the block to correspond with said outline, then registering the other pictures upon the block, and pressing the portions coincident with the engraved surface thereinto."

From these claims, and a description of both patents as contained in the respective specifications, it appears that the purpose of both patents is the same, viz. to produce an embossed picture or photograph, and that the principal parts or functions of both methods are for the most part substantially similar. The only material difference between the two is that by complainants' method, as covered by the Taber patent, the picture to be embossed is transferred to a block, and then carved out in the block, while by the defendant's method, as covered by his patent, the outline of the picture is cut on the block, and the picture is then carved out, following the picture, which is set up in front of the carver. This difference in the two methods of transferring the pictures upon the blocks for the purpose of carving them out is, in my opinion, sufficient to distinguish the two patents, and to defeat any claim for infringement. It is true that the result accomplished, viz. an embossed picture, is the same with both methods. But infringements are not determined by the result accomplished. It is the means by which that result is attained which is determinative and controlling upon a question of infringement. *Carver v. Hyde*, 16 Pet. 513, 519; *Le Roy v. Tatham*, 14 How. 156; *Corning v. Burden*, 15 How. 252; *Burr v. Duryee*, 1 Wall. 531; *Fuller v. Yentzer*, 94 U. S. 288; *Knapp v. Morss*, 150 U. S. 221, 14 Sup. Ct. 81. To constitute infringement, there must be identity in means, not merely in purpose, function, or effect. 3 Rob. Pat. p. 46, § 893, and cases there cited. Besides, the patent issued to the defendant, the complainants' assignor (the Taber patent), not being a pioneer invention, is entitled to a prima facie presumption in favor of its patentability. *Boyd v. Hay-Tool Co.*, 158 U. S. 260, 261, 15 Sup. Ct. 837; *Putnam v. Bottle-Stopper Co.*, 38 Fed. 234; *Ney Mfg. Co. v. Superior Drill Co.*, 56 Fed. 152; *Kohler v. George Worthington Co.*, 77 Fed. 844. It does not appear that the defendant has infringed by using or following the method covered by the Taber patent, and in this view of the case it would seem to be unnecessary to pass upon the question whether either Taber or Marceau invented anything, inasmuch as both are restricted, as above stated, to the exact and specific devices or methods claimed by them, and the complainants have failed to show that the defendant has used the particular method to which they may be deemed entitled. From these views, it follows that the bill must be dismissed, and it is so ordered.

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AMERICAN GRAPHOPHONE CO. v. LEEDS et al.

(Circuit Court, S. D. New York. June 18, 1898.)

1. PATENTS—ANTICIPATION—GRAPHOPHONES.

A recording cylinder for a graphophone, consisting of a blank made of a pliable substance, covered with tin or metal foil, on which indentations are made by a rigid indenting point, is not an anticipation of a cylinder of a waxy substance from which the metal foil is omitted, and upon which an engraved record is made.

2. SAME.

Where a patentee has made an actual living invention, which the public are able to use, the court is not called upon to struggle to decipher an an-

ticipation in the unfinished work and the surmises of earlier students of the same subject.

**3. SAME—PATENTABLE COMBINATIONS.**

The combination of a loosely mounted reproducer of a graphophone with the grooved tablet or cylinder, or other body having a sound record engraved thereon in the form of a groove in a waxy substance, is a true and patentable combination.

**4. SAME—INFRINGEMENT.**

The so-called "metallic soap record" for graphophones, which consists substantially of a mixture of stearic acid or stearin and ozocerite, paraffin, and ceresin, and is a cohesive, wax-like material, without fiber, is within the claims of a patent describing a sound record formed of a waxy or amorphous or slightly cohesive substance, which can readily be cut and readily be removed in chips or shavings.

**5. SAME—CONTRIBUTORY INFRINGEMENT.**

One who makes and sells the loosely mounted sound reproducer of the patent alone, with intent that it shall be used with sound records made and sold under a patent covering a combination of the record and reproducer, is guilty of infringement.

**6. SAME.**

The Bell & Taintor patent, No. 341,214, for improvements in recording and reproducing speech and other sounds, construed, and held valid and infringed as to claims 19, 20, 21, 22, 23, and 24, and invalid for want of invention as to claims 37 and 38.

This was a suit in equity by the American Graphophone Company against Loring L. Leeds, James H. White, and Leroy W. Baldwin for alleged infringement of a patent for an improvement in recording and reproducing speech and other sounds.

Philip Mauro, for complainant.

William Houston Kenyon and A. Parker Smith, for defendants.

**SHIPMAN**, Circuit Judge. This bill in equity relates to the alleged infringement of claims 19, 20, 21, 22, 23, 24, 37, and 38 of letters patent No. 341,214, dated May 4, 1886, issued to Chichester A. Bell and Sumner Taintor for an improvement in recording and reproducing speech and other sounds; in other words, for the instrument now known as the "Graphophone." These claims are as follows:

"(19) The combination, with a reproducing style, of a mounting therefor, which leaves said style free to move laterally, and thereby adjust itself automatically to a sound record, substantially as described. (20) The reproducer loosely mounted on a suitable support, so that the reproducing style is capable of a lateral movement, and may, in consequence thereof, adjust itself automatically on the record, substantially as described. (21) The reproducer mounted on a universal joint, and held against the record by yielding pressure, substantially as described. (22) The combination, with a grooved tablet or other body having a sound record formed therein, of a reproducer having a rubbing style loosely mounted, so that it is free to move laterally, and thus adjust itself to the groove, substantially as described. (23) The combination, with the tablet or other body having the sound record formed therein as an irregular groove with sloping walls, of a reproducer having a style for rubbing over said record, and mounted on a universal joint, substantially as described. (24) The combination, with a sound record formed in wax or a wax-like material, of a reproducer having a rubbing style for receiving sonorous vibrations from said record, substantially as described." "(37) The reproducer mounted on a hinged arm, and provided with a sound conveyer extending lengthwise of said arm, substantially as described. (38) The reproducer mounted on a hinged arm, and provided with a sound conveyer

extending lengthwise of said arm, and connected at the hinge with an exterior sound conveyer, substantially as described."

Prior to the patent in suit there had appeared the French patent to Charles Cros, No. 124,213, dated May 1, 1878; an article in *Le Rappel*, dated December 14, 1877, in regard to the Cros device; an article in the *Journal Cosmos*, in December, 1878, describing the phonograph of the Abbe Carbonel; and articles in 1879 describing Lambrigt's phonograph; and there had also appeared Edison's phonograph, described to some extent in his United States letters patent dated February 19, 1878.

The French devices were complicated, and, outside of experimental and scientific investigation, were of no value as practical instruments. From the Edison phonograph much was anticipated. It came into public use in about 1879, but in actual service it disclosed radical defects, and it ceased in 1880 to have a position as an article of ordinary use. The record was made by indentation upon a surface of yielding material, such as paper saturated or coated with something like paraffin, and a sheet of metal foil, or tin foil, over the underlying sheet. The tin foil received an impression from a rigid diaphragm having an indenting point secured to its center. The great difficulty arose from the pliable character of the material upon which the record was attempted to be made. As stated by Mr. Taintor, the indenting point bent the tin foil down and around the point of contact, and distorted the indentations. The record was perishable, was easily obliterated, and was easily injured when removed from the machine, and after a short trial the tin-foil indenting process fell into disuse. The experiments of the patentees of the patent in suit commenced in 1881, and resulted in the abandonment of any process of indentation, or of embossing, upon a pliable material, and in the substitution therefor of the cutting or the engraving the record in the form of a groove with sloping walls in a waxy substance, without fiber, and slightly cohesive, in which a clean cut could be made. It was found necessary that the material should be cut or engraved at the point of the blade, and that it should be capable of being readily removed in chips or shavings. The rigid reproducer was also abandoned, and a loosely mounted reproducer was substituted in its place, so loosely mounted that, resting against the recording material by gravity, it was guided by the record, and followed all the elevations and depressions in the groove. The material of the record and the reproducer are each necessary parts of the invention. Either part without the other would be ineffectual, but in combination both tend to make an operative and successful instrument. Judge Grosseup, who did not think that the reproducer by itself was patentable, attributed great value to its combination with the waxy record. He said in the *Amet Case*:

"The substance upon which the record is cut, and the reproducer thus loosely mounted, by which it is enabled to follow the undulations of the groove, together constitute an effective portion of the mechanism. Either, without the other, would be useless for the purpose of a graphophone or phonograph.

Together they bring about a successful result. They therefore constitute a patentable combination." 74 Fed. 789.

This peculiarity of the dual invention of the material for an engraved record and the reproducer, and the fact that the latter was brought into being to make the former of practical value, is of much importance in the proper construction of the quoted claims of the patent, if it should be held that the reproducer alone, though novel, is not patentable. The defenses are numerous, and extend to the details of the specification.

The first position in regard to the claims in suit is that any claim based upon the originality of the new sound record, and especially claim 24, is void, because sound records formed in wax, or wax-like material, were old in the art of reproducing speech, and stress is laid upon Edison's experiments. Mr. Edison did experiment upon almost every material, and undoubtedly experimented upon wax, and discarded one material after another, until, in his completed phonograph, he used a yielding material, and required that it should be covered with tin or metal foil. In his British patent No. 1,644, of 1878, which contained his ideas, both completed and crude, he describes the material to be indented as follows:

"The material upon which the record is made may be of metal foil, such as tin, iron, copper, lead, zinc, cadmium, or a foil made of composition of metals. Paper or other materials may be used, the same being coated with paraffin or other hydrocarbons, waxes, gums, or lacs, and the sheet so prepared may itself be indented, or the material, say paper, may be made to pass through a bath of hot paraffin and thence between scrapers. Thin metal foil is now placed on the material, and the sheet passed through rollers, which give it a beautiful smooth surface. The indentation can now be made in the foil and the paraffin or similar material, and the indenting point does not become clogged with the paraffin in consequence of the intervening foil."

He did not use, unless experimentally, a blank made of wax, or of a waxy substance, which was to become, by itself, the sound record to be used for reproduction. It is unnecessary to describe the theories of the French scientists in regard to the material for recording, because, while they used wax or stearin or paraffin upon the surface of a recording cylinder made of metal or of glass, none of them attempted to reproduce the sounds from a wax or paraffin or stearin record, but the reproduction was from the metal surface. The declaration in the specification that "no one has reproduced sounds from a wax record by rubbing a style or reproducer over it" is true; and it is furthermore true that this combination first shown in the patent in suit, either in method of operation or in the character of its results, converted the noteworthy, but short-lived, instrument of Edison into a machine of widespread use and of permanent utility. Each member of the combination was new, the result was new, and was not attained by the application of an old device to a similar subject. *Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co.*, 110 U. S. 490, 4 Sup. Ct. 220.

The defendants, upon the theory that claims 19, 20, and 21 relate merely to a loosely-mounted reproducer, are of the opinion that a reproducer capable of automatically adjusting itself to the record

groove, and loosely mounted, after the general plan of the patented invention, was disclosed in the Edison British patent of 1878. This patent contained some of the suggestions and sketches of various sorts and kinds which Mr. Edison had thought of or had made during his experiments upon a subject novel, intricate, and scientific, which required manifold and delicate experiments, and in which he took a great interest. Some of his surmises and beliefs in regard to what could be or might be done were thrown into this patent. The defendants' expert, with manifest consciousness of the difficulties in the text, translates the language of the descriptions of Figs. 27, 34, and 37 to mean that Edison had in his mind a gravity reproducer, or to show that such a reproducer can be inferred from the language. These descriptions are confessedly vague, and it is confessedly difficult to know the interpretation which the writer placed upon some of the words which he uses. Bell and Taintor made an actual, living invention which the public are able to use, and a court is not called upon to struggle to decipher an anticipation in the unfinished work and the surmises of earlier students of the same subject.

Having ascertained in what the invention of the patentees consisted, it is necessary to know whether it was aptly described in the claims. The two improvements of importance with respect to claims 19 to 24, inclusive, are the new material for a sound record upon which vertically undulating grooves with sloping walls were engraved by a cutting style; and the reproducer which rested upon these grooves by gravity, and moving along them, "imparted to a second diaphragm the vibrations incident to the elevations and depressions of the bottoms of the groove." A leading, and perhaps the only, novel element in this gravity or "floating" reproducer is the universal joint, and Judge Grosscup was not disposed to regard its adaptation to a new use as a patentable invention. He thought that while that element, separately considered, was not invention, the combination which included it with the new record was patentable, and called the combination "the mechanical means whereby the art of recording and reproducing speech and sounds is first made practically effective. To deny to it the dignity and quality of invention would be to deny the patentability of every first great mechanical success."

I think it may be that the improvement in the reproducing style was more than the mounting of an old style upon a universal joint, and that the reproducer may be patentable itself, because the style needed, not only the lateral motion produced by a universal joint, but also an elastic and yielding pressure against the record; but, if the reproducer is not patentable by itself, I fully agree with Judge Grosscup's idea of the patentable character of the combination which appears in these claims, and concur with him that any device which combines the reproducer described in claims 19 to 24 with the grooved tablet, or other body having a sound record as described in the patent, and especially in claims 22 and 24, is an infringement of the patent in suit. It is stated that claim 23 was not in the *Amet Case*. This construction is not so broad as that which the solicitor for the patentees apparently hoped for, but it limits the claims to the improve-

ments which, in combination, created the new machine, and which are abundantly described in the specification.

Infringement is denied because their apparatus is not intended for use "with a sound record formed in wax or a wax-like material," but with the sound record now commonly in use, and called a "metallic soap record," which is said to have been the invention of Mr. Edison, and to have been patented in 1890. The material which is described in the patent is a waxy or amorphous or slightly cohesive substance, which can readily be cut, and can readily be removed in chips or shavings. The metallic soap blank is substantially a mixture of stearic acid or stearin and ozocerite, paraffin, and ceresin, and is a cohesive, wax-like material, without fiber. Mr. Edison in two patents, Nos. 484,583 and 484,584, in speaking of the phonogram blanks in use in 1892, says: "The surface is ordinarily of wax, or a stearate or hard metallic soap or other wax-like material or composition." The criticism in regard to the material is not well founded.

The defendants' machine is simply for the purpose of reproducing the customary wax-like sound records of the patent, which are cut in a groove with sloping walls. These records are made by the owner of the patent, and sold separately for reproduction. The reproducing device "consists of a reproducing point on one end of a glass tube, the other end of which is loosely mounted on the frame of the machine. When a sound record is on the mandrel, the reproducing point rests by gravity upon the record, and with a yielding pressure, which is rendered adjustable by means of the adjustable coiled spring. The mounting of the reproducer tube or hollow arm is a free or universal mounting, so that it can swing laterally or in a longitudinal plane at the same time that the reproducing point rises and falls in following the sinuosities of the sound record. In operation, the reproducer is allowed to rest, with its free end carrying the reproducer point, on the record cylinder. As the record cylinder revolves, the reproducer swings laterally, being guided solely by the fine sound groove, and being kept in place by the sloping walls thereof."

So far as the reproducing device is concerned, there is no substantial controversy in regard to infringement, but it is said that the defendants do not infringe claims 22, 23, and 24, because they neither make nor sell the sound records, but simply sell this reproducing device, to be used as the purchaser chooses. It is well known that the complainant makes many records, embodying pieces of music, addresses or other speech, and sell them to be used by the owners of a graphophone. The defendants' device is an economical infringement of one element of the claim, which is sold for the purpose of being used in connection with the other element. The design of the defendants' machine, and their intent in selling it, are to have it used in connection with the engraved sound record of the complainant. There was a very little hearsay, but no proof, that the defendants' device was used with a celluloid record, and it sufficiently appears that its only actual use was in connection with the patented record. Infringement of the combination of claims 22, 23, and 24 is the legal result.

I do not think that the improvement described in claims 37 and 38 possesses the element of patentable invention. It is an obvious method of construction, when the reproducer is mounted in a hinged arm.

Let there be an interlocutory decree against an infringement of claims 19, 20, 21, 22, 23, and 24, and for an accounting, which will be drawn substantially in the form settled by Judge Grosscup in the Amet Case, and printed in 74 Fed. 1008.

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THOMSON-HOUSTON ELECTRIC CO. v. UNION RY. CO. et al.

(Circuit Court, S. D. New York. June 11, 1898.)

1. PATENTS—INVENTION.

An improvement which consisted in pivoting the contact arm of an underrunning trolley system to a rotating support on the top of the car, to which the spring which presses the arm upward is also attached, rather than to the car itself, so that the arm may be swung from one end of the car to the other, required only mechanical skill.

2. SAME—CONTACT DEVICES FOR ELECTRIC RAILWAYS.

The Van Depoele patent, No. 495,383, for improvements in overhead contact devices for electric railways, is void, as to claims 11, 12, and 13, for want of patentable invention.

This was a suit in equity by the Thomson-Houston Electric Company against the Union Railway Company and the Walker Company for alleged infringement of the Van Depoele patent for improvements in overhead contact devices for electric railways.

Frederic H. Betts, for complainant.

Charles E. Mitchell, for defendant.

SHIPMAN, Circuit Judge. This is a bill in equity based upon the infringement of claims 11, 12; and 13 of letters patent No. 495,383, applied for on June 20, 1888, and issued on April 11, 1893, to the administrators of Charles J. Van Depoele, for improvements in overhead contact devices for electric railways. The application for the patent was sworn to by Van Depoele on November 15, 1887. The three claims which were infringed are as follows:

"(11) In an electric railway, the combination of a car, an overhead conductor, a standard on the car, a rotating support thereon, an inclined contact-carrying arm hinged upon said support, and a tension spring secured so as to rotate with the support, and acting upon the said arm, for holding the contact device in position. (12) In an electric railway, the combination, with a car, of a standard on the car, a rotating support thereon, an arm hinged upon said support, and provided with a grooved or flanged contact device for engaging with a suspended conductor, and a tension spring secured so as to rotate with the support, and acting upon the said arm, for holding the contact device in position. (13) A reversible contact device for an electric railway vehicle, consisting of a standard, a rotating support thereon, a contact-carrying arm hinged upon said support, and a tension spring secured so as to rotate with the support, and acting upon the contact-carrying arm, for holding the contact device in position."

The inventor said in his specification that it related to improvements upon the invention which formed the subject of a prior ap-

plication for letters patent which was filed March 12, 1887. Upon that application, letters patent No. 495,443 were granted to Van Depoele's administrators on April 11, 1893, which described his basic invention for a "long, swinging, pivoted, hinged, and upwardly spring pressed arm, extending from a support on the top of the car, and equipped with an underrunning-contact device." This invention has been frequently described, in the language of an expert witness for the complainant, in the Winchester Ave. Case, 71 Fed. 192, as follows:

It "consists generally in an electric railway, having an overhead conductor, and a car for said railway, provided with a contact device carried by the car so as to form a unitary structure therewith, and consisting of a trailing arm hinged and pivoted to the car, so as to bridge the space between it and the conductor, and move freely both laterally and vertically, and said arm carrying at its outer end a contact device capable of being pressed upward by a suitable tension device into engagement with the underside of the conductor."

Van Depoele exhibited his trolley mechanism, as thus constituted and mounted upon cars, at Toronto, in September, 1885; and its novelty, its importance, and its inventive character are now thoroughly established, although, in respect to the letters patent which were issued upon it, the court of appeals in this circuit has held that after the original application was divided, and when the patents were issued upon the divisional applications, there was not an adequate line of separation between the claims of the patent No. 495,443, intended by the solicitor to be the generic one, and its predecessor, intended by him to be of a more limited character. Thus far, in the invention, the tension device was so secured that the arm must be trailed in one direction, and there were no means of reversing the contact device, and therefore the car must be reversed at the end of the route. A very simple means by which Van Depoele reversed the position of the contact arm is shown in Fig. 6 of the patent in suit, but it is not within these three claims. A post is fastened in the central portion of a board which is fastened upon the top of the car. In the top of the post a forked stem is pivotally supported, between the extremities of which the contact arm is secured, one end of which engages the underside of the conductor. To the other end of the arm a tension spring is attached, which is secured to the board by a stationary hook. The board is provided with a similar hook at its opposite end, and the position of the contact arm can be reversed by detaching the spring from one end of the board, turning the arm upon its pivot, and attaching the spring at the opposite end of the board. This inconvenient method of fastening the spring required that it should be hooked to the top of the car, and should subsequently be disengaged therefrom whenever a reversal was needed. The contact arm should not only be hinged upon a rotating support, but the spring should rotate with the arm, and enable it to have a more free lateral movement. Van Depoele made the required improvement,—whether before or after he made the one shown in Fig. 6 is not apparent in the record,—and gave a public experimental test and exhibition of it, in connection with his whole trolley system, at New Orleans,

in December, 1885. It is described in the three claims which have been quoted, and, as shown in the drawings, consists in a rotating sleeve around the post at the top of the car, upon which sleeve the contact arm is hinged, and in the attachment of the spring to the rotating support. The inventor said in his specification, with reference to claims 11, 12, and 13:

"The contact-carrying arm is described and claimed as being hinged and pivoted, by which is meant that the said arm is capable of universal movement upon its pivot. Ordinary forms of pivoted hinge connections between the contact-carrying arm and its support are herein shown and described, but it will be obvious that many different means of affecting a connection capable of the desired freedom of movement might be substituted for what I have shown and described, without in any way departing from the invention."

The improvement was both novel and useful. It permitted a prompt and easy reversal of the apparatus which connected the car with the conductor, which was an important matter, and it also permitted a wide or unrestricted lateral movement of the trailing arm. As said by Judge Townsend, upon that patent, in the Winchester Ave. Case, 71 Fed. 192:

"In the first patent in suit, No. 495,443, the spring which maintained the upward pressure of the underrunning wheel was so fastened to the car, or otherwise arranged, as to interfere with the lateral movements of the swinging arm. By the substitution of this rotatable support, and the attachment of said spring thereto, such movements are unrestricted, because the spring rotates with the support. Furthermore, it is unnecessary to turn the car about in order to run it in an opposite direction, because, the apparatus being reversible, the arm may be so adjusted as to trail rearwardly from the supporting post."

The question of widest importance in the case, viz. that of the patentability of the three infringed claims, has already been decided in this circuit, in the Winchester Ave. Case, by Judge Townsend, against the present complainant. In that case the patent now in suit and the patent No. 495,443 were both involved, but the complainant thinks that the attention of the parties and the court was especially directed to the more important and the earlier invention, that thus the patentable character of the later invention did not have its proper prominence, and that a more full record has now been presented. Waiving consideration of the fact that in this circuit these claims have already been submitted to judicial examination, I have endeavored to look at the subject as if it was a novel one, and was not controlled by former adjudication. Van Depoele had before December, 1885, an electric car furnished with his new underrunning trolley equipment; but city and suburban trolley roads cannot easily be furnished with turntables, and it was important, if not necessary, that the contact arm, rather than the car, should be reversed, and that the original underrunning system should be perfected in that direction. It was a matter of course that the arm should be hinged upon a rotating support, and it was soon seen that the spring must rotate with the support of the arm, or reversal would be awkwardly and slowly accomplished. The conception of the result, or of its useful character, is not patentable. The means by which the result is accomplished are patent-

able, if they are of an inventive character. The necessities of the new underrunning trolley system called for the improvement, but the idea of pivoting the contact arm to a rotating support, to which the spring is also attached, rather than to the car, must have been within the capacity of the ordinary mental equipment of the skilled mechanic. A railroad turntable, or a rotating office chair with a tension-spring attachment, did not probably tell the inventor how to make his rotating support. These are simply instances of the widespread character of pivoted and rotating supports; and when Van Depoele had advanced to the point in his improvement where he said, "I must advance another step, and make the contact arm freely rotate," the universality of mechanism of this sort made the mechanical task an easy one. It follows that the conclusions which Judge Townsend reached are confirmed, and that the bill should be dismissed, with costs.

WESTINGHOUSE AIR-BRAKE CO. v. NEW YORK AIR-BRAKE CO. et al.  
(Circuit Court, S. D. New York. May 9, 1898.)

1. PATENTS—CONSTRUCTION OF CLAIMS—PRIOR ART.

The Dixon patent, No. 382,032, for improvements in air brakes, which describes in claims 3 and 5 a modification of the prior Westinghouse patents (Nos. 360,070 and 376,837), consisting in dispensing with the passage from the train pipe and brake cylinder, and locally venting the train pipe directly to the atmosphere; and, if these claims are not void for want of novelty, they are yet technical, rather than valuable, ones, and should not be extended by construction beyond their literal import.

2. SAME.

The Westinghouse patent, No. 538,001, for improvements in air brakes, construed, and held not infringed.

This was a suit in equity by the Westinghouse Air-Brake Company against the New York Air-Brake Company and others for alleged infringement of certain patents for improvements in air brakes.

George H. Christy and Fredk. H. Betts, for complainants.

Fredk. P. Fish and Charles Neave, for defendants.

WALLACE, Circuit Judge. The patents upon which this suit is founded are for improvements in air brakes, infringement being alleged of claims 3 and 5 of letters patent No. 382,032, granted May 1, 1888, to Theron S. E. Dixon, and of claims 5 and 6 of letters patent No. 538,001, granted April 23, 1895, to George Westinghouse, Jr.

The patent of Dixon, so far as it is found in the two claims in controversy, describes a modification of the automatic air brake of the prior patents to George Westinghouse, Jr., Nos. 360,070 and 376,837, which consists "in cutting off and dispensing with the passage from the train pipe and brake cylinder, and locally venting the train pipe directly to the atmosphere through a passage or port." Westinghouse vented his train pipe into the brake cylinder.

Whatever theoretical advantages may reside in the modification, the improvements have not been of sufficient practical value to displace the Westinghouse brake, and those which are the subject of the two claims are of no commercial value.

What was done by Dixon was to interrupt the passage in the West-

inghouse brake, and is thus described by him in his specification: "I cut off and dispense with all communication between the train pipe and the brake cylinder, and in lieu thereof provide an open air port, H, through which, when the local discharge is taking place, the air will vent from the train pipe directly." H is a passage opened by a quick-action vent valve, just as the passage in the Westinghouse brake is opened by his quick-action vent valve, viz. by the impact of the triple-valve piston at the extreme end of its traverse. As illustrated in the drawings, there is a poppet valve in the passage, H, which is pushed out of the way by the train-pipe air admitted by the quick-action vent valve.

Dixon was not the first to effect a local discharge in automatic air brakes by venting them to the atmosphere, but he was the first to conceive the utility of doing so in the way in which he did it, and of modifying the organization of the Westinghouse brake to that extent. Local venting of train pipes was old in the air-brake art. It was perfectly well known that a quick serial application of the brakes throughout a train of cars could be effected in an automatic air-brake system by venting the train pipe at each car to the atmosphere. Westinghouse himself, in one of his earlier patents,—No. 217,838,—had pointed this out, and had devised a crude arrangement of devices to accomplish it. He concluded that it was desirable to vent the train pipe into the brake cylinder, and thus utilize the air, which would be wasted if vented to the atmosphere, to assist in charging the brake cylinder and actuating the brakes; and for this purpose devised the apparatus of No. 360,070, subsequently improved by the mechanism of No. 376,837. Dixon conceived that in such an apparatus the vent from the train pipe would not be as rapid or complete as it would be into the atmosphere, and accordingly modified the mechanism of the apparatus of Westinghouse. His change may have accelerated the serial brake action in emergency applications, but it did so at the expense of the advantage introduced by Westinghouse of actuating the brakes in part by direct train pressure.

In the Dixon air brake it is of the utmost importance that when the train-pipe vent has once been opened it shall promptly close after releasing a small quantity of the train-pipe air to the atmosphere, not only to prevent an unnecessary waste of air, but especially to enable the brakes to be released. As is stated by one of the expert witnesses for the complainant, any organization which is not provided with means for doing this "would be a practically inoperative device in an automatic air-brake system," and would be "a complete failure." The inventions specified in claims 3 and 5 do not include these means.

It is difficult to escape the conclusion that any competent mechanic skilled in the air-brake art could easily, and without the exercise of any inventive faculty, change the Westinghouse brake of patents Nos. 360,070 and 376,837 by opening a vent to the atmosphere in the air passage from the train pipe to the brake cylinder, either by the method of Dixon or by other methods equally available. In Westinghouse's certificate of addition of February 11, 1888, to his French patent of March 29, 1887, he shows how this can

be done by an "unimportant change" in the slide valve of No. 360,070.

If the claims are not void for want of patentable novelty, the defendants are entitled to prevail upon the issue of infringement. In any view of the facts, Dixon was not a pioneer, but was merely an improver upon the prior mechanism of Westinghouse, not alone for accomplishing the same general result, but also for effecting the specific result of locally venting the train pipe to the open air in an automatic air brake. If the claims cover inventions, they are technical, rather than valuable, ones, and ought not to receive a liberality of interpretation which will extend them beyond their literal import.

The claims themselves recognize the limitations imposed upon the scope of the patent by the prior art. The specification contemplates the use of a piston so constructed as to have two strokes, and which moves through a preliminary traverse upon a service application of the brakes, and a supplementary or final traverse for an emergency application, and completes the service application upon the primary traverse, and before entering upon its emergency traverse. This piston is an element of both claims. In the mechanism of the defendants the piston has but one stroke, making a single traverse for both service and emergency application of the brakes.

The third claim recites as one of its elements "a valve which opens said passage when the main valve-operating piston opens the emergency port," viz. when communication between the auxiliary reservoir and the brake cylinder is open. In the mechanism of the defendants the valve (71) that opens the vent passage is opened at or near the first part of the stroke of the triple-valve piston, and before any communication between the auxiliary reservoir and the brake cylinder is established. The train pipe is thereby vented to the atmosphere upon service applications as well as upon emergency applications, and at the commencement of the operation of setting the brakes.

The fifth claim has as a constituent a vent valve which is "operated by the final movement of the piston, B, when applying the brakes." As has been said, the valve in the mechanism of the defendants is not operated by the final movement of the piston. The piston lettered B in the drawings differs so materially from the piston in the mechanism of the defendants that the latter has been made the object of attack in the second patent in suit, in which the claims were obviously prepared for that express purpose.

The second patent in suit—No. 538,001—is not infringed by the mechanism of the defendants unless the claims are given a construction not warranted by the specification. The application for that patent was pending in the patent office when the defendant the New York Air-Brake Company sent to the complainant certain blue prints of the air brake which it was about to manufacture and was manufacturing when this suit was brought. Thereafter the pending application was amended by inserting six new claims. The patent is, so far as these claims are concerned, a transparent attempt to appropriate a combination of which Mr. Massey was the inventor.

The valve mechanism described in the specification is such as is

adapted to be used in conjunction with the well-known form of triple valve in an air brake as an auxiliary means of venting the train pipe into the brake cylinder. It is arranged within a casing of the brake cylinder, and is actuated by the triple valve. The claims cannot be expanded to cover inventions not suggested by the specification.

The bill is dismissed, with costs.

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ST. LOUIS CAR-COUPLER CO. v. NATIONAL MALLEABLE  
CASTINGS CO.

(Circuit Court of Appeals, Sixth Circuit. March 8, 1898.)

No. 527.

1. PATENTS—COMBINATIONS—IMPLICATION AS TO ELEMENTS.

Where all the claims are for combinations only, this implies that all the rest is old, or, at least, that the patentee does not claim the elements separately.

2. SAME—SUBSEQUENT PATENT—PRESUMPTION OF PATENTABLE DIFFERENCE.

The granting of a subsequent patent for a similar machine or device affords a presumption of a patentable difference between the two.

3. SAME—PATENTABILITY OF COMBINATION.

To sustain a patent for a combination each element of which is old, considered separately, there must be some peculiar combination of these elements, producing new and useful results.

4. SAME—AUTOMATIC CAR COUPLERS.

The Lorraine and Aubin reissue, No. 10,941 (original, No. 369,195), for an automatic car coupler, which is intended as an improvement on couplers of the Janney or Master Car Builders' type, is only sustainable, if at all, by confining it to the precise form shown in the specifications and delineated in the drawings, and is not infringed by a coupler made in accordance with the Tower patent, No. 541,446. 81 Fed. 706, affirmed.

Appeal from the Circuit Court of the United States for the Eastern  
Division of the Northern District of Ohio.

The complainant below and appellant here is engaged in the manufacture and sale of an automatic car coupler, generally known as the "St. Louis Coupler," and made under and in accordance with reissued patent No. 10,941, dated June 26, 1888. The original patent was No. 369,195, dated August 30, 1887. Both the original and reissue were to Madison J. Lorraine and Charles T. Aubin. The object of the bill was to restrain an alleged infringement of said reissued patent by the defendant company, which is engaged in the manufacture and sale of a rival car coupler, under a patent to C. A. Tower of June 18, 1895, and numbered 541,446. This patent is for an improvement on the patent issued to the same patentee, June 5, 1894, and that was an improvement on the patent issued to the same patentee, October 24, 1893, No. 507,511. Upon a final hearing, before Taft, circuit judge, the bill of complainant was dismissed, upon the ground that the Tower device did not infringe the Lorraine and Aubin patent. The opinion of the circuit court is reported in 81 Fed. 706. The defenses were noninfringement, invalidity of patent for want of novelty and patentable invention, and that the reissued patent is void for unlawful extensions of the claims of the original patent.

The character of the reissued patent to Lorraine and Aubin is thus stated in the specifications: "Our invention relates to that class of car couplings known as 'vertical plane,' and having a pivoted outwardly opening coupling head or clutch and an extended arm or buffer. The object of our invention is to provide a vertical plane coupling free from complicated parts, locking by means of a simple automatic gravity pin, requiring no adjusting and made in one piece; to provide a vertical plane coupling in which, when a coupling-head is unlocked and released, said coupling-head, by reason of its own weight,

will turn outwardly and open, and thus automatically set itself in position to effect a coupling with a similar opposing coupling-head, which may be either open or closed; to provide an improved and simplified means of setting not to couple; to so construct and arrange the coupling-head that it will be unusually strong, and to make a coupling that will perform the work under all circumstances, as well on the sharpest curves as on a tangent, and with the greatest variations in height of the opposing parts.—In fact, to provide a car coupling that will be simple in construction, automatic in action, and free from springs and superfluous and loose parts, that will combine strength and durability with simplicity and perfection of action."

For further illustration, we here set out Figs. 1, 2, 3, 5, 9, and 10, shown in the drawings of the patent. The drawings show but one form and arrangement of a vertical plane coupler, and the specifications describe only that form, and do not suggest any modification:

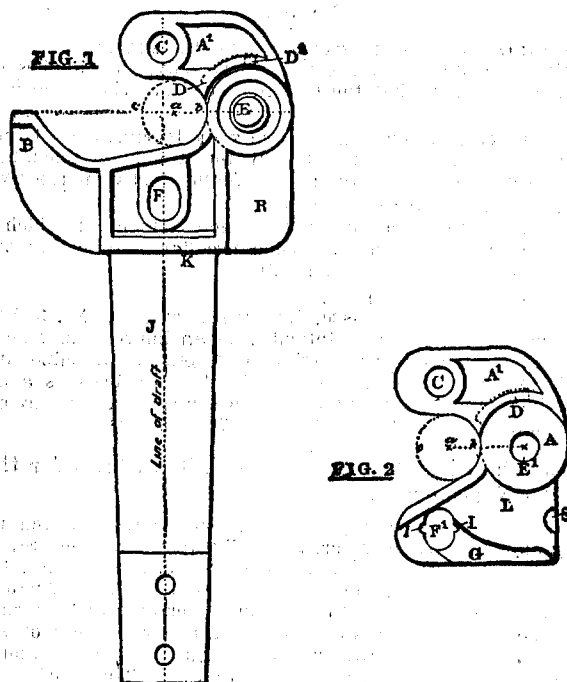


Fig. 1 is a plan of draw-head, with coupling-head—sometimes called a "knuckle"—attached and closed. Fig. 2 is a plan of coupling-head detached from draw-head.

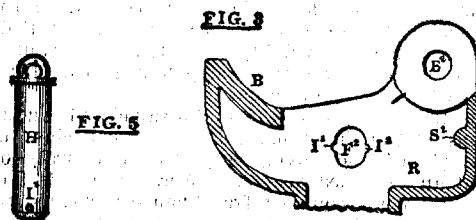


Fig. 3 is a horizontal section, showing lower half of draw-head separate from coupling knuckle. Fig 5 is a side view of locking pin.

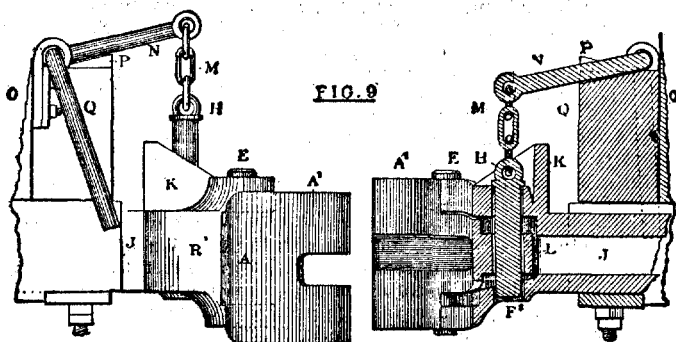


Fig. 9 is a side view of two draw-heads, with coupling-heads attached, about to make a coupling, with the left-hand coupling-head closed up and locked, and showing vertical longitudinal section of draw-head through line X<sup>2</sup>, Y<sup>2</sup>, of Fig. 10.

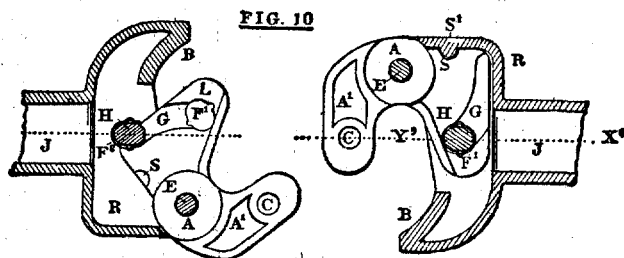


Fig. 10 is a horizontal longitudinal section of two opposing draw-heads, with coupling-heads attached, about to make a coupling, with left-hand coupling-head unlocked and open, and the right-hand coupling-head closed and locked. The same letters of reference refer to the same parts throughout.

In Fig. 10, J is the draw-bar; R is the draw-head; B is the buffer; A is the coupling-head, which is pivoted at its center to the draw-head, and which, viewed in position shown in Fig. 2 (which shows the knuckle of Fig. 10), has a general U shape; E is pin that pivots coupling-head to draw-head; A<sup>1</sup> is the outer arm or clutch of U-shaped coupling-head; L is rearward arm of U-shaped coupling-head; H is locking pin (said locking pin can be either oblong, round, or square); \* \* \* F is hole in top of draw-head for reception of locking pin (this is not shown in Fig. 10, but is in Fig. 1); F<sup>1</sup> is hole which perforates inner arm of coupling-head for purpose of receiving locking pin, and F<sup>2</sup> is a hole in bottom of draw-head for same purpose; G is groove in inner arm of coupling-head for guiding locking pin as hole F<sup>1</sup> moves from or towards it; S is recess in arm, L, made to receive rib, S<sup>1</sup>, which is cast to side of draw-head.

The outer or hook arm of the coupling-head is divided so as to receive a link when coupling with common draw-head. The operation of this coupler, as described in the patent, is as follows: "Should the two similarly constructed draw-heads approach each other in the position shown in Figs. 9 and 10, the arm, A<sup>1</sup>, of the closed coupling-head, encounters the point of the arm, L, of the open coupling-head, turning it partly inward, when the point of the arm, A<sup>1</sup>, of the open coupling-head, then encounters the concave face of the buffer-arm, B, which forces it completely around to the limit of its inward movement. As the coupling-head turns inwardly, the projecting knob or pin, D<sup>1</sup>, being at the commencement of this movement at the top of the inclined or curved groove, D, the upper side of the groove travels up and across the pin, D<sup>1</sup>, and by this movement raises the coupling-head up into a space left at the top to allow for this upward movement. At the same time the coupling-head is turning, and raising the pin, H, which rests on top of the inner arm, L, is guided in the guide groove, G, towards the hole, F, and when it is over said hole the pin,

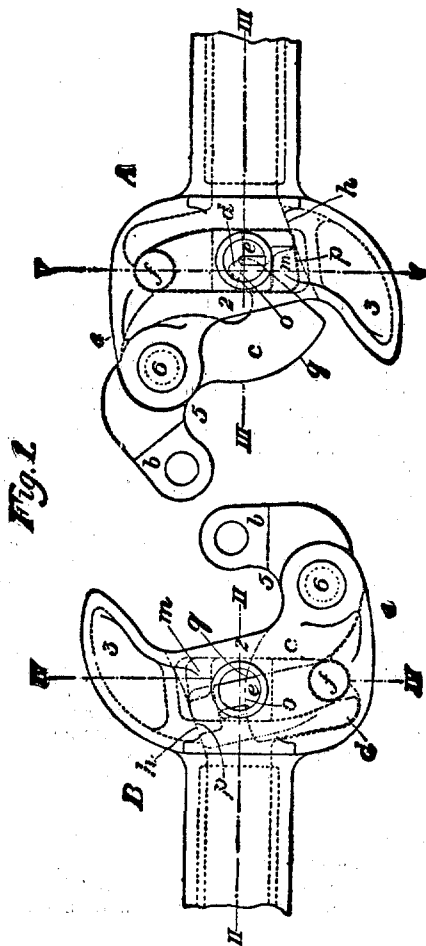
H, falls through it and into the hole, F<sup>2</sup>, and thus securely holding and locking the coupling-head. The rib, S<sup>1</sup>, fitting into the recess, S, is intended to give the coupling-head a solid bearing against draw-head when the coupling-head is locked by the pin, H. For uncoupling, the lever arm, N, or any suitable device, is used. To uncouple, the arm, N, is raised, and this in turn, through the chain, M, raises the pin, H. The coupling-head has then nothing to retain and support it, and as the opposing head draws away from it the action of gravity draws the coupling-head down into the vacant space beneath, and as it falls, by reason of the top of the groove, D, traveling down and across the knob or pin, D<sup>1</sup>, the coupling-head turns and opens and is set into position for another coupling. Should both heads be closed when desiring to make a coupling, the pin, H, is raised, and the automatic action of the coupling-head immediately opens and turns it ready for coupling. After the coupling-head is open the pin, H, is allowed to fall, and rests (in the position shown in Figs. 7 and 10) in the groove and on top of the arm, L, of the coupling-head. Should it be necessary to set not to couple, the lever arm, N, is raised and pushed or pulled on top of the block, P (Fig. 9), and as this keeps the pin, H, in a raised position, the coupling-head can therefore not be locked and a coupling cannot be effected. It is only necessary that one pin be operated to set to couple, to uncouple, or set not to couple."

The claims of the patent said to be infringed are the 1st, 2d, 3d, 6th, 7th, 8th, 10th, 11th, 12th, 18th, 19th, and 20th, and are as follows: "(1) The combination of the  $\cap$ -shaped coupling-head pivoted at its center, the draw-head, and the automatic locking pin, for the purposes set forth. (2) The combination of the  $\cap$ -shaped coupling-head, the draw-head, the pivot, E, the inclined (or curved) groove, D, and the knob or pin, D<sup>1</sup>, for the purpose of making an automatically opening coupling-head. (3) The combination of the  $\cap$ -shaped coupling-head, the groove, G, the draw-head, the locking pin resting on top of the arm, L, when the coupling-head is open, and falling through the holes, F<sup>1</sup> and F<sup>2</sup>, when the coupling-head is closed, and the lever arm and chain, substantially as described." "(6) The combination of the  $\cap$ -shaped coupling-head having the recess, S, the locking pin engaged with the rearward arm of said coupling-head, and the draw-head having the rib, S<sup>1</sup>, which fits in the recess, S, only when the coupling-head is closed for making the coupling-head firm and secure when locked. (7) The combination of a coupling-head turning laterally on its pivot, and having an external arm extended to engage with and grip a like fellow and a rearward arm intended to engage with some locking mechanism, with a draw-head carrying a common gravity vertically moving locking pin, said automatically locking pin riding directly upon such rearward arm when opened, and locking such inner arm by dropping through a hole perforated in the inner arm of the coupling-head, substantially as described. (8) The combination of two similarly constructed draw-heads having  $\cap$ -shaped pivoted automatically opening coupling-heads and the automatic locking pins, substantially as described, for the purpose of making an automatic coupling." "(10) The combination of a coupling-head, the draw-head, the groove, G, the locking pin resting on top of the arm, L, when the coupling-head is open, and falling through the holes, F<sup>1</sup> and F<sup>2</sup>, when the coupling-head is closed, and the lever arm and chain, substantially as described. (11) The combination of the draw-head, the pivoted coupling-head, and the locking pin, said locking pin resting upon the inner arm of the coupling-head when the coupling-head is opened and riding upon said inner arm when the coupling-head is turned to be closed, and said inner arm being grooved to receive and guide the locking pin. (12) The combination of the draw-head, the pivoted coupling-head, and the locking pin, said locking pin working vertically in a perforation in the draw-head and resting directly upon the inner arm of the coupling-head when the coupling-head is opened, riding directly upon said inner arm when the coupling-head is turned to be closed, and dropping through said inner arm to secure said coupling-head when closed." "(18) The combination of the draw-head, the pivoted coupling-head, and the vertically moving locking pin, the inner arm of said coupling-head, when the coupling-head is closed, being held by said pin, and also interlocked with the draw-head at a point between the location of said locking pin and the coupling-head pivot, for the purpose described. (19) The combination of a coupling-head turning laterally upon its pivot, and having an external arm intended to engage with and grip a like fellow, and an inner arm intended to engage with some

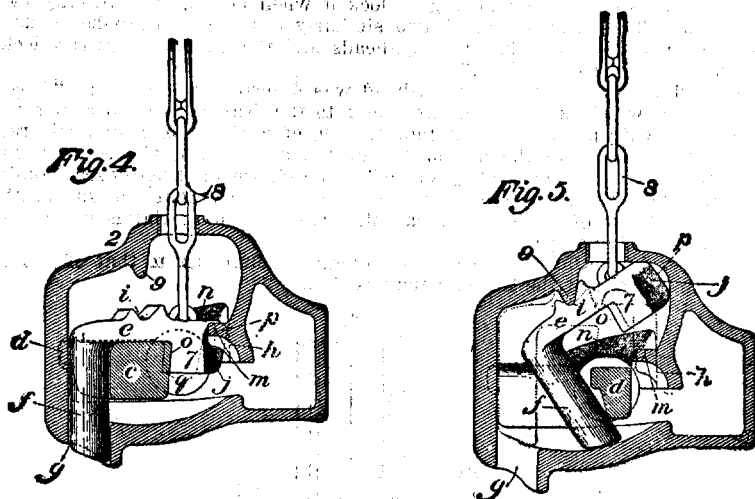
locking mechanism, with a draw-head carrying a common gravity vertically moving locking pin riding directly and solely upon such inner arm when the coupling-head is open and dropping to lock it when closed, substantially as described. (20) The combination of two similarly constructed draw-heads having pivoted automatically opening coupling-heads and the automatic gravity locking pins, substantially as described."

In the original patent the coupling-head was described as follows: "A is the coupling-head, which is pivoted at its center to the draw-head (said center being in direct line with prolongation of radius, a, b, of circle, a, b, c, and said radius being at right angle to the line of the draft), and which, viewed in position shown in Fig. 2, has a general 'D' shape." The clause in parentheses is omitted in the reissue. The first eight claims of the reissued patent are substantially the same as those of the original patent. The remaining claims are not contained in the original patent.

The Tower device bears a very close general resemblance to that of Lorraine and Aubin. Fig. 1 of the Tower patent is this:



This figure is a plan view, showing two coupler-heads, one closed and the other open, about to close. Figs. 4 and 5, set out below, show the Tower locking device,—Fig. 4 when the coupling-head is closed, and Fig. 5 when open;



The draw-head is identical with that of the complainant's device. The operation of this device is thus described in the opinion of the circuit court: "In one of the prongs swings the coupling-head, and the other prong is used as a buffer bar. The knuckle or coupling-head is formed with an outer arm, b, and an inner (and preferably longer) arm, or tail, c, which project substantially at right angles to each other, and the rear side of the tail is formed into a hook, d. In order to hold the knuckle in locked position (the position shown in Fig. 4, and at B, in Fig. 1), an angled-locking and opening piece is set within the coupler head, and shown most clearly in Fig. 4 and Fig. 5. The upper and transversely extending member, or arm, e, of this angled piece, reaches over the tail of the knuckle. Its dependent block or head, 7, is adapted to fit in front of and to lock the knuckle when in closed position, and its dependent arm, f, which extends downwardly at the rear of the knuckle, and is substantially upright when the knuckle is in locked position, passes through a guide hole, g, in the floor of the coupler. When the knuckle is locked, the head, 7, of the angled piece, fits between the front side of the knuckle tail and the shoulder, h, on the coupler-head; but when the brakeman raises the angled piece by a link, or lifting rod, 8, it is raised above the knuckle, and out of its path of motion. The notch, i, on the upward side of its member, e, engages a projecting rib or shoulder, 9, on the coupler-head, which shoulder acts as a fulcrum upon which the arm, f, acquires a radial motion against the rear side of the tail of the knuckle, moving it outwardly into the open space. The end of the arm, f, will then drop upon and be supported by the bottom or floor of the draw-head until the knuckle tail swung back and the operation of locking again succeeds. In this operation the rear side of the knuckle tail engages the arm, f, and moves the angled piece so as to carry the arm back into a vertical position, until its lower end comes into register with the hole, g, and then the angled piece will drop by gravity, its arm, f, entering the hole, and its head, 7, adjusting itself in front of the knuckle tail, and locking the knuckle. As a security against the jumping of the locking piece the opposite sides of the head, 7, are not in parallel vertical planes, but with downward divergent surfaces." 81 Fed. Rep. 712.

John W. Munday, Edmund Adcock, and Henry M. Post, for appellant.

M. B. Philipp, T. W. Bakewell, and E. A. Angell, for appellee.

Before LURTON, Circuit Judge, and SEVERENS and CLARK, District Judges.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

The whole subject of car couplers has long been a fruitful field of invention, and no less than 6,500 patents have been issued for improvements in this single device. The particular type of coupler to which both those in contest belong is that established by the automatic vertical plane coupler patented to Eli H. Janney, April 29, 1873, No. 138,405. This was followed by patent No. 156,024 of October 20, 1874, to the same patentee, for an improvement upon his original device, and another in 1879, and still another in 1882, and on April 2, 1878, by a reissue of his original patent, being re-issue No. 8,153.

The narrowness of the field for further invention in couplers of the type now in question will not escape observation if we examine the devices covered by Janney's patents. For this purpose we reproduce Figs. 1 and 4 from the drawings of the patent to Janney of April 29, 1873:

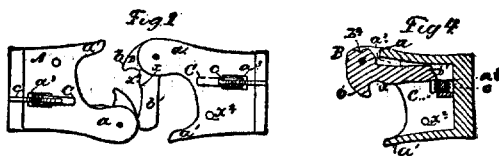
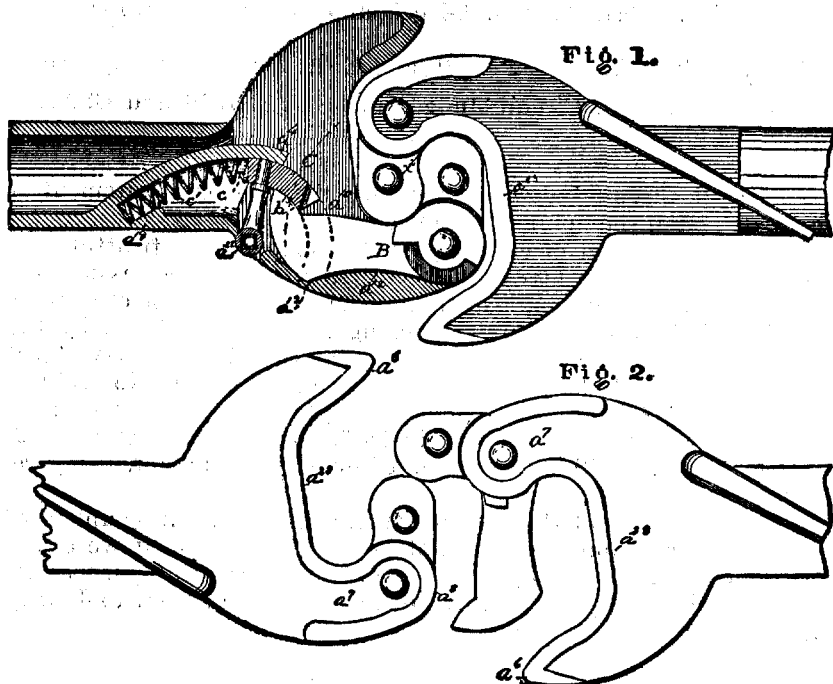
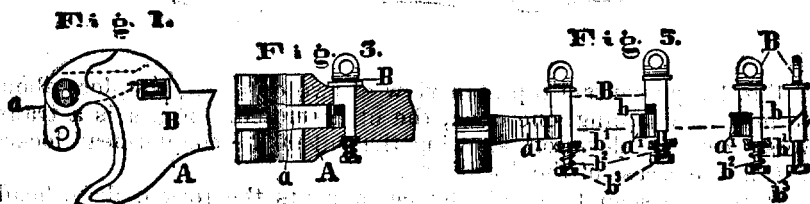


Fig. 1 represents a top plan view of two opposing couplers about to make a coupling, one open, the other closed. Fig. 4 is a transverse sectional elevation, showing the tail of the coupler-head locked within the recess of the draw-head.

It will be seen that this device presents the forked draw-head, which is one element in each of the claims of the Lorraine and Aubin patent here involved. One arm of this draw-head acts as a buffer, and also as a guard to prevent uncoupling from lateral motion of the cars; to the other a coupling-head or knuckle is pivoted which swings horizontally on the pivot in opening or closing to couple or uncouple, with a twin knuckle upon an opposing draw-head. The draw-head and coupling-head of Janney's improvement of 1879 is shown by Figs. 1 and 2, from the drawings of patent No. 212,703:



The form reached by his improvements patented February 21, 1882, No. 254,093, is shown by Figs. 1, 3, and 5 of the drawings:



This coupler is similar in construction to those of Janney's prior patents, with the exception that it has an automatic vertically moving gravity locking pin. It is guided in holes at the top and bottom walls of the draw-head, and moves freely in a vertical direction. The locking device in all the Janney patents, prior to 1882, is a spring latch engaging the tail or inner arm of the coupler-head. But this patent of February 21, 1882, is for a locking device which consists in a locking pin provided with an inclined face and a shoulder for holding the pin in a raised position. This pin extends downward through a hole in the top of the draw-head, and drops behind the inner arm of the knuckle-head when open, and in front of it when closed, the inner arm of the knuckle being also provided

with a double inclined face so as to push the pin up until the knuckle passes under, which then drops by gravity in front of the inner arm, and thus holds it in a locked position.

In Figs. 3 and 5, shown above, this locking pin is shown with a spring,  $b^2$ , but it is intended to be used, and is used, without such spring, the specification stating, "It may be provided with a spring."

In 1887 the Master Car Builders' Association adopted a standard shape of a vertical plane coupler, which was substantially that of the Janney coupler, and fixed upon gauges to decide the limits allowed in variation of sizes. These gauges fix the dimensions of the coupler-head or knuckle, and the size and contour of space between knuckle and draw-bar. The size and shape of the tail of knuckle, method of locking, point of pivoting knuckle-head, and location of locking pin, were left to discretion of the respective manufacturers of couplers. Couplers built on these lines are known as couplers of the M. C. B. type, and to this type both the contending couplers belong. It follows, from what has already been said, that couplers of the class to which the Lorraine and Aubin device belong were old, and that the most which can be said for the patent in suit is that it is for an improvement upon other automatic gravity locking couplers, accomplishing the same general result, in much the same way.

In summing up the argument for the patent in suit, counsel for appellant in their brief say:

"Lorraine and Aubin were the first to embody in a single coupler all the advantages, without any of the disadvantages, of the couplers of the old art." "This [say appellant's counsel] they accomplish by a new combination of old parts. And they were enabled to produce this new combination by reason of having invented a single new part,—the centrally pivoted  $\neg$ -shaped knuckle,—which was the key to the solution, and enabled the parts to go together in such manner that all of the numerous desirable results or features of advantage could be embodied without interference with each other."

Continuing, they say:

"The primary combination to which all of this is due, and which is included in all the claims of the patent, consists in the union of the following parts in a single coupler: (1) The Master Car Builders' forked draw-head; (2) The centrally pivoted  $\neg$ -shaped knuckle; (3) The pivot pin; (4) The automatic, riding, gravity actuated locking pin."

In respect to the defendant's coupler, the same counsel, in conclusion, say that "it embodies this primary combination and in its mode of operation, and produces all of its results and embodies all of its advantages, and is therefore an infringement of the principal claims of the patent in suit."

It must be conceded that, if the patent in suit is such as to entitle it to a liberal construction and a broad application of the rule as to equivalents, the device of the defendant company is an unblushing infringement. But this was not the view entertained by the learned trial judge, who, after an elaborate review of the prior art, reached the conclusion that the patent to Lorraine and Aubin could only be sustained by confining it to the precise form shown in the specifications and delineated in the drawings of the

patent, and that when thus limited the Tower device did not infringe.

This claim to the "centrally pivoted  $\cap$ -shaped knuckle," as a "new part" "invented" by Lorraine and Aubin, is not the subject of any separate or distinct claim of the patent. The knuckle described is only claimed as one element in a combination, and the combination is not infringed unless all of the elements of the combination are found in the infringing device. The invention claimed by the patentees is the combination of the elements mentioned in the several claims of the patent. This implies that all the rest is old, or, at least, that the patentee does not, so far as this patent is concerned, claim the elements separately. The Corn-Planter Patent, 23 Wall. 181-224.

But it cannot be admitted that a  $\cap$ -shaped knuckle is new. If this particular shape or form of the coupling-head be regarded as a limitation and as differentiating this element from the L-shaped knuckle of Janney, or the S-shaped knuckle of Tower or Dowling, it is not to be distinguished in form from the coupling-head of the patent to Hien of July 26, 1881, No. 244,724, nor Ferguson, No. 361,867, nor from the same element in the Kling patent of April 12, 1887, No. 361,165, which issued upon an application prior to the application of Lorraine and Aubin. For the purpose of showing this conformity in form or shape of the prior coupling knuckles of the old art, we here set out Figs. 2 and 3 of the drawings of the patent to Hien for an automatic car coupler:

FIG. 2.

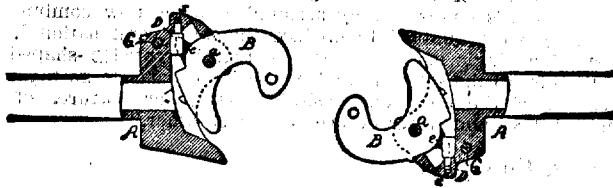
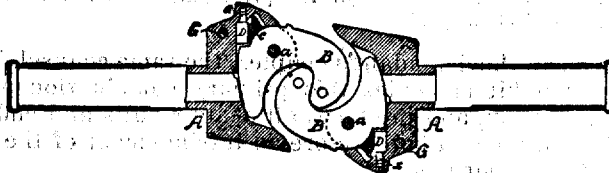
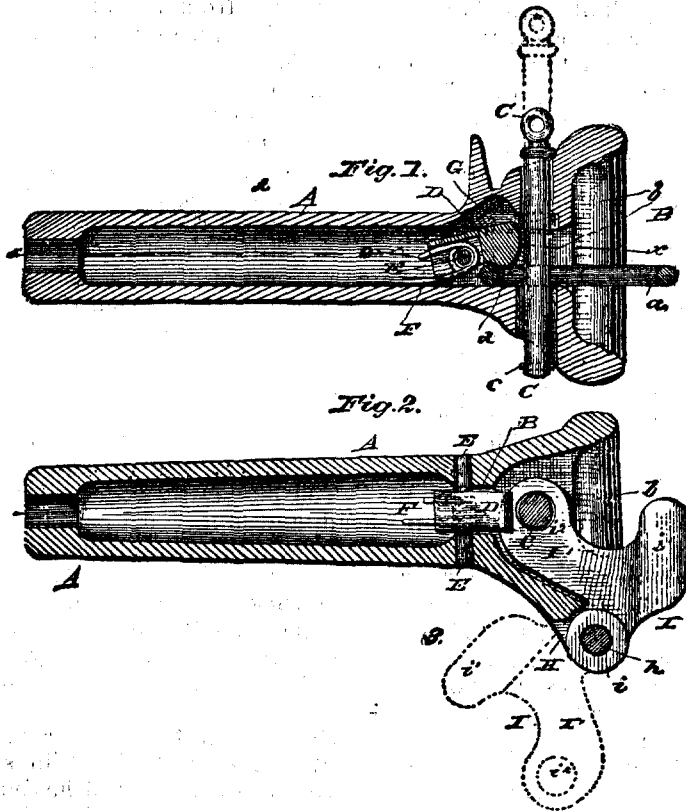


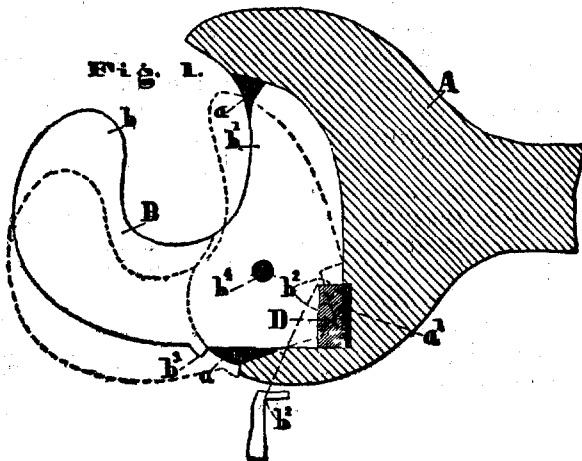
FIG. 3.



We also show below Figs. 1 and 2 from the drawings of the patent to Kling. Kling calls this knuckle a coupling-hook, and describes it as "my improved coupling-hook, I," which he says "is in general form similar to the ordinary ones in present use, and is provided with the hinge arm, i, and front vertical position or head, i, which is adapted to engage with the head of a similar hook to couple them as usual."



The patent to Wineman of January 29, 1884, No. 292,724, also shows this same  $\cap$ -shaped coupling knuckle. We here set out Fig. 1 from the drawings of that patent:



But appellant says that these knuckles from the old art, if  $\cap$  shaped, are not centrally pivoted, and therefore do not answer to this element in the device in suit. The expert of appellant says that by "centrally pivoted" is meant a knuckle pivoted opposite the gap between the arms of the knuckle. In the original patent of which the patent in suit was a reissue, the coupling-head was described as "pivoted at its center to the draw-head [said center being in direct line with prolongation of radius, a, b, of circle, a, b, c, and said radius being at right angles to the line of the draft]. \* \* \*". The words in brackets are omitted from the reissue, but the drawings of the original show the point of pivoting as described in the original. This drawing has been heretofore set out. This fact will become important if it shall be found that the central pivoting of this  $\cap$ -shaped knuckle should be treated as a limitation of the patent in suit. But in the Kling patent, as is seen by an inspection of Fig. 2 of that patent shown above, and in Ferguson by Fig. 14, the knuckle is not only  $\cap$ -shaped but centrally pivoted. The most that can be said of the patent in suit is that it is an improvement upon the Janney. The Janney has the bifurcated draw-head, the rotary coupling-head, and is locked by a pin which drops by gravity. The inner arm of the coupling-head, called the "tail," when uncoupled, projects out into the cavity between the arms of the draw-head, so as to be struck by the coupling-head of an opposing coupler. Thus, the Janney, itself a combination, accomplishes the same result in substantially the same way. The unlocking devices are not here involved, and for the present we shall not refer to them.

Now, in what respect is the device in suit to be differentiated from the improved Janney coupler? The great object in securing an automatic coupler was to avoid the necessity of having the trainmen go in between the cars, and with their hands guide the link and drop the pin, a necessity which existed under the old method of coupling with link and pin, and led to great destruction of life and limb. So great has been the danger attendant upon the old link and pin methods of coupling that congress, in 1893, enacted that after January 1, 1898, it should be unlawful for common carriers engaged in interstate traffic to permit to be hauled or used on their lines any car used in interstate traffic "not equipped with couplers coupling automatically by impact, and which cannot be uncoupled without the necessity of men going between the ends of the cars." That a coupling by impact could be made automatically by the Janney device is clear. His method of uncoupling differed from that of either of the patents in suit. That operation under his patent was performed by a movement of a lever placed on the side or top of the draw-head, which necessitated some exposure between the ends of the cars by the trainmen manipulating this lever. This defect led to many attempts to improve on his mode of uncoupling by the use of springs, levers, etc., which are the subject of several patents discussed in Coupler Co. v. Pratt, 70 Fed. 622, and Gould Coupler Co. v. Trojan Car-Coupler Co., 21

C. C. A. 97, 74 Fed. 794. Though defective in this particular, the Janney devices have nevertheless come into most extensive use, although a large number of patents have been since granted covering mechanisms which are supposed to be improvements upon them. That Lorraine and Aubin were granted a patent for their combination affords a presumption that there is a patentable difference between their device and those of Janney or any of the many improvers who obtained patents between Janney and the application of Lorraine and Aubin. *Boyd v. Tool Co.*, 158 U. S. 260, 15 Sup. Ct. 837. But the same presumption exists also in favor of the Tower patent.

Confining ourselves for the present to the first claim of the patent in suit, and comparing the combination there claimed of the bifurcated draw-head, the  $\cap$ -shaped knuckle centrally pivoted, and the automatic gravity locking pin, we find in Janney, Hien, Wineman, Ferguson, Kling, Dowling, and others of the prior art the same forked draw-head combined with same form of coupling knuckle and some form of gravity locking device, performing substantially the functions of the combination of the first claim of the patent in suit. To distinguish them from the device of complainant, we must read into its claims the description of these elements found in the specifications and drawings of its patent. When we do so, we find some peculiarities in the form and shape of the knuckle, in its place of pivoting, and in the mechanism of the locking device, not precisely paralleled in any one of these devices of the prior art, though each element, considered separately, is found in some of them and is old. Lorraine and Aubin are at most but mere improvers upon Janney and upon those devices which were confessedly but improvements upon Janney. Unless, therefore, their combination, as claimed in the first claim of their patent, shall develop under examination some peculiar combination of old elements producing some new and useful result, their patent cannot be sustained at all. The knuckle of the old art assumed many shapes. In Janney it somewhat resembles an L, though the longer limb has some peculiarities of form distinguishing it from the letter it most resembles. In others of the old art this knuckle has more the shape of an S, as in Dowling, No. 379,888, and in the patent to Tower, under which the alleged infringing device is made. In still others, as in Hien, Ferguson, Kling, and Wineman, the knuckle has a general  $\cap$  shape.

In every one of the old devices the shape of the knuckle is made to depend upon the function it performs as a part of the locking mechanism. That the tail should be long enough to project into the cavity of the draw-head is important only if it is desirable that the tail should receive a blow from the head of the opposing knuckle to insure proper rotation and the necessary engagement of the tail and locking pin. In Janney's device this would seem to be necessary. The head of the knuckle when open is so presented to the opposing head of its twin as that closing would not always result from the impact. But in Hien, Harrington, Ferguson, Wineman,

and Dowling the head of the opened knuckle is presented to the head of the opposing knuckle at such an angle as that closing is insured without regard to whether the tail is struck. In these last-mentioned devices the projecting, long, inner arm was therefore unnecessary, and might be omitted without interference with the other functions of the knuckle. Still another matter determining the shape and form of the knuckle is the character of the locking device. In Janney the pin is arranged to drop by gravity in front of the knuckle. When unlocked, his pin is behind the inner arm or tail of the knuckle. To raise the pin and pass the tail under it, the face of both the pin and the tail of the knuckle are so inclined as that the effect of the blow upon the front of the tail forced the pin up and the tail under it, so that by gravity the pin drops outside the tail and holds it locked. Lorraine and Aubin adopted a different mode of locking. To them it seemed desirable that the pin should ride on the tail of the knuckle until dropped by gravity into a hole in the tail and thus lock it in position. This locking device was, however, not peculiar to Lorraine and Aubin. A locking device in which a gravity pin is carried on the tail of the knuckle until dropped into a locking position is seen in the patent to Richard E. Gray, No. 261,702, and in Dowling, No. 379,888, the latter only being of the Janney type. Thus, if a gravity pin is to be carried on the tail of the knuckle, the latter must be so shaped as to furnish a surface upon which it may ride. In Dowling, the pin drops in front of the tail, as in Janney, but in Lorraine and Aubin it drops through a hole in the tail and a corresponding hole in the floor of the chamber in the draw-head. This required, therefore, greater breadth of tail than in Dowling. The head of Dowling's knuckle swings when open at such an inclination that a blow thereon from the head of the closed opposing knuckle insures rotation and secures locking. His tail need not, therefore, be long enough to project into the space between the arms of the draw-head to be struck by the head of an opposing knuckle. The head of the knuckle of the patent in suit is not so pivoted as to insure rotation under all conditions when struck by the opposing knuckle. It was therefore important to adopt the long tail of Janney. Thus the character of the locking device adopted by Lorraine and Aubin determined the shape of his knuckle and its place of pivoting. The patent itself does not specifically state any advantages in a  $\square$ -shaped knuckle, except as they are implied from what is said as to the advantages of a central pivoting. Of this feature of the patent the specifications say:

"The object of pivoting the coupling-head at its center is threefold: First, if the coupling-head was otherwise pivoted, by reason of its shape, when uncoupled, the arm, L, of the unlocked head would bind with arm A<sup>1</sup> of its neighbor, and prevent uncoupling with facility, and this it would do especially on curves; second, if the coupling-head were pivoted back of its center or in the arm, L, it would then be necessary to open both heads to either couple or uncouple, which would be unnecessary and faulty; third, if the coupling-head were pivoted in its forward arm, A<sup>1</sup>, when the coupling-head was entirely open, the arm, L, would then come entirely without the draw-head, and there would be

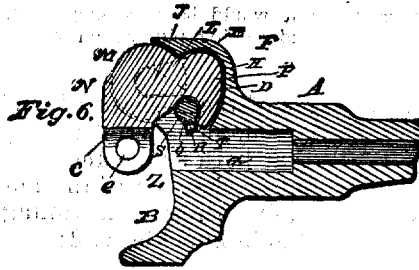
nothing to support the locking pin in a raised position, and it would accordingly fall, and when coupling it would be necessary to construct some mechanism to automatically raise said locking pin, which would be complicated and is unnecessary."

The supposed advantages of the  $\cap$ -shaped knuckle centrally pivoted, as stated by M. E. Dayton, an expert for complainant, supports the conclusion we reach that both shape and point of pivoting are but incidents of the locking mechanism of the Lorraine and Aubin combination. Mr. Dayton, in stating the advantages of the peculiar form of the Lorraine and Aubin knuckle, said:

"As to the advantages of the  $\cap$ -shaped coupling-hook thus mounted in the draw-head, and thus combined with a centrally placed locking pin, he must, in my opinion, be a very poor mechanic to whom these advantages are not apparent from the described and obvious operation. The primary advantage is that the rear leg of the  $\cap$ -shaped coupling-hook swings far enough forward in opening to bring its front edge into the cavity of the draw-head and into the path of an approaching coupling-hook, while, at the same time, its rear edge remains within the chamber of the draw-head in position to act as a support for the uplifted locking pin. At the same time, also, by reason of the changed position of the pivot pin, the front arm of the coupling-hook is opened and moved laterally far enough to admit an opposing similar hook, which is closed. Still further, at the same time, the whole enlarged and changed coupling-hook is easily embraced within the limits of the inclosed coupling-head. Additionally, the added leg of the  $\cap$  which gives the  $\cap$  shape to the coupling-hook, gives a rear surface to the latter which may abut broadly against a transverse rear wall of the chamber in the draw-head to give great strength in resistance of bumping strain substantially in line with the front arm of the hook against which such strains are initially applied."

If this knuckle was not shaped as it is, and rotated from its center, it would not perform the double function of projecting out into the recess of the draw-head to be struck by the opposing coupler and at the same time support the pin when unlocked. If either of these functions be omitted, and some other locking device substituted, as in Janney, or the advantage of the projecting tail be omitted, as in Dowling, then the precise central pivoting of the knuckle is of no direct advantage. If it be pivoted far enough from the locking device to prevent adverse leverage, there is no mechanical reason for central pivoting not due to its peculiar shape and locking device. The evidence afforded by such practical men as compose the Master Car Builders' Association is of great weight; and it is in evidence that they have recommended that the point of pivoting should be  $2\frac{1}{2}$  inches forward of a prolonged radius at right angles to the line of draft, of a circle of which the gap in the knuckle should form a part.

The fact that the rear of the tail has a bearing against the rear wall of the chamber in the draw-head is not mentioned in the specifications, nor is any strength in resisting buffing blows claimed therein as a result of such abutment. It is doubtless of some advantage of the character indicated, but is one found to a large degree in the Dowling No. 379,888. The abutment of Dowling's S-shaped knuckle against the rear wall of the recess in which it is locked is shown by Fig. 6 from the drawings of that patent shown below:



The specifications of that patent say: "The rear wall of this recess curves forward, and its outer or marginal portion, E, extends to the lugs, F and C, and forms a bearing and stop for the claw, N." The tail of Dowling's knuckle does not project transversely across the open recess of the draw-head as in Lorraine and Aubin, but, if it did, we should then have a  $\cap$ -shaped knuckle centrally pivoted, the rear wall of the chamber serving as a bearing for the tail of the knuckle. As it is, the buffing strains are in part sustained by the bearing of the short tail of an S-shaped knuckle against the rear wall of the chamber in draw-head. But this advantage of a parallel sided knuckle having a bearing against the rear wall of the chamber in the draw-head is more distinctly seen in the device patented to P. Hien, No. 244,895, Figs. 2 and 3 of which have been shown in a former part of this opinion.

We reach the conclusion from these considerations, based upon the history of the prior art, that the patent in suit can only be supported by limiting its claims to the precise form of the device described in the specifications and delineated in the drawings. That the combination has some merit may be conceded, but it is a merit dependent upon slight changes in shape and form of old elements, thereby enabling the patentees to combine in a slightly new way old elements for the purpose of doing substantially what they had been doing in the old art. These changes are of so slight a character, and the improvement by the new combination so debatable, that if any liberality in construction, or in the application of the doctrine of equivalents, be conceded for the purpose of including other improvers along the same lines within the scope of this patent, it will have the necessary effect of rendering it void for anticipation. "That which infringes if later, anticipates if earlier." The invention is in no sense one of primary character, and complainant upon this ground is not entitled to that range of equivalents accorded to such an invention.

In *McCormick v. Talcott*, 20 How. 402-405, the court said:

"If he be the original inventor of the device or machine called the 'divider,' he will have a right to treat as infringers all who make dividers operating on the same principle, and performing the same functions, by analogous means or equivalent combinations, even though the infringing machine may be an improvement of the original, and patentable as such. But if the invention claimed be itself but an improvement on a known machine by a mere change of form or combination of parts, the patentee cannot treat another as an infringer who has improved the original machine by use of a different form or combination performing the same functions. The inventor of the first improvement cannot

invoke the doctrine of equivalents to suppress all other improvements which are not mere colorable invasions of the first."

In *Miller v. Manufacturing Co.*, 151 U. S. 207, 14 Sup. Ct. 318, Justice Jackson, for the court, said: "The range of equivalents depends upon the extent and nature of the invention." This is also the rule of the English courts in regard to mere improvements. In *Proctor v. Bennis*, 36 Ch. Div. 740, Lord Justice Cotton said:

"Where there is no novelty in the result, and where the machine is not a new one, but the claim is only for improvements in a known machine for producing a known result, the patentee must be tied down strictly to the invention which he claims, and the mode which he points out of effecting the improvement."

In *Bragg v. Fitch*, 121 U. S. 478-483, 7 Sup. Ct. 981, the court, speaking of an invention in the light of the prior art, said: "It is one in a series of improvements, all having the same general object and purpose; and that in construing the claims of his patent they must be restricted to the precise form and arrangement of parts described in his specifications, and to the purpose indicated therein."

In *Wells v. Curtis*, 31 U. S. App. 123-158, 13 C. C. A. 494, and 66 Fed. 318, this court had occasion to consider this whole question of the range of equivalents where the invention was but a mere improvement, and reached the conclusion in that case that the inventor, where the step in advance was a slight one, must be held rigidly to the specific form of the device he had described and delineated.

When we come to compare the complainant's device with that made in accordance with the Tower patent, we find that, although defendant's has the forked draw-head, it does not have either the  $\cap$ -shaped knuckle centrally pivoted, nor the automatic gravity locking pin of Lorraine and Aubin. The Tower knuckle has the shape of an S, and is not centrally pivoted, though nearly so. The change in shape is not merely colorable, for it in shape and form is just what it must necessarily be in order to perform its function in co-operation with a locking device which does not necessarily ride on the knuckle, though it may exceptionally do so. If the tail of the knuckle was filled in to give it the  $\cap$  shape of complainant, a different locking device would be necessary. Shaped as it is, an absolute central pivoting is not necessary to its operation, and yet it is pivoted near enough to the center to properly rotate the knuckle and avoid adverse leverage. The locking device is a two-legged pin or block. The shorter leg drops by gravity outside the tail, and holds it in a locked position. The longer leg rides in a groove in the floor of the chamber in the draw-head. When the device is locked, this long leg drops behind the tail, and through a hole in the floor of the draw-head. When the pin is raised by the action of trainmen in lifting the chain attached, the long leg rides under the tail as a result of the radial motion given to it by the pull of the brakeman upon it, and ejects the tail from the chamber, thrusting it out into the opening between the arms of the draw-head, in position to be struck by an opposing coupler and relocked. The complainant's opening is the result of the force of gravity, which swings the tail of the knuckle down an inclined plane, where it remains open until closed again by force. This, as stated by the circuit judge, is an automatic opening, while the open-

ing in the defendant's coupler is the result of the raising of the locking block through the interposition of a trainman. These differences between the two devices serve to distinguish the defendant's mechanism from that of the complainant's quite as markedly as complainant's device is distinguished from the old art. If there is a patentable difference between the invention of Lorraine and Aubin and the many devices prior in time to them for accomplishing the same result, there is the same patentable difference between the defendant's coupler and that of complainant. Both are mere improvers. The field was a narrow one for either. There is as much to distinguish Tower from Lorraine and Aubin as there was to distinguish the latter from Janney, Dowling, Ferguson, Wineman, Kling, and others who have traveled over the same field. We therefore conclude, that although an S-shaped knuckle, not centrally pivoted, in combination with a gravity pin which does not normally ride on the tail of the knuckle, performs substantially the same functions as the knuckle and gravity lock of the patent in suit, yet this fact is not enough to justify us in finding infringement of a patent so limited as that of Lorraine and Aubin. Unless complainant is entitled to a considerable range of equivalents, it cannot be said that the elements in the defendant's combination are identical with those in the first claim of the patent in suit. Such a range of equivalents as would bring the defendant's device within the scope of the complainant's first claim would invalidate this claim upon the ground of anticipation. The elements included in the first claim should all be read into each of the other claims here involved. Two of the elements, the D-shaped knuckle centrally pivoted and the gravity pin riding directly on the tail of the knuckle, are not found in the infringing device, limited as we have limited the first claim. The groove, G, and the recess, S, nor the shoulder, S<sup>1</sup>, which are elements in some of the other claims, are not found in the infringing device, nor any equivalent for them, within the limited range of equivalents to which complainant is entitled.

We have not deemed it necessary to go into the question raised by the criticisms made upon the reissued patent, nor have we deemed it at all important, in the view we have as to the question of infringement, to consider the effect of the proceedings in the patent office as limiting the claims of the reissued patent. The decree of the circuit court must be affirmed upon the defense of noninfringement. We express no opinion as to the validity of the Tower patent.

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**CHRISTY et al. v. HYGIEA PNEUMATIC BICYCLE SADDLE CO. et al.**

(Circuit Court, D. Maryland. June 13, 1898.)

**1. PATENTS—INVENTION—BICYCLE SADDLES.**

There is no invention in constructing a bicycle saddle top with vertical walled depressions, adapted to receive two cushions or pads, and hold them firmly in place.

**2. SAME—EVIDENCE OF PATENTABILITY—LARGE SALES.**

Large sales and increasing popularity cannot be accepted as certain proofs of novelty and invention when the article, as made and sold by

complainant, differs widely in many respects from the article shown in the specifications and covered by the claims.

**8. SAME—BICYCLE SADDLES.**

The Christy patent, No. 532,444, for a bicycle saddle having a solid top with vertical walled depressions adapted to receive and hold in place two cushions or pads, is void for want of invention.

This is a suit in equity by H. A. Christy & Co. against the Hygeia Pneumatic Bicycle Saddle Company (Walter B. Wentz, receiver) and William J. Sneeringer for alleged infringement of letters patent No. 532,444, issued January 15, 1895, to Henry A. Christy, for a bicycle saddle.

Julian C. Dowell (Benj. Butterworth and Wm. A. Redding, of counsel), for complainants.

Stewart & Stewart, Horace Pettit, and Stinson & Williams, for defendants.

**MORRIS**, District Judge. The defenses are want of patentable novelty and noninfringement. The claims of the patent are as follows:

"(1) A bicycle saddle having a solid top provided upon its upper surface with recessed or sunken portions at each side of the seat portion, constructed to receive and hold removable pads; said recesses being formed with abrupt marginal walls to prevent the pads from slipping, substantially as described. (2) A bicycle saddle having a solid top provided upon its upper surface with recessed or sunken portions at each side of the seat portion, constructed to receive and hold pads, said recesses being formed with abrupt marginal walls to prevent the pads from slipping, in combination with pads adapted to fit said recesses so as to be removably retained therein, substantially as described. (3) A bicycle saddle having a solid top provided upon its upper surface with recessed or sunken portions at each side of the seat portion constructed to receive and hold removable pads, and having a horn portion shortened or truncated, so that it will not project between the legs of the rider; and also cut away or recessed upon its upper surface centrally of said horn portion, substantially as described."

The complainant contends that claims 1 and 2 are infringed. Claim 3 is not in controversy, for the reason that in the defendants' saddle it is conceded that the horn is not truncated or shortened up so as not to project between the legs of the rider as called for by claim 3. Claim 1 is for the saddle plate made with sunken recesses on each side of the center line of the seat, the recesses being formed with abrupt marginal walls to receive and hold removable pads, and prevent the pads from slipping. Claim 2 is for the same device in combination with pads adapted to fit the recesses so as to be removably retained therein. As the defendants' saddle has the removable pads fitted into the recesses, if it infringes either it infringes both claims, and, so far as this case is concerned, claims 1 and 2 may be considered as identical. The Christy saddle, as manufactured by the complainant and known to the trade, is quite different in some of its features from the saddle described in the specification and the drawings of the patent, so that the question to be decided in this suit turns, not upon the similarity of the defendants' saddle to that made by the complainant, but upon the validity of the claims of the patent in suit and the infringement of those claims as explained by the specification. The prior patents put in evidence

show that there was nothing new in any of the objects which Christy has in mind to accomplish. Christy states that his object was to lessen the discomfort and injury which bicycle riders suffer from the pressure of the saddle upon the perinæum, and from the rubbing of the legs against the horn. In Hicks' patent for a cushion seat designed particularly for bicycles,—No. 487,367, October 11, 1892,—he states that his object is to obtain a cushion seat that will adjust itself to the shape of the rider, and at the same time prevent injurious pressure against the perinæum. This he tried to accomplish by an inflatable cushion with a covering of any suitable material secured in any desired manner to a base of some inelastic material, preferably of wood, the cushion to be formed with a fissure extending from the front rearward to any desired extent. He says:

"This fissure prevents upward pressure on the perinæum when a person sits thereupon. This fissure may be formed by securing a portion of the top of the cushion intermediate the sides down firmly upon the lower portion thereof, allowing the cushion to be inflated at each side thereof. The fissure may extend only part way toward the rear of the cushion, \* \* \* or it may pass to the rearward limit of the cushion, dividing it into two separate air chambers. \* \* \* Such a form relieves the perinæum. \* \* \*"

We thus have in the Hicks device an inelastic base upon which are secured two cushions to support the ischial tuberosities of the rider, and separated along the center line of the seat by a vacant space which relieves the perinæum from all pressure. This is precisely what is accomplished by the two separated cushions or pads with the space between them shown in the Christy saddle as manufactured by the complainant. In the English patent to Henson—No. 19,840 of 1893—the same object is declared to be the purpose of the bicycle saddle there described, in which there is cut out from the framework of the saddle the portion between the points where the ischial tuberosities are to rest, or a depression is formed in the frame there, so as to leave a vacant space with nothing to press against the perinæum. It is apparent, therefore, that the claim of Christy was rightly restricted to the mechanical device by which a saddle having two separated cushions or pads, with a space between them, might be constructed; his invention, as claimed by him in his patent, being solely for the sunken depressions in the solid saddle top so formed as to receive the cushions or pads, and prevent the pads slipping. It is conceded that if cushions or pads similar to those shown in the defendants' saddle are fastened to the top of a saddle without depressions, there is no infringement. The validity of the patent then depends upon whether, in view of the state of the art, it required invention to construct a saddle top with vertical walled depressions adapted to receive the two cushions and hold them in place. It is certainly a case in which all that is new in the mode of construction is not very distinguishable from mere mechanical improvement, and if it can be shown that the idea of the mode of construction was not new, then, I think, nothing remains but mechanical skill. It being conceded that all that the complainant can make claim to is the depressions to receive the pads, it is important to see if that idea, in connection with the seat of a metal-top saddle, was new. It is a matter of observation that a depression,

more or less deep, made in a seat in order to receive a cushion, is common and old; and in the English patent in evidence, No. 12,854 of 1889, to Henry Edward Newton, he describes an equestrian saddle to be made of thin sheet steel or iron in which "two cup-like depressions are stamped, one depression being on each side of the central axis of the blank." "These depressions are subsequently filled up with India rubber, gutta percha, padding, or any other suitable elastic substance, so as to render the seat comfortable and elastic to the rider." And his claim 2 is for "the cup-like depressions, F, F, as described, as illustrated in the drawing for the purposes herein set forth." This, it seems to me, is the substance of the complainants' specification and claim, viz. in a metal-top saddle a depression on each side of the axial line, made to receive padding, intended to make the seat elastic to the pressure of the tuberosities of the ischii. Here we have the same problem of a rigid metal seat to be made elastic at the same two points of contact with the rider's body, and the same device to accomplish it, viz. depressed spots in the metal, to be filled with pads.

It is urged that there are in the complainant's device the additional elements that the depressions are made with abrupt walls to prevent the pads from slipping, and that the pads are removable, both of which features are asserted to be important and useful improvements. But with the cup-like depressions to hold the pads, already shown by Newton's patent, it does not appear that it required invention to make the depressions sufficiently abrupt to prevent the filling from slipping. In his specification Christy states:

"In my improved saddle I have only a truncated horn; \* \* \* and I also prefer that this truncated horn portion, instead of being convex upon its upper surface, as in the old construction, should be cut away or concave centrally thereof, thereby giving room for the portions of the person which are so easily injured. I also preferably make the rear of the saddle wider than ordinarily constructed, so as to sustain the fleshy portions of the buttocks as well as the pelvis, and provide upon each side of the seat portion a sunken portion or recess constructed to receive and hold pads or cushions which may be removably fitted therein for the comfort and ease of the rider."

In the drawings the pads are shown lying in the depressions, and not extending above the plane of the metal top of the saddle. In the Christy saddle, as manufactured, the horn is not truncated, it is not cut away or made concave on its upper surface, and the saddle is not made wide, and does not support the fleshy portion of the buttocks at all. As manufactured, the Christy saddle presents nothing to the body of the rider but the two small pads on which the two ischii rest, sustaining the whole of the rider's weight. Instead of the concavity, the truncated horn being cut out to relieve pressure on the perinæum, there is substituted on the saddle as manufactured an open space the whole length of the saddle from front to rear between the two cushions, which space, from the cushions being considerably separated, and being built up quite high above the plane of the metal saddle, is both wide and deep. Merit is claimed for the saddle because the cushions are removable, but as manufactured they are held in the recesses by catches of twisted wire. Any cushion which is affixed to a solid base may be removed if the fasten-

ings are released. Great advantage is also claimed because the abrupt walls of the sunken recesses prevent the cushions from slipping. But if it was not new, as is shown by the English patent to Newton, to make recesses in a metal saddle to receive cushions, it can hardly be said to require invention, when the cushions as used are liable to slip, to make the recesses sufficiently abrupt to prevent slipping. The strongest and most persuasive argument which the complainant urges in favor of the patentability of the Christy saddle is based upon the testimony showing the rapidly increasing sales, and its decided popularity, since it has become known upon the market. But the saddle manufactured differs so widely from the saddle shown in the specifications and drawings that it is not easy to determine just what features make it acceptable to the trade and to those who use it. It would appear that some of the features of the saddle as manufactured which are not shown in the saddle as patented possess more novelty and utility than those described in the patent. It may well be that the advantages of the manufactured saddle result from the fact that the saddle plate is reduced in size until it is nothing more than a support for the two pads, and has no bearing at all for the fleshy portion of the buttocks so that the rider's weight rests exclusively upon the two ischii of the pelvis, and also from the fact that the interval between the cushions or pads leaves an open space from front to back similar to that shown in the Hicks patent, through which there can be a current of air, and because of which there can be no pressure upon the perinæum. It seems quite probable that it may be these unpatented features, not shown in the specifications or drawings, which have given the Christy saddle the acceptance which it has obtained, rather than any advantage of construction arising from the fact that the pads are set in depressions, and are detachable. It may also be that with the enormously increased use of bicycles experience may have taught particular riders that upon long runs it is less injurious to use one kind of a saddle than another, although not so agreeable at first. The fact of comparative utility when the acceptance of the improved device may just as well be attributed to features not claimed in the patent is an unsafe guide in determining the existence of patentable invention. Upon the whole case, considering the prior state of the art, I have been forced to the conclusion that it did not require invention to form the recesses on the surface of a solid-top saddle with abrupt marginal walls to receive the pads and keep them from slipping.

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UNION SWITCH & SIGNAL CO. et al. v. PHILADELPHIA & R. R. CO. et al.

(Circuit Court, E. D. Pennsylvania. May 26, 1898.)

**1. PATENTS—PRIOR USE—RAILWAY SIGNALING.**

The Westinghouse patent, No. 270,867, for improvements in electric circuits for railway signaling, is void because it was in practical and public use for more than two years before the patent was applied for, and because a complete description of it was previously published in the "Railroad Gazette," a trade paper having a general circulation among railroad people and those connected with railroads.

## 2. SAME—INFRINGEMENT.

The Gassett patents, Nos. 233,746 and 246,492, for electric railway signaling apparatus, which disclose improvements on the preceding Robinson system (No. 130,661, reissue 5,938), consisting in the exhibition of a danger signal set at the entrance of a track section until the train has passed over a certain portion of the track section next in advance, thus securing two danger signals rearward of the train while it is traversing the overlap, are not infringed by a device in which two danger signals are set at the beginning of each section while the train is traversing that section, and one of which continues at danger, as a distant cautionary signal, during the passage of the train over the second track section in advance. At most, these patents secure the exclusive right only to use the specific means described to produce the described result.

## 3. SAME—INFRINGEMENT—CONNECTORS FOR ELECTRIC TRACK CIRCUITS.

A patent for an improvement in connectors for electric track circuits, consisting of a wire having its ends coiled around and soldered to the outer ends of tapering plugs, which are driven into holes bored in the rails to be connected, is not infringed by a connector formed by laying the ends of the wire in longitudinal grooves formed in the sides of the tapering plugs, and then driving the plugs, with the wire, tightly into holes in the rails.

## 4. SAME.

The Gassett & Fisher patent, No. 227,102, and the Means patent, No. 273,377, for improved connectors for electric track circuits, construed, and *held* not infringed, the former as to claim 1, and the latter as to claim 6.

This was a suit in equity by the Union Switch & Signal Company and others against the Philadelphia & Reading Railroad Company and others for alleged infringement of a number of patents relating to electric railway signaling.

Geo. H. Christy, J. Snowden Bell, and J. Warren Coulston, for complainants.

Witter & Kenyon and Thomas Hart, Jr., for respondents.

ACHESON, Circuit Judge. The plaintiffs sue for the alleged infringement by the defendants of five letters patent, namely: First, No. 233,746, dated October 26, 1880, to Oscar Gassett, for electric railway signaling apparatus; second, No. 246,492, dated August 30, 1881, to Oscar Gassett, for electric railway signaling apparatus; third, No. 270,867, dated January 16, 1883, to George Westinghouse, Jr., for improvements in electric circuits for railway signaling; fourth, No. 227,102, dated May 4, 1880, to Oscar Gassett and Israel Fisher, for a connector for electric track circuits; and, fifth, No. 273,377, dated March 6, 1883, to Charles J. Means, which includes improved means for attaching a conducting wire to the rails of the track. The Gassett and Westinghouse patents relate to signaling devices for the protection of a railway train against rear collisions from other trains following on the same track.

Before considering the particular features of the signaling appliances of these patents, it will be well to give some attention to the prior state of the art of railway signaling. Prior to the date of the earliest of the inventions of the patents in suit, electrically actuated railway signaling apparatus, automatically operated by a moving train, was in common use. The railway track was divided into a series of blocks or track sections of any desired length, and the protecting signals were located and operated with respect

to the track sections as the train passed over them successively. The moving train protected itself against rear collisions by setting signals to "danger," "caution," and "clear," for the information and guidance of the engineer of the following train. It was common to maintain at least two protecting signals to the rear of a moving train. "Home" and "distant" signals were in use. These signals act in connection with each other. The home signal is the signal for the track section at the entrance of which it stands. The distant signal is placed at a convenient distance to the rear of its home signal, and gives cautionary notice of the showing of the home signal. All this was part of the art as practiced anterior to any of the inventions of the patents sued on. A reference to a few of the prior railway signaling patents may be helpful.

The British patent of 1872 (No. 3,448), to Sykes & Francis, shows a series of springs arranged along one of the rails of the track in electric connection with electro-magnets for working the signal lights and signal arms, and operated by the passing train. The patent states:

"For example, a train on leaving station No. 1 (see diagram, Figure 4), acts upon a spring outside that station, and thereby moves the signals at that station to danger. On reaching a position midway or between stations Nos. 1 and 2, it acts upon another spring, and moves the signals, which may be the 'distant signals' in connection therewith to danger, without interfering with the signals at station No. 1. Then, on leaving station No. 2, it acts upon another spring, thereby moving the signals at this station to danger, and at the same time returning the signals at station No. 1, and the intermediate or distant signals to caution. This mode of working signals automatically may, of course, be modified to adapt it to the various systems now in use on different lines."

The British patent, of 1873 (No. 344), to Carr & Barlow, for improvements in railway electrical signaling apparatus, states:

"The object effected by our invention is that no train passing along a line of railway can approach within a limited distance of the preceding train without receiving a warning signal. The distance at which trains are kept apart may be any suitable distance, and the apparatus works automatically."

The specification, among other things, says:

"Now, let us suppose a train to be starting from A. It arrives at the lever at a, passing over it, breaks the current a, A, thus leaving the signal 'line blocked' at A. The train, going on, will arrive at B, and receiving the signal 'line clear' will proceed, passing over the lever, b. In doing so, it breaks the current b, B, thus leaving the signal 'line blocked' at B, and at the same time, by the wire b, a, brings in action the electro-magnetic apparatus at a, which couples up the circuit a, A, thus leaving signal 'line clear' at A, and so on. The arrangement, so far as above described, is suitable for lines of railway on which every train stops at each of the stations; but, for the lines of railways where this is not the case, we modify the arrangement by employing, in addition to the insulated bar situated at each station itself, another corresponding bar at a distance in rear of the station to act as a distance signal apparatus, as shown by the diagram view, Figure 1, so that a train receiving a signal of 'line blocked' at the distance signal may slacken its speed as it comes up to the station, when it will receive another signal, and either go on or stop, according to the signal it receives."

The United States patent to Henry Flad, No. 162,369, dated April 20, 1875, shows improvements in safety signals for railways, embodying the principle of overlapping signals. The patent states:

"For a double track (where the trains only run in one direction on each track), the signal abreast of the train is set to indicate danger (to a train following), and the signals are left standing at danger for a sufficient distance in the rear of the train, but are set to indicate safety, after the train has proceeded a given distance, by connection with the same mechanism by which the signals are set to indicate danger. At least one signal in condition indicating the danger is at all times left to the rear of the train, the train reversing the second signal to its rear; so that, in case of an accident between signal stations, the train following would have sufficient warning. For single-track railways (on which the trains run in both directions) the construction of the signal apparatus is such that upon each side, abreast of the engine, the signals are reversed by the passing train; and simultaneously the signal two stations ahead, upon the left side, is set to danger, while upon the right side the signal two stations to the rear is set to safety, so that a train either following or meeting the first will be warned about two stations from the train first mentioned. Thus, it will be understood, the train does not act on the signal at the station next in advance or to the rear, but upon signals more distant, so as to always leave at least one danger signal in advance, and one to the rear of the train, and at sufficient distance for warning to another train. This is what I denominate my system of overlapping signals, as the pipes or other means of communication, between the train and distant signals, overlap or run past each other, as is fully explained hereafter by reference to the diagrams."

The first claim of this patent indicates the scope of Flad's invention, viz.:

"(1) The method herein described of signaling, whereby overlapping signals at a distance from the train are reversed, while other signals, between the former signals and the train, remain at rest, to be reversed in their turn, all substantially as and for the purpose set forth."

Flad's preferred means of carrying out his invention is by pneumatic action, but he does not confine himself to that, and, after stating that hydraulic or other specified means may be employed to work the apparatus, he adds: "Or the communication between the train and signal may be by electricity, the closing or opening of the circuit setting in motion mechanism by which the signals are reversed." There can be no doubt that, at the date of Flad's patent, any electrical engineer of ordinary skill, acting upon the suggestion of the patent, could have successfully applied Flad's system of overlapping signals by means of mechanism electrically actuated and operated by the train.

The overlap relation of safety signals is a main feature of United States patent No. 150,030, to Hall, dated April 21, 1874, for an improvement in train-operated electric railway signaling apparatus. It is proved that this Hall overlap was in practical use for a considerable time, beginning about the year 1873, on the Eastern Railroad, in the state of Massachusetts, where there was for each track section an overlapping space of 500 feet in length during the passage over which the train was protected by two danger signals behind it, the first of these signals not being put to safety until the train had passed beyond the 500 feet overlap.

Originally, the method of operating railway electrical signaling apparatus automatically was by means of instruments so arranged along the track that the train in passing engaged with them. This method is called the "track instrument system." Afterwards William Robinson devised and patented a method for the automatic operation of

railway electric signals by the passing train, which was a very great improvement upon the track instrument system. Robinson's invention is described in his United States patent No. 130,661, dated August 20, 1872 (reissue 5,958). His specification states the object of his invention thus:

"The object of this invention is to operate electric signals, audible or visible, by means of moving or standing vehicles or trains without the use of ordinary track connections for closing or breaking circuits, and without the use or with a limited use of line wires for conducting the electric current, the rails of the track being used for the latter purpose."

His patent shows the track divided into sections insulated at their ends, and the poles of the battery connected by wires to the two opposite rails, and the electro-magnet which controls the signal in like manner connected to the two lines of rail. Robinson thus provided a normally closed circuit in each track section with the signal normally in safety position. The method of operation is this: As the train enters upon a track section, its wheels and axles, by short-circuiting, cut off the battery current from the electro-magnet, which is thus demagnetized, and thereby the signal is shifted to danger, and remains at danger as long as long as any part of the train is on the section. The specification states:

"When the signal banner is in a position of exposure, as shown, the lever, L, may serve to close an additional circuit through the battery, B, which may be used to operate an alarm, I, in conjunction with the signal, S, or to actuate another signal at any distant point. Furthermore, instead of using the magnet, H, to actuate the signal directly, it may be used as a relay, operating, when magnetized, to keep the circuit which directly actuates the signal open or closed, as desired. The signals may be used also on a single track, and be applied as block signals, and for other purposes on single or double tracks. When used as a block signal or for other purposes, it may be desirable to indicate at a distant station when the signal is operative. To accomplish this object, carry one of the wires from the magnet, M, to the distant station. Here let the wire be passed through the coils of a bell magnet or other signaling device, and thence be carried to the track, and attached to the same, as already described. The distant office or station signal will operate simultaneously with the signal S. Thus, any desired number of signals may be operated simultaneously at different points from a single section of track."

Robinson's British patent of August 29, 1879 (No. 3,479), which includes his closed circuit system of signaling, thus speaks of its capability:

"One or more lines of wires may also be used to operate additional signals; for instance, to indicate at a station the approach of a train, or to indicate when the block signal has changed."

We come now to the patents here in suit, and we take up first the earlier of the two Gassett patents, No. 233,746, dated October 26, 1880. The specification begins with an acknowledgment with respect to the previous condition of the art, and a statement of what the patentee had in view. We think it best to quote here at length:

"My invention relates to that system of automatic electric railway signaling which consists in dividing the whole or a portion of the length of a line of railway into a signal section of any required or convenient length (which length corresponds to the minimum interval of space which it is desired to preserve between different trains moving upon the same track), and in guarding each of said sections by a signal placed at or near the entrance of

such section, which signal is actuated or controlled by an electro-magnet included in an electric circuit extending the entire length of the signal section to which it appertains, said electro-magnet being, in its turn, controlled through the electric circuit by a movable circuit closer attached to the train. By this means the passage of a train over each successive signal section causes a danger signal to be exhibited at the entrance of such section from the time that the train enters it at one end, until it leaves it at the opposite end, when the danger signal is withdrawn or discontinued, leaving the way clear for the next succeeding train. It has been found in practice that it is frequently desirable and necessary to continue a given danger signal in action after the train which sets it in action has passed off from the section which the signal is designed to guard until such train has passed over the next section in advance or a certain portion thereof, by which means an additional security is provided, especially upon dangerous portions of the road, such as sharp curves or descending grades. The object of my invention is to effect this result; and it consists, principally, in a novel arrangement of electric circuits in which the several circuits, appertaining to the different signal sections, instead of being entirely independent of each other, as in the ordinary arrangement, are made to act to a certain extent dependently, so that each circuit is, as heretofore, under the direct control of the train while the latter is traversing its own section, but, in addition to this, is also indirectly under the control of the train through the agency of the next signal circuit in the series while the said train is traversing a certain portion of the next signal section."

The specification then proceeds to describe Robinson's closed circuit system of signaling, and the patentee adopts Robinson's apparatus and method in its entirety. Gassett's disclosed improvement upon Robinson consists in continuing the exhibition of the danger signal set at the entrance of a track section until the train has passed over a certain portion of the track section next in advance, thus securing two danger signals rearward of the train while it is traversing the overlap. Gassett shows specific means for accomplishing this result. At a certain point (b2) in advance of the entrance end of the track section, he inserts an insulated splice "in one line of rails only, the severed ends being connected by the wires 3, 4, which form the terminals of an electro-magnet, C2." The electro-magnet, C2, controls the circuit breaker, d. A peculiar adjustment is given to this electro-magnet, C2, and its armature, d. Further details here may be omitted. Indeed, they would hardly be intelligible unless accompanied by diagrams. The object to be attained and the general method of its accomplishment are thus summed up in the specification:

"Thus, it will be understood that the danger signal of each section is exhibited during the passage of a train over that section by the shunting of its electro-magnet, and that its exhibition is continued during the passage of the train over a portion of the next advance section by the interruption of the circuit by means of a circuit breaker controlled by the train while traversing the latter section."

The specification then adds, with respect to the extent of the overlap, the following direction:

"The insulated splice, b2, may be placed at any desired point between a2 and a3, according to circumstances. In practice it is usually preferable to place it at a distance from the point a2, at the entrance of the section, equal to the maximum distance required to stop a train after passing the signal S2 at full speed, and this will obviously be determined by the circumstances of the particular location."

To understand the force of this last citation, it must be noted that a2 and a3 are the insulations at either end of the track section, and

therefore the "insulated splice, b2," to be inserted "in one line of rails only," cannot be coincident with either end insulation, but must have an intermediate position, as, indeed, the drawings show and the specification directs.

Infringement is alleged of the third and fourth claims of this patent. These claims are as follows:

"(3) The combination, substantially as hereinbefore set forth, of a railway track divided into two or more signal sections, a signaling apparatus actuated or controlled by an electro-magnet, and placed at the entrance of each one of said signal sections, a circuit closer controlled by a moving train, which acts to exhibit a danger signal by diverting the actuating current from the electro-magnet during the time occupied by the train in traversing the section guarded by said signal, and a circuit breaker controlled by the moving train, which acts to continue the exhibition of said danger signal by interrupting the current through its electro-magnet during the time occupied by the train in traversing a determinate portion of the next succeeding signal section.

"(4) The combination, substantially as hereinbefore set forth, of a series of two or more normally closed railway signaling circuits and a series of circuit breakers, one for each circuit, each of which circuit breakers is actuated or controlled by an electro-magnet included in the next circuit in the series."

The second Gassett patent, No. 246,492, dated August 30, 1881, like its fellow, is based upon Robinson's closed circuit system of signaling, and it makes the same acknowledgment as to the prior state of the art as was made by the earlier Gassett patent. It contains this recital and statement of invention:

"In letters patent of the United States No. 233,746, granted to me October 26, 1880, I have described and claimed a combination of electric circuits and apparatus in which the several circuits appertaining to the different signal sections, instead of being entirely independent of each other, as in the ordinary arrangement, are made to act to a certain extent dependently; so that while each signal is, as heretofore, under the direct control of a train which is traversing the section appertaining thereto, it is also under the indirect control of the same train through the agency of the next signal circuit in the series during the time in which the said train is traversing a certain portion of the next signal section. My present invention consists of an improved organization of circuits and apparatus whereby the same result may be obtained in a more reliable and efficient manner."

The second Gassett patent, then, is a mere improvement upon his first invention in arrangement of circuits and apparatus. It involves simply a change of means—the substitution of other special devices—for attaining the same result. The first Gassett patent, as we have seen, prescribed the insertion of the "insulated splice," b2, "in one line of rails only." The second patent directs the insulating splice, b2, to be put in both rails, at the same point, and the purpose of the change is thus stated:

"Additional insulated splices, b2, b2, are inserted in both lines of rails at some suitable intermediate point of the signal section, whereby each signal section is divided into two subsections, constituting two complete circuits, which are electrically independent of each other."

The special electro-magnet, C2, and the peculiar adjustment between it and its armature, d, which characterized the first Gassett patent, are absent from the second patent. A circuit breaker is placed in each alternate signaling circuit of the series, and these circuit breakers are placed under control of electro-magnets included in the adjacent intermediate signaling circuit, while in No. 233,746, circuit

breakers are located in each and every circuit of the series. There are other differences in details which need not be mentioned. The result attained is the same as that aimed at by the earlier patent (No. 233,746), namely, the continued exhibition of the signal set to danger at the entrance of the track section, "while the train is passing over a certain portion of the next adjacent section ahead."

The action of the train is thus stated in the specification of the second patent:

"Thus, it will be understood that the danger signal of each signal section is automatically exhibited during the passage of a train over that section by reason of the successive shunting and the consequent demagnetization of the electro-magnets, c and m, and that the exhibition of a danger signal is continued during the passage of the same train over a certain portion, viz. the adjacent subsection, of the next signal section ahead, in consequence of the interruption of the circuit by means of a circuit breaker controlled by the train while traversing the last-named subsection."

The direction here given as to the extent of the overlap to be obtained is precisely the same as in the first Gassett patent, namely:

"The insulated splice, b2, may be placed at any desired point between A2 and A3, according to the circumstances. In practice it is usually preferable to place it at a distance from the point a2, at the entrance of the section, which is equal to the maximum distance required in order to stop a train which has passed the signal S2 at full speed; and therefore the proper distance will necessarily be determined by the circumstances of the particular location."

Infringement of the third claim of this patent is alleged. That claim is as follows:

"(3) The combination, substantially as hereinbefore set forth, of a secondary circuit for actuating an electro-magnet controlling the movements of a signal, two independent circuit breakers placed in said secondary circuit, and two independent primary signaling circuits, respectively controlling the action of the said circuit breakers, which primary circuits are themselves actuated successively by a train while traversing the signal section protected by said signal."

We turn now to the Westinghouse patent, No. 270,867, dated January 16, 1883. Infringement of the fourth claim of this patent is alleged. That claim is as follows:

"(4) In combination with a track circuit and a relay-magnet therein, a signaling circuit opened and closed by such relay, and at least two signals in such signaling circuit, one of which is arranged at or near the entrance end of such track circuit, and the other at the required distance to the rear for safety, substantially as set forth."

The nature of this invention is concisely stated by the plaintiffs' expert (Mr. Waterman), and his statement may be accepted as substantially correct. He testifies thus:

"This invention, like those of Gassett, is founded upon the Robinson system, specific mention thereof being made in the specification. And it has therefore, in common with that system, a division of the track into blocks by the interposition at intervals, in each line of rails, of insulating pieces, which break the electric continuity of the rail. At all other points the rails are electrically connected. Each block has, like the Robinson system, a battery with its poles connected to opposite rails of the block, and an electro-magnet having its two terminals likewise connected to opposite rails, thus forming, for each block, a normally closed circuit. Referring to Fig. 1, the successive blocks into which the track is divided are shown at R1, R2, R3, the location

of the insulating pieces being designated by r1, r1, r1. The several batteries connected to the rails of each block are designated a1; the main-track magnets are c1, c2, c3, c4. These magnets act as relays, making or breaking contact by means of armatures, s1, s2, s3, s4. The several circuits of the signals are designated by numerals placed just above the main magnets, as circuits 1, 2, 3, 4. Circuit No. 1, being controlled by the first section of the track, contains three signals, b, d, d2, receiving current from battery d1, as shown. Circuit No. 2, and also the remaining circuits, contain four signals, those of circuit No. 2 being designated b1, b2, d1, d4. All these signals are so arranged that normally a current flows through them, and they are held at the safety position, but when, under train action, the current ceases to flow in the main-track magnet, and the circuit breaker breaks the circuit of the signals so that no current flows through them, they indicate danger. Supposing now a train, which we will call 'No. 1,' to enter section R1, proceeding from right to left. Its wheels and axles will divert the current from magnet c1, causing circuit breaker s1 to open circuit No. 1, thereby setting the signals on that circuit to danger, and a train approaching from the rear cannot enter block R1, but must stop and wait, because the signal b, which is the lower of the two signals at the entrance to block R1, is at danger, indicating by its position that train No. 1 is upon block R1. When train No. 1 enters block R2, its magnet, c2, is de-energized, causing circuit 2 to be broken at s2, thereby setting to danger signals b1 and b2 in its rear, and signals d1 and d4 in its front. The engineer of train No. 2, seeing signal b go to safety, and signal b1 go to danger, will know, by reason of the fact that b1 is the upper signal, that train No. 1 has passed on to section R2 in advance, and that he may proceed with caution. At the same time, if a train (No. 3) should be on block R4, it will find signal d4 at danger, indicating to the engineer of train No. 3 that train No. 1 is upon block R2. As train No. 1 runs onto block R3, it sets behind it signals b3 and b4 to danger, signals b1 and b2 returning to safety; and the engineer of train No. 2 on block R1, finding only one danger signal at the entrance to block R2, and that signal the upper one, will know that train No. 1 has passed on to block R3, and that he may still proceed with caution. In the application of the system to a double-track road, it is evident that it is only necessary to omit the forward signals."

This patent need not long engage our attention. It is not necessary to consider the question of its alleged infringement, or the question whether claim 4 shows patentable novelty, in view of the Robinson patent and the state of the art prior to Robinson's invention. A complete defense on other ground appears. This patent, as we have seen, was issued on January 16, 1883. Assuming that it was applied for on November 16, 1882, as alleged, no earlier date than that can be accorded to Westinghouse. Now, the proof is clear that more than two years before the last-named date the invention described in the Westinghouse patent, and covered by its fourth claim, was in practical and public use on a portion—about 10 miles of track—of the Chicago, Burlington & Quincy Railroad, near the city of Chicago. The installation of this signaling system upon that railroad was the work of the Union Electric Signal Company (the plaintiff's predecessor in business) under a written contract entered into in September, 1879. The work was completed in August, 1880, and was taken possession of by the Chicago, Burlington & Quincy Company on October 7, 1880. The apparatus was thereafter operated by that company for a period of about two years. This installation was an embodiment of the invention of the Westinghouse patent in a completed and operative form. The use was public and practical, and was continued until about 1883. The only reply attempted to be made to this defense is that this

use upon the Chicago, Burlington & Quincy Railroad was in the nature of an abandoned experiment. This suggestion is unsupported by the evidence. It is against the clear proof. The apparatus, indeed, was set up at the expense of the signal company on trial to satisfy the railroad company with a view to a sale to that company, and the company declined to buy. But in no other sense was the use experimental. Furthermore, it is shown that an article on the "Union Electric Signal System" was printed and published in the "Railroad Gazette," a trade newspaper published in New York and Chicago, and having a general circulation among railroad people and those connected with railroads, beginning with the number issued on March 12, 1880, and ending with the number issued on April 2, 1880, which contained a substantially complete description of the invention of the Westinghouse patent. I can see no patentable difference between the subject-matter of the fourth claim of the Westinghouse patent and the description contained in the publication in the Railroad Gazette. That article was not in the nature of a trade circular addressed to the customers of the signal company, but was a publication to the world, and intended for general circulation and information.

The defendants' signaling apparatus now demands our attention. The defendants have employed two forms of apparatus, but they are substantially alike, and a description of one will answer for both. The defendants' line of rails is divided into blocks or track sections, insulated from each other, and the signals are operated according to Robinson's closed circuit system, which has been free to the public since 1889. At the entrance end of each track section two signals are placed on the same post. One is the block signal for that section, and is denominated the home signal. In this record it is designated signal H. A series of H signals guards the entire line of railway, each H signal guarding its own track section exclusively. Each signal circuit is independent of the signal circuits of adjacent track sections. The other signal at the entrance end of each track section, is denominated the "distant signal." In this record it is designated "signal D." Its purpose is to give preliminary notice to an engineer of a train about to enter a block of the then condition of the second block or track section in advance. To effect this, an indicator wire is run back from the track section in advance to the entrance end of the track section in the rear, and is put in electrical connection with the D signal there. The H signals are alone depended on for blocking the train. The D signals are cautionary, giving the engineer an indication of what he may expect when he reaches the entrance end of the track section second in advance.

In the defendants' apparatus, with everything in good order, and with the track free, all track circuits are closed, all signal circuits are broken, and all signals stand at danger. In that situation let us illustrate the operation: The initial track section may be designated as "A," and the two following ones as "B" and "C." A train entering upon section A would put to safety both signals at the entrance end of section B, and also signal H at the entrance

end of section C, if the track ahead were in normal condition. When the train reached the entrance end of section B, if the engineer should find signal H at safety, he would thereby learn that there was no train on section B. If he should find that signal D was also at safety, he would thereby learn that there was no train on section C, the second section ahead. The engineer would then be at liberty to proceed at schedule speed. When the train entered section B, it would put to danger the two signals H and D at the entrance of that section, and keep them at danger while it was on that section. As soon as the train had passed beyond section B, the signal H, at the entrance of that section, would be returned to safety, but the signal D would remain at danger. If at this juncture a second train following on section A should approach the entrance end of section B, its engineer would learn from the safety position of the home signal (H) that section B was clear, and from the danger position of the distant signal (D) that the second section in advance, section C, was occupied. Under these circumstances, the engineer might proceed with caution with his train under control, so as to stop at the entrance of section C if the home signal there should show danger. The result, therefore, is this: A train, on entering a track section (say, B), leaves behind it the two signals H and D at the entrance at danger; and, when it enters the next track section ahead (say, C), it leaves behind it at danger the two signals H and D at the entrance of that section, and also the signal D one whole block to the rear, as a cautionary signal to indicate to the engineer of a following train that the first train is on the second block in advance, section C. And this is repeated from block to block. The only reason for having the signal D show danger when the signal H on the same post is at danger is to avoid confusion. If signal D then stood clear, the engineer might possibly be misled. By repeating the danger showing of its companion, signal H, possible mistake is averted. At this juncture the function of signal D is not brought into play at all. For practical purposes it might as well be absent. The real function of signal D begins when the train has passed into the second section ahead, and then it announces the condition of that section to the engineer, who is a whole block to the rear. Upon this subject the plaintiff's own expert (Mr. Waterman) truly says:

"The only time when the engineer does not know exactly what his distant signal means is the time when it makes no difference whether he knows or not, namely, the time when the adjacent home signal is at danger. In effect, therefore, this is not doing anything more than would be done if a covering could be dropped down over the distant signal, so that in effect it could be removed altogether."

Do the defendants infringe the Gassett patents, or either of them? It is not pretended that any such infringement is to be found in the defendants' home signals or in the manner of their operation. Clearly, to that extent the defendants have simply followed Robinson's system, as described and illustrated in his expired patent. The alleged infringement of the Gassett patents by the defendants lies in their use of the distant signals,—the series of signals D. These distant signals, however, are set, shifted, and operated under

train action by Robinson's method, and not otherwise. Here, then, nothing is borrowed from Gassett. The supposed violation of the plaintiffs' rights consists exclusively in the fact that the distant signal D is set to danger while the home signal H on the same post makes that showing, and that it continues at danger during the passage of the train over the second track section in advance. Does this afford any fair ground for the charge of infringement if we regard the substance of things? The office of the distant signal is solely to give warning to the engineer of the following train that the track section second in advance is occupied. Its function springs into action when the forward train enters on the second section ahead. The D signal does not guard the section at whose entrance it stands. Its functional relation is to the section second in advance, and it is in electrical connection with that section for the purpose, and only for the purpose, of preliminary announcement and caution to the engineer of the oncoming train when he is a block's length rearward.

Again, the system of home and distant signals was old, antedating Robinson. Now, plainly, Robinson's method, no less than the track instrument method, was applicable to the working of signals standing in the home and distant relation. It is not to be doubted that to add to the apparatus shown in Robinson's patent a signal to repeat at a distance to the rear the showing of the block signal would have been an obvious expedient to a skilled electrical engineer, even had the patent been wholly silent with respect to the employment of additional signals. The patent, however, gives express directions for carrying a wire from the electro-magnet which controls the block signal to a distant office or station to indicate when the signal is operative. This particular use is put as an example only, for the patent adds: "Thus, any desired number of signals may be operated simultaneously at different points from a single section of track." Clearly, this language points to and covers the employment of a distant indicator signal. The British patent says that lines of wire may be used to operate additional signals; "for instance, to indicate when the block signal has changed." In view of these suggestions, certainly no invention was involved in carrying back a wire to a signal at a distant point in the rear to give cautionary notice to the engineer of an approaching train of the condition of a forward block. This, then, is a legitimate exercise of Robinson's invention, now open to the public. Moreover, the feature of preliminary notice to a following train of the condition of the track section second in advance is not taken from Gassett. It is altogether wanting in Gassett's patents. In the working of his apparatus, the engineer, when stopped by the danger showing of the signal at the entrance of a track section, cannot tell where the forward train is, whether upon that section or upon the overlap in advance. Gassett has but one signal for each track section, and that signal, if at danger, acts as an absolute block upon any further advance of the train until the signal shifts to safety.

What, then, was Gassett's real improvement in the art of railway signaling? As we have seen, Robinson had devised a closed track circuit method, which gave complete and continuous train control

over signals. The problem to which Gassett addressed himself was to introduce an overlap into a Robinson operated system, by continuing in action the danger signal at the entrance of a signal section after the train had left that section, and while it was passing over "a certain portion of the next adjacent section ahead." It is insisted that Gassett contemplated the continuance in action of such danger signal during the passage of the train over the whole of the next advanced section. Whether or not he considered this to be desirable is immaterial. He suggested no means for accomplishing such result. Nothing can be plainer than that Gassett's novel organization of circuits and apparatus, both in the original and in the improved form, was intended and devised so as to secure the continued exhibition of the danger signal at the entrance of a block while the train is traversing a definite portion only of the next signal section in advance. To attain this declared object, each of his patents disclosed specific means. It may here be remarked that neither of Gassett's patents shows a pioneer invention. The proofs abundantly establish that devices for securing a train from rear collisions by means of overlaps and the setting of two danger signals behind the train were old in the art. Gassett may have been the first to incorporate an overlap into a Robinson worked system; but, if so, his patents conferred on him the exclusive right only to use the means he specified to produce the described result; and anyone may lawfully accomplish the same end, without infringing the patents, if he uses means substantially different from those described. *O'Reilly v. Morse*, 15 How. 62, 119.

Now, while it is true that Gassett and the defendants both aim at the same general object, namely, to secure safety to the train in advance, as against a train following on the same track, yet the special purposes they respectively have in view are quite different, as also are their respective organizations of circuits and apparatus. Gassett's achievement was a forward overlap, effected by a peculiar arrangement of circuits, whereby the action of the danger signal at the entrance of the section is prolonged after the train has gone beyond that section. His improvement has no relation whatever to distant cautionary signals for the guidance of the engineer of a following train. On the other hand, that part of the defendants' apparatus complained of relates altogether to the series of distant cautionary signals. The specific means employed by Gassett, such as the insulated splice, b2, whether inserted in one line of rails or in both lines of rails, the special electro-magnet, C2, and its peculiar adjustment with its armature, d, the division of each signal section into two subsections, and the interdependence of adjacent signaling sections, are absent from the defendants' organization. After a patient investigation of the subject, I cannot do otherwise than hold that, in structure, operation, purpose, and result, these two organizations of signaling circuits and apparatus are essentially different, and that the defendants are not shown to have infringed either of the Gassett patents.

We are now brought to the examination of the fourth patent embraced in this bill, namely, No. 227,102, dated May 4, 1880, to Oscar Gassett and Israel Fisher, for an improvement in connectors for electric track circuits. The specification describes the invention thus:

"Our invention consists in punching or drilling holes in the flanges of adjacent rails at convenient points near, but so as not to interfere with the rail joint, and driving into these holes the ends of a wire connector long enough to reach between them and span the rail joint, the said connector being provided at its ends with driving studs a trifle larger in diameter than the holes and tapering; so that, when they are forcibly driven into the holes in the rail, they form a perfect and permanent contact therewith, and, on account of the taper, fit so tightly that they cannot be driven out or removed except by a special instrument for drawing them, thus removing from them any scale or loose or tarnished surface, and leaving the surface thereof bright where it comes in contact with the rail, such bright metallic surfaces, forced together, insuring a perfect electric connection. The ends of the wire connector are coiled around the said driving studs just under their heads, and the whole then dipped in molten solder or other suitable metal."

The specification adds that "a connector of this kind is cheaper and more reliable than one applied by soldering or clamping."

The claim alleged to be infringed is the first, namely:

"(1) The combination, with a rail bored to receive it, of a wire provided at its ends with a connected driving stud, to be driven into the said rail to form a continuous metallic conductor therewith for an electric current, substantially as described."

The alleged infringement consists in this: The defendants bore a straight hole in the rail; then take a longitudinally grooved tapering stud, lay the end of a piece of wire in the groove, and drive the stud with the wire in the groove tightly into the hole. From an examination of the prior patents in this record, and the general proofs relating to this subject, it is very evident to me that, if the Gassett and Israel patent is to be sustained at all, it must be narrowly construed, and restricted to the identical device described. Now, the only way of connecting the wire with the driving stud here suggested is by coiling the wire around the stud, and then soldering it. The coiling of the wire around the driving stud is essential to the described device, and perhaps its only patentably novel feature. But the defendants do not coil their wires around the stud, and, indeed, they do not, in the sense of this patent, connect their wires at all with the driving stud. They simply lay their wire lengthwise in a longitudinal groove formed in the side of the stud, and the stud with the wire laid in the groove is then driven into the hole in the rail. The result really is a clamping attachment or connection between the wire and the rail. Clamping, however, in effect, is disclaimed. Under all the proofs, I am thoroughly convinced that the defendants have not infringed this patent. As, therefore, the defense of noninfringement must be sustained, I do not deem it necessary to consider the other defenses to this patent.

We reach, finally, patent No. 273,377, dated March 6, 1883, to Charles J. Means, for improvements appertaining to electric railway signals. Infringement of the sixth claim of this patent is alleged. That claim reads thus:

"(6) The combination, with the conducting wire, U, of the split plug, X, and railroad track, Q, substantially as and for the purpose set forth."

The part of the specification upon which this claim is based is as follows:

"The other end of the coils of electro-magnet, K, is connected to the rail, Q, by means of a spring plug, X. This plug is tapered, and has a hole in the center just the size of wire U. The end of the plug is slit like the plugs used for making connections on switch boards, so that, when it is driven forcibly into a hole drilled in the rail, it clamps the wire, making a reliable electric connection."

Several defenses are here set up, but none of them save that of noninfringement need be considered. Most clearly, the defendants do not infringe this patent. Their plug has no hole in the center; it is not split; it is not a spring plug, and has no spring action.

Let a decree be drawn dismissing the bill of complaint, with costs.

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### WALES v. WATERBURY MFG. CO.

(Circuit Court, D. Connecticut. June 20, 1898.)

#### PATENTS—INFRINGEMENT—DAMAGES AND PROFITS.

Where complainant executed a license to defendant, but, after defendant began to manufacture thereunder, canceled the license, and defendant continued to manufacture and sell the goods, the measure of damages is not to be determined by the license fee, but by the actual profits of defendant.

This was a suit in equity by Harriet H. Wales against the Waterbury Manufacturing Company for alleged infringement of a patent. The cause was heard on exceptions to the master's report.

Henry Stoddard and Roger S. Baldwin, for complainant.

Charles R. Ingersoll, Geo. E. Terry, and John K. Beach, for defendant.

TOWNSEND, District Judge. In this cause, upon final hearing, the court held that certain claims of the patent in suit were infringed, and referred the matter to a master for an accounting. 59 Fed. 285. The questions herein arise upon exceptions to the master's report.

The patent was for an improved buckle. Complainant gave defendant a license to manufacture said buckle upon payment of a royalty of 15 cents a gross. The buckle was also used in connection with a pencil holder to be attached to the clothing, and, for each gross of buckles and pencil holders combined, defendant agreed to pay a license fee graded according to the selling price, and amounting to \$2.03 $\frac{1}{2}$ , where the selling price was \$5.08 per gross. After defendant had commenced to manufacture, complainant canceled the license. Defendant continued to manufacture, and complainant brought suit. The license was canceled in June, 1881. The bill was filed in November, 1881, and the answer was made in May, 1882. Complainant first began to take evidence seven years later, and brought the case to the court for a final hearing in 1893, after the patent had expired. Complainant in the meantime made no attempt to manufacture. Defendant manufactured between June 15, 1881, and January 18, 1893, 11,609 $\frac{9}{12}$  gross of buckles, of eight different sizes and prices, 9,561 of which were made in connection with a pencil holder. Large profits were made on No. 1,403, which was used in the pencil holder.

The principal contention herein is as to what share of their profits should be assigned to the buckle. The master suggests several different methods of estimating the amount to be allowed the complainant: First, the license fee agreed upon for buckles and for buckles attached to pencil holders, which would amount to \$19,010.61; second, a deduction of 15 cents from the profit on the pencil holder, leaving all the other profits to the complainant, which would amount to \$32,431.18; third, a division of the profits of the pencil holder according to the respective cost of the holder and buckle, which would give the complainant \$21,454; fourth, a division of the profits of the pencil holder equally on four elements named by the master, which would give the complainant \$25,383.49. Defendant insists that the claims allowed do not cover the entire buckle; that the buckle used in the pencil holders was different from the others, and was improved by defendant; that there is no definite proof as to the amount of profits accruing to the complainant from the patented part of the buckle; that, as complainant has never attempted to manufacture, she has suffered no damages; that complainant cannot recover an amount based on her license contract; that, having canceled her license, she can now recover only legal damages for infringement; and that, if the license fee is to goven, it should be the license fee on the buckle only, or 15 cents for each gross of buckles sold, which would make about \$1,740. Defendant submits a statement of receipts and costs, in which it estimates the amount received for the buckles used with the holder at the same price as that for which it sold the same buckles without the holders, and makes the amount of its profits \$2,690.04, which it claims to be the whole profits for which it can be liable in any event.

I think defendant is right in its contention. Complainant appears to have preferred an accounting for defendant's profits after the expiration of the patent to an adjudication upon the patent during its life. Complainant is only entitled to the profits made upon the buckle. The 15 cents license fee on the buckle might be adopted as the measure of profits except that, taking the selling price and cost of the buckles at defendant's own estimate, its profits were manifestly greater than this license fee. The seven numbers or sizes of buckles sold, other than those combined with the pencil holders, make about 2,130 gross of buckles, for which defendant admits that it received \$2,408.63. Defendant's estimate of the cost in making these buckles is \$1,975.33, which would leave a profit of \$433.30. The master's estimate of the costs, correcting a manifest clerical error, and supplying a manifest omission, is \$1,973.50, or \$1.85 less than that of complainant. Complainant admits, however, certain omissions on the part of the master, and that the actual cost, based on the master's estimates and supplying his omissions of the No. 1,403 buckles, was \$2,085.50. This reduces the profits on the buckles other than No. 1,403 to \$323.13, instead of \$433.30, which defendant admitted in its account. Of No. 1,403, 116 gross were sold for about \$174, which defendant says should fix the price for those attached to pencil holders. Altogether about 9,478 gross of No. 1,403 were sold, and, at the price thus fixed, would amount to \$14,245.25. De-

defendant estimates their cost at \$1.26½ per gross. The master estimates their cost at \$1.03. Inasmuch as the master's estimate of cost on the other buckles exceeds that of defendant, and the defendant has furnished no definite statement of errors on this No. 1,403 which I am able to adopt or complainant's counsel admits to be correct, I shall adopt the master's instead of the defendant's estimate of cost, which gives a cost of \$9,762.21; and deducting this profit from the admitted selling price of \$14,245.23 leaves \$4,483.02, which, added to \$323.13 profits on the other series, makes \$4,806.15. In regard to the selling price adopted by complainant, the actual selling price of the buckles sold separately was 15½ per cent. above the cost, as admitted by complainant. In the case of No. 1,403 the selling price is more than 45 per cent. above the cost, which indicates that it is sufficiently high; that is, the complainant is allowed about three times the proportionate profit on No. 1,403 that was made on the other numbers in which the actual selling price and cost are admitted by complainant. Furthermore, as the claims allowed do not cover the whole buckle, and as defendant improved the buckle for this particular purpose, and added a new element thereto, the share of profit to be assigned to the buckle must, as the report in other ways makes evident, be a matter of opinion, upon which different minds would necessarily differ. I think the above amount is as much as should be assigned to the buckle and recovered by complainant upon all the facts before me, and especially in view of her delay in enforcing her rights. Let judgment be entered for complainant for said sum of \$4,806.15.

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PERKINS ELECTRIC SWITCH MFG. CO. v. GIBBS ELECTRIC MFG. CO.  
et al.

(Circuit Court, D. Connecticut. June 20, 1898.)

1. PATENTS—CONSTRUCTION OF CLAIMS—PROCEEDINGS IN PATENT OFFICE.

A patentee should not necessarily be estopped by statements of his solicitor in explaining the claims; but where he deliberately acquiesces in the rejection of a broad claim, and substitutes therefor a narrower one, as a condition of securing the patent, he cannot thereafter insist on a construction which will cover what was thus abandoned.

2. SAME—ELECTRIC SWITCHES.

The Gibbs patent, No. 517,100, for an improvement in electric switches of the form known as "snap switches," covers a new and useful improvement, but must be limited to the precise construction shown.

This was a suit in equity by the Perkins Electric Switch Manufacturing Company against the Gibbs Electric Manufacturing Company and others for alleged infringement of a patent.

C. L. Buckingham, for complainant.

Phillipp, Phelps & Sawyer and J. J. Kennedy, for defendants.

TOWNSEND, District Judge. Bill in equity on patent No. 517,100, granted March 27, 1894, to complainant, as assignee of one Gibbs. Defendants claim that they manufacture under patent No.

557,198, granted to said Gibbs. The invention relates to that form of electric switch known as a "snap switch." Complainant and defendants each use devices which comprise the ordinary insulating base, with stationary contacts, and the lock latch and trip, of the prior art. Each use what will hereafter be called the "two-part block"; the complainant actuating it by a screw and nut, while the defendants use a rack and pinion. The complainant, after the manner of owners of patents for electrical devices, claims that this two-part block feature is a great invention, "and constitutes such an important contribution to the art that the patent may be regarded as of the pioneer class, and, as such, interpreted to cover, not the mere forms shown, but, as well, the real invention of the claims." The claims in suit alleged to cover this feature are the following:

"(1) An electric switch, having a base with stationary contacts; a rigid lock, independent of any conducting parts; and a rotary handle, with a screw thread bearing a two-part block (one part having conducting poles, and the other part normally engaging with the lock on the base, but adapted to be released therefrom by the rotation of the handle spindle); and a spring, connected between the spindle and a portion of the block, for throwing the block when the spindle is sufficiently rotated,—substantially as specified. (2) An electric switch, having a base with stationary contacts, and a rotary handle spindle, with a screw thread; a threaded nut borne by the screw; a block, with conducting poles, loosely connected with the nut; a lock on the base for temporarily holding the nut and block against rotation; and a spring for rotating the block when the nut is released from the lock,—substantially as specified. (3) An electric switch, having a base with stationary contacts, and a rotary handle spindle, with a screw thread; a threaded nut borne by the screw; a block, with conducting poles, held rotarily with, but movable sideways independent of, the nut; a circular ratchet on the base beneath the nut; and a spring, with one end connected with the spindle and the other with the nut,—substantially as specified."

The "two-part block," so-called, of the patent, consists of "a threaded nut that is preferably provided with wings, the bottom edges of which, when the nut is screwed down the thread, are adapted to make contact with the teeth of the ratchet on the base," and "a circular block of insulating material which holds a pair of conducting poles." A screw-threaded spindle bears this nut, and when said spindle is rotated the nut is drawn up said spindle until it is freed from the teeth of said ratchet, when it springs forward, and carries the block of insulating material to a point where its poles make or break contact between stationary rigid contacts below, and spring arms above, said block. Whether such a mere locking nut forms a part of a block, and whether complainant's device is a two-part block, as distinguished from the prior art, is a question of names, and immaterial. The term did not originally appear in the patent at all, and now is nowhere to be found except in the first claim. The essential consideration is the functional result of this construction. The block, being "loosely supported, so that it rotates with, but moves sideways independently of, the nut," floats, as it were, between the contacts, and thus secures better contacts, is adapted to use in switches constructed or assembled by unskilled labor, and thus cheapens the product. The complainant's patent covers a practical construction. But, stripped of the dazzling halo which conventionally adorns appliances designed to deal with that mysterious agent,

electricity, and viewed in the everyday light of the prior art, it is merely a new and useful improvement, effected by the skillful adaptation of well-known means so as to secure greater freedom of movement. Complainant has made more out of its patent than the patentee conceived, by the discovery of the importance of the distinction between one-part and two-part blocks; but nevertheless the patent is a good one, within narrow limits.

Patent No. 435,152, granted August 26, 1890, to Norton, sufficiently shows the status of the patent in suit, with reference to the prior art. It shows the lock, latch, trip, and spring of complainant's patent, and a perforated block of insulating material, and a cam-faced disk, from which two pins extend down so as to pass through said perforations into corresponding holes in the base, and is operated like complainant's switch. It is immaterial whether this is a one-part or a two-part block. It does not provide means for such free floating or sidewise movement as are shown in complainant's patent. Its contacts are rigid, and therefore the range of sidewise movement of the blocks must be limited. But it is cited here in order to show what slight modifications were required to adapt existing appliances to the new requirements of the electric switch art. Neither complainant nor defendants construct their switches in accordance with the specifications of the patents under which they respectively profess to make them. Defendants use a block like that covered by the patent in suit. But their handle has no "screw thread, bearing a two-part block," nor "threaded nut borne by the screw," as claimed in the patent in suit. Their switch is operated by means of a rack and pinion, as described in patent No. 557,198, to defendant Gibbs. The pinion is borne by the spindle, and is located in a recess in the block, and a sliding rack meshes with it. When the handle is turned, the pinion moves the rack outward to work a catch, which moves at right angles to the axis of the spindle until the block is unlocked and rotated by the spring in the ordinary way for making or breaking contact. The complainant claims that the defendant Gibbs, by the substitution of the rack and pinion, merely sought to evade his former patent, and that the one is the equivalent of the other. If this were a broad patent, there would be more force in this contention. But, as defendants have neither screw nor nut, we must examine the file wrapper for further light. I do not think the patentee should necessarily be estopped by statements made by his solicitor in explaining the claims. But here the broad claim was rejected, and the applicant, as a condition of securing his patent, deliberately acquiesced in such rejection, and, as a condition of receiving a patent, abandoned the broad claim, and substituted therefor a narrower one. Upon notice from the patent office of the adverse claims of the public, the inventor is at liberty to stake out his boundaries where he sees fit, but he cannot then fix them by a rolling stone, to be afterwards pushed into the domain occupied by the public. In the first claim, as originally filed, the two-part block construction was neither referred to nor claimed. The claim was rejected on the Norton patent, No. 430,252, and Johnson patent, No. 427,328. The claim was then so amended as to refer to

"the locking part of the block for throwing the block," and was again rejected, in the following language:

"Claim 1 covers no more, broadly, than the mere use of the idea of the independent locks of 435,152 on the switches of 427,328. Such use, broadly, is not patentable. The applicant is limited to his specific construction."

Patent No. 435,152 is the Norton patent, already discussed. The claim was again amended; the attorney for the expert arguing as to said claim as follows:

"It cannot be said to cover merely the use of the Norton lock on a Johnson switch. This claim is limited to a specific construction, and the structure claimed is not found in the references cited against the former first claim."

The claim was again rejected, and claim 1 of the patent in suit substituted therefor; the attorney for the applicant saying, *inter alia*:

"The reference cited does not have a screw thread bearing a two-part block, one part having conducting poles, and the other part engaging with a lock on the base, which is now an element of the first claim."

Claims 2 and 3, which are limited in terms to a screw-threaded spindle and threaded nut, were allowed as filed, and the objection to the first claim was amended so as to cover a certain specific construction. In these circumstances, complainant's claim should be limited to the precise construction stated by the patentee, and should not be extended to cover the broad construction abandoned by him in the patent office. And inasmuch as the defendants do not use "a screw thread bearing a two-part block," and operating horizontally, but a rack and pinion moving at right angles to the axis of the spindle, they do not infringe said first, second, and third claims. The fourth claim is a narrow claim in terms. It was narrowed by the action of the applicant in the patent office to a "block of insulating material, bearing loose poles of conducting material." It abundantly appears from the record that this claim means "poles free to move a little longitudinally in the block," as stated in the specification. The defendants' conducting poles are rigidly screwed to the block of insulating material, and therefore said block holds rigid and fixed poles, not loose poles, of conducting material. Let the bill be dismissed.

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THE RITA.

(District Court, D. South Carolina. June 2, 1898.)

**1. PRIZE—CONDEMNATION—ENEMY'S VESSEL.**

A Spanish merchant vessel captured, after the declaration of war, by a United States cruiser while bound from a neutral to a Spanish port, is lawful prize, not being within the exceptions mentioned in the president's proclamation of April 26, 1898.

**2. SAME—DECLARATION OF WAR.**

The act of April 25, 1898, declaring that war has existed since April 21, 1898, between the United States and the kingdom of Spain, fixes the precise period when the peculiar duties and obligations imposed by the condition of war arise.

This was a prize proceeding instituted to procure the condemnation of the Spanish steamship *Rita*, which was captured by the auxiliary cruiser *Yale* on May 8, 1898.

**BRAWLEY, District Judge.** The Spanish steamship *Rita* was captured off the island of Culebra, May 8, 1898, by the United States cruiser *Yale*, and sent into this port in charge of a prize master for adjudication. A libel for condemnation was filed May 17th, and a monition issued returnable June 1, 1898, on which day proclamation was duly made, and no claimant has appeared. It appears from the testimony taken by the prize commissioners in preparatorio, and from the examination of the ship's papers, that the *Rita* belongs to a corporation of Bilboa, Spain,—the *Línea de Vapores Serra*; that she is a steamship of 1,396 net tonnage; that she carried a crew of 31 persons, all subjects of the king of Spain, and a miscellaneous cargo; that she sailed from Liverpool, England, on April 9th, touched at Santander, Spain, on April 14th, and at Corunna, Spain, on April 16th, at which last-named ports she took on six passengers and a part of her cargo, consisting of wine, macaroni, and potatoes, and that she was bound for St. Juan and other ports on the island of Puerto Rico; and that the voyage was to terminate at the port of Humacao, on that island. The cargo is now being unladen under the direction of the prize commissioners, and, pending an inventory and report thereon, all questions respecting the same are reserved. The libel filed by the attorney for the United States for this district claims that the vessel and cargo are lawful prize of war, and subject to be condemned and forfeited to the United States as such, and the proofs in respect to the vessel are sufficient to enable the court to proceed to adjudication. The congress of the United States, by an act approved April 25, 1898, has declared that war has existed since April 21, 1898, between the United States and the kingdom of Spain.

The testimony shows that the *Rita* is a Spanish merchant vessel, owned by a corporation in the kingdom of Spain; that while on a voyage to a port belonging to that kingdom, on May 8, 1898, in latitude 18.25 north, and longitude 65.18 west, she was captured by the United States cruiser *Yale*. The case does not come within the exceptions declared in the fourth and fifth paragraphs of the proclamation of the president dated April 26, 1898, which exempt from capture merchant vessels loading or bound for any port of the United States within limitations as to time therein mentioned. This act of congress fixes the precise period when the peculiar duties and obligations imposed by the condition of war arise; and as this vessel was enemy property, captured after the commencement of hostilities, it is by the law of nations subject to condemnation and forfeiture. Under the influence of the milder sentiments of recent years, the private property of non-combatants upon land is generally held not liable to seizure as booty by an invading army; and it is to the credit of the government of the United States that it has sought, on several occasions, to have

embodied into the law of nations the more mild and mitigated practice of exempting merchant vessels from capture; but except in isolated cases, provided for by treaty, this policy has not met with general acceptance. While these considerations are proper for that department of the government which can make or modify the law as policy or humanity may dictate, they have no place in that department which must administer the law as it is found. It is adjudged and decreed that the steamship Rita, together with her tackle, apparel, and furniture, be condemned, forfeited, and sold as lawful prize of war; and an order will be entered providing for the distribution of the proceeds as prize money as may hereafter be adjudged.

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THE BUENA VENTURA et al.

(District Court, S. D. Florida. May 27, 1898.)

1. PRIZE—RIGHT OF CAPTURE.

By the prize law, as accepted at the present time, the war vessels of a belligerent have the right, in the absence of any declaration of exemption by the political power, to capture wherever and whenever found afloat, anything which belongs to or is the property of the enemy. Whenever it is claimed that an exemption is made by proclamation or ordinance, the burden of proof is on the claimant to show that the particular case comes within the exemption; and, although such proclamation or ordinance is to be liberally construed in behalf of the claimants, there must be found therein sufficient language to justify the court in finding that the intention was to exempt from seizure the class of property under investigation.

2. SAME—WAR WITH SPAIN—PRESIDENT'S PROCLAMATION—SPANISH VESSELS IN AMERICAN PORTS.

The declaration in the president's proclamation of April 26, 1898, that, "Spanish merchant vessels in any ports or places within the United States, shall be allowed until May 21, 1898," for loading cargoes and departing, and shall not be subject to seizure on the voyage, applied not only to vessels in such ports at the date of the proclamation, but also to those in American ports at the breaking out of the war on April 21, 1898, and which sailed prior to the proclamation. The cargoes of such vessels are entitled to the same exemption as the vessels themselves.

3. SAME—VESSELS BOUND FOR AMERICAN PORTS.

The fifth article of the president's proclamation of April 26, 1898, declaring that any Spanish merchant vessel which, prior to April 21, 1898, sailed from any foreign port bound to any port of the United States, shall be permitted to enter such port and discharge her cargo, and afterwards depart without molestation, does not exempt from seizure vessels sailing from European ports for Spanish ports in Cuba, to there discharge their cargoes, and which, in the ordinary course, would then come to a port of the United States to receive cargo.

4. SAME—ENEMY'S PROPERTY—NEUTRALS HAVING TRADING HOUSES IN ENEMY'S COUNTRY—CORPORATIONS.

Vessels or property belonging to a trading house established in an enemy's country is liable to condemnation as prize whatever the domicile of the partners; and this principle applies with even greater force to the property of a corporation formed under the laws of the enemy's country, regardless of the domicile of the individual stockholders, or of any equitable interest neutrals may have therein.

5. SAME—VESSELS SEIZED BEFORE FORMAL DECLARATION OF WAR.

The practice of a formal proclamation before recognizing an existing war and capturing enemy's property has fallen into disuse in modern times, and actual hostilities may determine the date of the commencement of

- war, though no proclamation may have been issued, no declaration made, and no action of the legislative branch of the government had.
6. **SAME—VESSELS BOUND FOR AMERICAN PORTS—LIBERTY TO TOUCH FOR COAL.**  
A vessel which cleared from an American port for a foreign port prior to the outbreak of hostilities, with liberty, however, to touch at another American port for coal for her voyage, was not a vessel bound for an American port, within the meaning of the president's proclamation of April 26, 1898, and was, therefore, subject to capture.
  7. **SAME—NEUTRAL CARGO IN ENEMY'S VESSEL.**  
The exemption declared in section 2 of the president's proclamation in favor of neutral goods, not contraband, found under the enemy's flag, applies to the case of a capture between the outbreak of hostilities and the date of the proclamation.
  8. **SAME—PRESUMPTIONS—CARGO SHIPPED BY NEUTRALS TO ENEMIES.**  
Cargo shipped in enemy's vessels by neutrals to parties in the enemy's country is prima facie enemy's property, but this presumption can be overcome by evidence.
  9. **SAME—CARGO CONSIGNED TO NEUTRALS.**  
Cargo shipped from this country in an enemy's vessel, and consigned to residents of a neutral country, is presumptively neutral cargo, and not subject to seizure under the president's proclamation.

These were libels filed by the United States to procure the condemnation as prizes of war of the Spanish steamships Buena Ventura, Panama, Catalina, Miguel Jover, Pedro, and Guido, and their cargoes.

J. N. Stripping, U. S. Atty., and Ed. K. Jones, for the United States.

Converse, Kirlin & Patterson, for the Buena Ventura and the Panama.

Wilhelm Mynderse and G. Bourne Patterson, for the Pedro and the Guido.

G. Bourne Patterson and Geo. Deriegre, for the Catalina and the Miguel Jover.

LOCKE, District Judge. The questions involved in these several cases, being of the same character, have been considered together.

Of these vessels, the Buena Ventura cleared from the port of Scranton, Miss., on the 16th of April, 1898, and sailed with a cargo of lumber for Rotterdam the 19th of that month, and was captured in the Straits of Florida, between Key West and Cuba, on the 22d, by the United States steamship Nashville. The Panama cleared and sailed from New York for Havana with an assorted cargo on the 20th of the same month, and was captured on the 25th by the United States steamship Mangrove, while approaching that port. The Catalina and the Miguel Jover, laden with cotton and staves, cleared from New Orleans on the 21st of the same month, and sailed the evening of the same day for Barcelona and Genoa. The Catalina was captured by the United States steamship Detroit, and the Miguel Jover by the United States steamship Helena, both on the 24th. The Pedro, which had sailed from Antwerp some time before, had been into Havana, had cleared for Santiago, Cuba, and was captured on the 22d of the same month about 12 miles from the port of Havana by the United States steamship New York; and the Guido, from Liverpool, bound for Havana, by the way of Santander, Cuwana, and La Puebla, was captured on the 27th by the United States steamship

Terror. They are all Spanish vessels, sailing under the Spanish flag, with royal patents, officered and manned by Spaniards, and, with the exception of the *Pedro* and *Guido*, no question has been raised as to their being enemy's property. They were all merchant vessels, engaged in regular lines of commerce, and this, and the hardship and injustice of the captures before a declaration of war, has been strenuously urged in argument as contrary to the humane policy of our government, in addition to the provisions of the president's proclamation. The principles of the law of prize have been so often and so distinctly declared by the highest courts of all civilized countries that they need no extended review here. The law of prize is a law of war, of might and of force, which is to be exercised at the order and behest of the executive, and not upon the principles of policy or equity; and while prize courts, where questions of doubt arise, yield as far as possible to the claims of humanity and respect for personal rights, yet they cannot be controlled by such considerations. The former rule of the law of prize was that the belligerent had a right to capture the property of the opposing belligerent or antagonist under any circumstances, and to injure him in any way, by depriving him of his property. That was the original practice, but it has been restricted by the gradual advance of civilization until by the prize law of to-day, as accepted, the captor has the right, in the absence of any declaration of exemption by the political power, to capture, wherever and whenever found afloat, anything which belongs to or is the property of the enemy. Whenever it is claimed that there is an exemption made by proclamation or by ordinance, the burden of proof is upon the claimant to show that the particular case comes within the exemption, and, although such proclamation or ordinance is to be liberally construed in behalf of the claimants, there must be found therein sufficient language to justify the court in finding that the intention was to exempt from seizure the class of property under investigation. The language, to justify an exemption, must be found. It cannot be presumed from international history or policy, nor from the principles of justice, generosity, or humanity.

The important questions in the cases now pending arise upon the construction of the proclamation of the president of the United States of April 26, 1898. As that is construed by the claimants of these several steamships, each one of them comes within some provision of this proclamation which exempts it from the liability of capture and condemnation, but, as construed by the attorneys for the captors, not one of them is so exempt. The proclamation is as follows:

"By the President of the United States of America.

"A Proclamation.

"Whereas, by an act of congress approved April 25th, 1898, it is declared that war exists, and that war has existed since the 21st of April, 1898, including said day, between the United States of America and the kingdom of Spain; and whereas, it being desirable that such war should be conducted upon principles in harmony with the present views of nations, and sanctioned by their recent practices, it has already been announced that the policy of this government will be not to resort to privateering, but to adhere to the rules of the Declaration of Paris:

"Now, therefore, I, William McKinley, president of the United States of America, by virtue of the power vested in me by the constitution and the laws, do hereby declare and proclaim:

"(1) The neutral flag covers enemy's goods, with the exception of contraband of war.

"(2) Neutral goods, not contraband of war, are not liable to confiscation under the enemy's flag.

"(3) Blockades, in order to be binding, must be effective.

"(4) Spanish merchant vessels in any ports or places within the United States shall be allowed until May 21st, 1898, inclusive, for loading their cargoes and departing from such ports or places; and such Spanish merchant vessels, if met at sea by any United States ship, shall be permitted to continue their voyage, if, upon examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term: provided, that nothing herein contained shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage), or any other article prohibited or contraband of war, or any despatch of or to the Spanish government.

"(5) Any Spanish merchant vessel which, prior to April 21st, 1898, shall have sailed from any foreign port bound for any port or place in the United States, shall be permitted to enter such port or place, and to discharge her cargo, and afterward forthwith to depart without molestation; and any such vessel, if met at sea by any United States ship, shall be permitted to continue her voyage to any port not blockaded.

"(6) The right of search is to be exercised with strict regard for the rights of neutrals, and the voyages of mail steamers are not to be interfered with, except on the clearest grounds of suspicion of a violation of law in respect of contraband or blockade.

"In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

"Done at the city of Washington the 26th day of April, in the year of our Lord one thousand eight hundred and ninety-eight, and of the independence of the United States the one hundred and twenty-second.

"[Seal.]

Wm. McKinley.

"By the President:

"Alvey A. Adee, Acting Secretary of State."

Examining this proclamation in its several parts, we find: First, the simple declaration and announcement of a recognition of a condition of war existing since the 21st of April, 1898, as declared by the act of congress of April 25, 1898; second, a declaration of the desire that such war shall be conducted upon principles in harmony with the present views of nations, and sanctioned by recent practice. This being the declared intention of the executive, it must be accepted to aid in construing the subsequent declarations of the proclamation. The first point in which the executive desires to continue the practice and be in harmony with the views of nations is that there shall be no privateering; the second, that a neutral flag shall cover the enemy's goods with the exception of contraband of war, and that neutral goods not contraband of war shall not be liable to forfeiture under the enemy's flag. So far it is very clear that the proclamation has followed the humane practice of all nations more recently established; but, reaching the fourth article of the proclamation, we find it absolutely necessary in these cases, in order to interpret and construe it according to the arguments of either the libelants or the defendants, to read into it some language determining the time at which Spanish merchant vessels should be "in any ports or places within the United States" to give them the right of being allowed until May 21, 1898, for

loading their cargoes and departing. There is no expression of any element of time in this connection to aid in the construction, but upon this depends the cases of the *Catalina* and of the *Miguel Jover*, which cleared from New Orleans the evening of April 21, 1898. It is urged by the claimants that the intention of the proclamation was that the exemption should attach to all Spanish merchant vessels in harbor at the outbreak of the war, and that the words "at that date," or their equivalent, should be understood; while the counsel for the captors contend that there can be no retroactive effect of the proclamation, and the only word that could be understood is "now." Which of these views is in harmony with the present view of nations, and sanctioned by their recent practice? Formerly, at the outbreak of war, nations lost no time in seizing enemies' shipping found in their ports, although they had entered in good faith in time of peace; but modern usage condemns such a breach of national good faith, and recent practice has been to give certain days of grace to shipping found within enemies' ports at the outbreak of war. In the Crimean war of 1854, Russian vessels were allowed six weeks to leave British ports. In 1870, thirty days were allowed German vessels in French ports, and French vessels in German ports were allowed six weeks to leave. In 1897 (the Greco-Turkish war) fifteen days were allowed by each nation for the vessels of the opposite nation to clear with impunity. In each of these cases the immunity attached from the outbreak of the war.

In the proclamation of the 22d of April the president had declared that 30 days of grace should be given to neutral vessels found in blockaded ports. Can it be believed that he intended to change the number of days of grace, from 30, already named in one proclamation, to 25 in this? Is it not more reasonable to consider that the same number of days was intended, which, commencing at the outbreak of the war, would bring it to the 21st of May, the day named?

Was it the intention of this proclamation to apply these days of grace to all vessels in ports of the United States at the outbreak of the war, or to those so in port on the day of the actual issuance of the proclamation? If the latter construction is accepted, it certainly would not be in accordance with the present views of nations, nor sanctioned by their recent acts. It would leave a space of five days after the commencement of hostilities when, according to such views and practice, they might be considered exempt from seizure, and could safely leave port; but upon the issuing of such proclamation became subject to seizure. If they were safe according to the present rule of civilized nations, certainly the issuing of the proclamation at a later day, without declaring that it should be retrospective, should not make them liable. While it is true that the rule of construction generally is that statutes have no retrospective or retroactive effect, it is not without exceptions, and the principal question always is, what was the intention of the legislators? It is contended that, the vessels being captured before the proclamation issued, the rights of the captors attached; but, if it was the intention to exempt all in port at the outbreak of the war, it is not considered that the attaching of any such right should influence the decision in these cases. Giving the

introductory language of the proclamation the force to which I consider it is entitled, I feel compelled to hold that the intention of the executive was to fully recognize the recent practice of civilized nations, and not to sanction or permit the seizure of the vessels of the enemy within the harbors of the United States at the time of the commencement of war, or to permit them to escape from ports to be seized immediately on entering upon the high seas; and that the fourth article should be held to apply to all Spanish merchant vessels in a harbor of the United States upon April 21, 1898, and exempt them from seizure. This will effect the release of the *Catalina* and the *Miguel Jover*.

In regard to the cargoes of such vessels, it cannot be considered that it could be the intention of the executive, or the policy of any nation, to permit vessels to take in their cargoes up to a certain time, and leave the port free, and then have them seized, so that the cargoes should be liable to condemnation. What makes the free vessel makes the free cargo, although it may be found to belong to the enemy.

The fifth article of this proclamation declares that any Spanish merchant vessel, which, prior to April 21, 1898, shall have sailed from any foreign port bound to any port or place in the United States, shall be permitted to enter such port and discharge her cargo, and afterwards to depart without molestation. This raises a question which is not without difficulty in the cases against the *Pedro* and *Guido*. The testimony shows that both these vessels were owned by a Spanish corporation of Bilbao, Spain, and were engaged in regular trade with outward cargoes from European—particularly Spanish—ports to the Cuban ports to discharge; thence to some part of the United States—usually Pensacola—for a load of lumber for the return voyage. The *Guido* had sailed from Liverpool by way of Santander, Coruna, and La Puebla, and was bound for Havana. In her regular course, after she had touched at that and several of the Cuban ports, she would have proceeded to Pensacola, and she had among her papers a bill of health for that place; but there was no charter party or certainty of her going there. She had no cargo for that or any other port of the United States. The *Pedro*, a vessel of the same line, had sailed from Antwerp with cargo destined for several Cuban ports. She had been into Havana, discharged some cargo, and taken other on board, and was bound to Santiago. After she had touched there, and one or two other Cuban ports for which she had cargo, she was under charter to proceed to Pensacola to load lumber for some port in Europe. She had on board no cargo for Pensacola. It is contended by the claimants of these two vessels that the fact that their ultimate destination, after stopping at the other ports, was a port of the United States to take in a cargo, brings them within the provision of the fifth article of the proclamation, as being vessels which, prior to April 21, 1898, had sailed from a foreign port, bound for a port or place of the United States; and extended and elaborate arguments were had, and cases were cited, upon the subject of continuing voyages and their termini. I do not consider that such a construction can be recognized as reasonable when applied to the cir-

cumstances of this case; nor that it can for a moment be considered to have been the intention of the proclamation when made. The reasons for such exemption from seizure are twofold: First, it excuses a vessel which, ignorant of the condition of war, comes directly into the power of the enemy, and is, therefore, to that extent, a protection to commerce, and tends to prevent a breaking up of commercial relations between nations upon the first, and perhaps unfounded, suspicion of unfriendly relations between them; secondly, as the material increase of a nation's possession is always desirable upon the outbreak of war, and the importations of foreign cargoes may well be considered to tend towards such increase, it is desirable to encourage these importations, although brought by ships of the enemy. But neither of these reasons apply to the cases at bar. These vessels would have been informed of the condition of war long before approaching our shores. In fact, a state of war existed before the *Pedro* left Havana; and, having no cargo to bring into this country, they were only coming to take property away, and in the meantime carrying on commerce in the interest of the enemy between its ports, and supplying it with necessary provisions with impunity.

It is also urged by the claimants of these vessels that, although they were owned by a Spanish corporation of Bilboa, La Flecha, the general managers of which were Spanish citizens, and resided at Barcelona, a large portion of the stock of this corporation was owned by subjects of Great Britain, who had a lien on, or equitable ownership of, the rest of the stock, so that in reality the vessels were neutral property, and had only been put under the Spanish flag to take advantage of certain privileges given them in trading to the Spanish West Indies. It has been repeatedly declared that the property of a house of trade established in an enemy's country is liable to condemnation as prize, whatever may be the domicile of the partners, and this principle will apply with much greater force to the property of a corporation duly incorporated, and acting under the laws of an enemy's country, regardless of the domicile of the individual stockholders, or any equitable interest neutrals might have in the stock. A mortgage or equitable lien upon the vessel itself, if held by a neutral, could not protect her from seizure, and much less can an equitable interest in the stock of the corporation which is the owner. These vessels were owned by a Spanish corporation, sailing under a royal Spanish patent, flying the Spanish flag, officered and manned by Spanish citizens, nearly, if not quite, all of whom were registered as members of the Spanish naval reserve; and they must be taken and considered as in all respects property of the enemy, and subject to forfeiture.

The *Panama* sailed from New York before the 21st of April, 1898, and was upon the high seas at that time and at the time of capture. The fact that there had been no formal proclamation or declaration of war before she had sailed or at the time she was captured, or that she had at a recent date left a port of the United States, cannot be considered as exempting her from the liability of all enemy's property to capture, unless coming directly within the language of the president's proclamation. The practice of a formal proclamation before

recognizing an existing war and capturing enemy's property has fallen into disuse in modern times, and actual hostilities may determine the date of the commencement of war, although no proclamation may have been issued, no declaration made, or no action of the legislative department of the government had. This date has been declared by the act of congress of April 25, 1898, and by the proclamation of the president of the next day to have been April 21, 1898, including that day, so that any Spanish property afloat, captured from that time, became liable to condemnation, unless exempt by the executive proclamation.

In the case of the Buena Ventura it is shown by the evidence that she cleared for Scranton, Miss., with permission to touch at Newport News for coal on her voyage to Rotterdam. Although she was to touch there for that purpose, it was not a port of discharge, nor was she from a foreign port, and her case clearly does not come within the language of the proclamation. Had she been captured approaching Newport News for the purpose of coaling, even then there might have been some opportunity for argument that the permission to touch had given her encouragement, and it should, in justice, furnish the same protection as to a vessel coming from a foreign port; but that was not the case. When captured she must have been pursuing the same course she would have pursued had there been no intention to stop for coal, and neither such intention nor permission tended in any way to increase the liability of her capture. She was an enemy's vessel, found upon the high seas at the commencement of the war, and not coming within the exceptions of the proclamation. Her cargo was shipped by a citizen of the United States to a neutral port, consigned partly to the shipper's order and partly to a citizen of Great Britain, and is unquestionably either neutral, or the shipper's property. The suggestion that it should be condemned, although neutral, because found in an enemy's vessel, and, at the time of the capture, there had been no proclamation issued declaring it not subject to condemnation, cannot be entertained for a moment. The policy and law declared in the executive proclamation is considered to be the law by which this court is governed, whether the capture took place before or after it was issued. It is the existing law by which rights must be determined, and in this matter there can be no possible question of construction or intention.

The cargoes of the Pedro and the Guido appear from the testimony and papers found on board to have been mostly shipped by neutrals to parties in the enemy's country. Such shipments are *prima facie* enemies' property, and subject to condemnation; but such presumption can be overcome by evidence, and, in those cases in which claims and test affidavits have been filed tending to show the ownership, time will be given for further proof; but the property all being either perishable, or subject to deterioration by delay, or such that the cost of keeping will be disproportionate to its value, an order of sale will issue, and the claim stand against the proceeds of sale.

The Panama, after touching at Havana, was bound to Vera Cruz, and a large portion of her cargo is shown to have been shipped to Mexico, and consigned to residents, and presumptively citizens, of

that republic. That is all *prima facie* neutral property, and will be released. The rest, shipped by merchants in New York, and consigned to parties in Havana, is presumably the property of the consignees, but, where claims and test affidavits have been filed combating that presumption, time for further proof will be given, as in the cases of the *Pedro* and the *Guido*. When the property can be immediately restored to the claimants, it will be so ordered, but otherwise it will be sold pending further proof, as the greater part, if not all, is liable to deterioration by the delay.

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#### TEN THOUSAND AND EIGHTY-TWO OAK TIES.

(District Court, D. New Jersey. June 20, 1898.)

##### 1. DEMURRAGE—DELAY IN DISCHARGING—CHARTER PARTY.

In a charter of a vessel to carry railroad ties a provision that from the time the vessel is reported ready not less than 1,500 ties shall be furnished per running day "for loading at port of loading, and prompt dispatch for discharging at port of discharge," entitles the ship to demurrage for delay in unloading caused by other vessels being previously at the consignee's dock, though, by the custom of the port, vessels are obliged to take their turn.

##### 2. SAME.

If the master, after beginning to unload, intends to discontinue until security is given for demurrage, he should give such timely notice thereof as will enable the charterers to furnish the required security without delaying the progress of the work, or adopt a means by which prompt discharge can be made and the lien of the vessel retained.

This was a libel in rem by Matthew M. Norbury against 10,082 oak ties to recover demurrage for delay in discharging.

Cowen, Wing, Putnam & Burlingham, for libellant.

Horace L. Cheyney, for claimants.

**KIRKPATRICK**, District Judge. This is an action in rem to recover demurrage claimed by the schooner *Rob Roy* for delay occasioned in the discharge of a cargo of oak ties at Elizabethport, in this district, the charter providing that the "vessel should have an absolute lien on cargo for freight, dead freight, and demurrage." The *Rob Roy* was chartered to bring a cargo of oak ties from Charleston, S. C., to Elizabethport, N. J. The vessel arrived at Elizabethport on Saturday, June 1, 1895, at 3:30 o'clock p. m., and the captain immediately reported her arrival to Mr. Finch, the agent of the Central Railroad Company of New Jersey, to whom the ties were consigned, and the same day telegraphed the same to Messrs. Brockie & Welsch, the charterers, who resided in Philadelphia. When the *Rob Roy* reached Elizabethport there were lying at the dock of the Central Railroad Company of New Jersey three schooners similarly laden with railroad ties, and by reason thereof there was no berth available at which the *Rob Roy* could discharge. Solely for this reason the *Rob Roy* was detained at Elizabethport, and the unloading of her cargo was not begun until June 14th. During all the time of this delay Mr. Harriss, the agent of the vessel, was in almost daily com-

munication with the charterers, Messrs. Brockie & Welsch, demanding prompt discharge, and he notified the charterers that demurrage for the delay would be demanded according to the terms of the charter. On the 14th day of June the discharge of the Rob Roy began, and proceeded until the 19th, by which time about 7,000 ties had been unloaded, placed upon railroad cars, and shipped to different points on the railroad, whereby the lien of the vessel for demurrage became limited to the cargo remaining on board. Thereupon, on the 19th day of June, the master notified the consignee and the charterers that he would stop discharging unless his lien for demurrage was secured. On the 20th day of June the master was informed that the consignee assumed no liability for his detention. On the 21st of June Messrs. Brockie & Welsch offered to give security in these words: "In consideration of your delivery of cargo of schooner Rob Roy without attaching for alleged claim of demurrage, we agree to pay demurrage, if any, for which we may be legally liable." On the same day the attorneys for the master of the Rob Roy notified charterers that the schooner would remove to and discharge balance of cargo at nearest wharf where lien could be preserved, unless security were given for demurrage, and asking for answer. To this notice Messrs. Brockie & Welsch replied on June 22d: "We are endeavoring to arrange with owners of Rob Roy for her to continue discharging ties to Jersey Central Railroad without libeling or adopting course outlined by you." No arrangement, however, was made. The libel in this suit was filed, and on the 25th of June the charterers telegraphed that they would "enter security at Trenton." On the 26th of June the unloading was resumed, and continued to finish on the afternoon of the 28th of June. The actual time required for the discharge was seven days.

The clause in the charter upon which the libelant bases his claim is as follows:

"It is agreed that the lay days for loading and discharging shall be as follows (if not sooner dispatched): Commencing from the time the captain reports vessel ready and prepared to receive or discharge cargo, not less than 1,500 ties per running day, Sunday excepted, to be furnished the vessel for loading at port of loading, and prompt dispatch for discharging at port of discharge; and for each and every day's detention by default of the party of the second part or agent 74 dollars per day, day by day, shall be paid by said party of the second part or agent to said party of the first part or agent."

The defendants interposed by their answer these defenses of fact: That the vessel delayed entering upon her charter, and that the master did not report her ready to discharge to the proper officer of the consignee, and that for these reasons the delay of which the libelant complains was occasioned. These allegations are not substantiated by the proofs. I find the facts to be that there was no delay in entering upon the voyage, and that report was made to proper officer at port of destination.

The defendants also insist that the "prompt dispatch for discharging" stipulated for in the contract is so qualified by the succeeding words "at port of discharge" that, taken as a whole, they are simply equivalent to prompt dispatch as regulated or determined by the custom of the port of discharge, and that it being the custom of

the port of Elizabethport for vessels to wait their turn for discharging, and the Rob Roy having been promptly discharged after the work of discharge began, no liability arose for detention in beginning the work caused by her being obliged to wait her turn. It seems to have been the intention of the parties to the contract to provide against delay of the schooner both at the port of lading and discharge. She was to be loaded at the port of lading at the rate of 1,500 ties per day, and be discharged at the port of discharge with prompt dispatch. The words "at port of discharge" were not intended to qualify the prompt dispatch the vessel was to receive in discharging cargo, but to relate to the place where such prompt discharge was to be made. In making this definite and express contract to give discharge with prompt dispatch, the charterers took upon themselves the risk of providing at once a berth from which the discharge could take place, and it is no excuse to show that, by the custom of the port, vessels there take their turn. "Demurrage is a matter of contract, the provisions of which usage cannot modify." *Davis v. Wallace*, Fed. Cas. No. 3,657. To the same effect is the case of *Riley v. Three Thousand Railroad Ties*, 38 Fed. 254, where the learned judge, discussing the question of demurrage in connection with usage of the port, says: "If not satisfied to do this [become subject to port usage], he [the master] should have guarded against the danger by stipulating for demurrage." In the absence of express contract, reasonable diligence is all that can be required. To hold that the vessel was bound to wait her turn according to the usage of the port, notwithstanding the stipulation for prompt dispatch, would be to prohibit the parties from receiving that compensation for delays for which it was their intention to provide. *Fish v. One Hundred and Fifty Tons of Brown Stone*, 20 Fed. 202. Prompt dispatch excludes all delay save the time employed in unloading and delivering cargo, except what is caused by natural causes beyond the control of the party contracting. Under the contract, the charterers were bound to furnish prompt dispatch for discharging. This they failed to do, and such failure was a default on his part such as was contemplated by the charter. *Burrill v. Crossman*, 16 C. C. A. 381, 69 Fed. 747. "A charter party which made charterer liable for demurrage only when caused by his default did not relieve him for delay caused by omission to perform his covenants, even though he was not guilty of negligence." *One Thousand Six Hundred Tons of Nitrate of Soda v. McLeod*, 10 C. C. A. 115, 61 Fed. 849.

The libellant being entitled to demurrage, the only remaining question is how much. Under the charter the vessel had a lien on the ties for demurrage, which on the day of the stoppage of discharge had already accrued. By the removal of the ties from the wharf upon the cars of the consignee, the vessel was losing her lien expressly provided for in the charter. There was no place on the railroad wharf of discharge where the ties could be stored. The only course open to the vessel by which the lien could be preserved was that suggested to the consignee and charterers,—to remove to nearest wharf, where the ties could be retained until the question of demurrage was determined. The evidence shows that there was not a

wharf near by suitable for the purpose. The dock suggested had not sufficient water at low tide to float the Rob Roy, and to it the master could not have been expected to go. To have proceeded elsewhere to complete discharge would have consumed several days. This was not desired by the charterers, as is apparent from their telegram of June 22d, in which they say: "We are endeavoring to arrange with the owner of Rob Roy in this city for her to continue discharging ties to Jersey Central Railroad without libeling or adopting the course outlined by you, and hope by Monday to have matters satisfactorily arranged." This was virtually a request for the vessel to remain at Elizabethport and await developments, and it may be assumed that she did so in consequence of this telegram. On the 26th of June unloading was recommenced, and proceeded promptly until vessel was discharged. There is no dispute in regard to the rapidity of the discharge while the work was in actual progress. If the master intended to discontinue discharging his vessel until security were given for demurrage, he should have given such timely notice of his intention to the charterers as would have enabled them to have furnished the required security without delaying the progress of the work, or have adopted a means by which prompt discharge could have been made and the lien of the vessel retained. This course was not pursued by the master. I will not, therefore, award any demurrage from the time when the master arbitrarily stopped the discharging on the 20th of June to the time of charterers' telegram last above referred to, June 22d, a period of three days.

I am of the opinion that, under the contract and the circumstances of this case, the libellant is entitled to demurrage for 14 days. Let a decree be prepared accordingly.

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PEDERSON v. JOHN D. SPRECKLES & BROS. CO.

(Circuit Court of Appeals, Ninth Circuit. March 3, 1898.)

No. 418.

1. TOWAGE—METHOD OF FASTENING LINE.

On the preponderance of the evidence, *held*, that in towing a schooner it is not good seamanship, when the line is passed through the breast chock, to make it fast to the pawl bitt, as this brings it at such an angle as to put a great and uneven pressure on the chock, and a heavy strain on the line; that, if passed through the breast chock, the line should be fastened to the windlass bitt; and that the best method is to have as straight a lead as possible.

2. SAME—SPEED OF TOWAGE.

In towing a schooner about 90 feet in length, and of some 87 tons, gross, with a 5-inch Manilla line, in a smooth bay, 6 to 7 knots an hour is not excessive or dangerous speed.

3. SAME—RESPONSIBILITY FOR FASTENING TOWLINE.

When a tug takes in tow a schooner, having her own officers and crew on board, who take control and management of the fastening of the towline to their vessel, they are bound to see that it is securely fastened; and the tug is not responsible for any failure in this respect.

4. SAME—RECIPROCAL DUTIES.

A tug engaged in towing is not bound to exercise the highest possible degree of skill and care. Her duty is to use reasonable care and skill,

and she has a right to expect corresponding care and skill on the part of the tow, when the latter is in charge of her own officers and crew.

**5. SAME—PERSONAL INJURIES.**

A tug, towing a schooner manned by her own officers and crew, *held not* liable for personal injuries occasioned to the schooner's mate by the breaking of the breast chock, through which the line was run, where the accident was due to bad seamanship of the mate, in causing the line to be run through the breast chock and fastened to the pawl bitt, instead of to the windlass bitt.

Appeal from the District Court of the United States for the Northern District of California.

H. W. Hutton, for appellant.

Shortridge, Beatty & Brittain, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is a libel in personam by Louis A. Pederson, appellant, to recover damages from the John D. Spreckles & Bros. Company for injuries received. The undisputed facts are substantially as follows: The steamer Crown of England was wrecked at Santa Rosa Island, in Santa Barbara Channel, December 1, 1894. The California Iron & Wrecking Company was employed by the owners of the Crown of England to recover the machinery from the wreck; and, to assist in this work, the company employed the schooner S. Danielson and the tugboats Kittie O'Neill and Vigilant. The schooner was owned in part by one Mrs. Gruggel, wife of its captain. It had a gross tonnage, 87.55; net tonnage, 83.20; net length, 91.9; breadth, 27.7; depth, 6.8 feet,—carried about 5 tons of iron, and was about 10 years of age, and in good condition. The tug Vigilant was owned by appellee. The S. Danielson and the Vigilant lay at anchor all night before the accident, side by side, in Beechers' Bay, on the east side of the island. On the morning of January 6, 1895, about 8 or half past 8, the S. Danielson, upon the suggestion of the tug, hauled in her anchor, and started to drift, while waiting for the tug to come alongside and take her in tow. After drifting about half a mile, the tug came alongside, and about 9 o'clock made fast to the schooner, and began towing. Appellant, who was the mate of the schooner S. Danielson, passed a 5-inch Manilla rope out to the tug, to be used in the towing. The line was passed through the breast chock on the port side, and was made fast, under his supervision, to the pawl bitt. Between 40 and 50 fathoms of line were passed out before the master of the tug Vigilant signified that they had length enough. While engaged in parceling the line, and standing on the side of the line, between the line and the capstan, the chock broke; and appellant was thrown against the capstan by the snap of the line, and his leg was broken, and so severely injured that amputation was made necessary. Some 10 or 15 minutes thereafter the line parted. The time occupied in towing before the accident is variously estimated by the witnesses at from 15 to 20 minutes.

What caused the accident? Was the appellee guilty of any negligence? The contention of appellant is that the accident was caused

by the negligence of the parties in charge of the Vigilant, in towing at such an excessive rate of speed that the chock through which the towline was passed was pulled in two; that the appellee was guilty of negligence, in not supervising or directing the arrangement of the towline, in not watching the effect of her towing upon the schooner, and in towing at an excessive speed. It is claimed on behalf of appellant that there is a substantial agreement on the facts, and that the only questions involved herein are questions of law. The contention of the appellee is that the accident was caused by the acts of appellant and those acting under his direction, in putting the line through the breast chock, and making it fast to the pawl bitt, instead of the windlass bitt; that improper steering by the captain of the schooner, in charge of the helm, also contributed to the breaking of the chock, by increasing the strain thereon; that, in failing to perform his duty in this respect, appellant was guilty of such negligence as bars him from recovering any damages. It is claimed by appellee that the questions involved herein are purely questions of fact, upon which there is a conflict of evidence, and that the decision of the trial court should not be disturbed on this ground.

The tug and the schooner were each in charge of their respective officers and crew. Each was properly manned and equipped. There were no visible defects in either. The weather was calm and clear, there was a light wind, and the water was smooth. The chock on the schooner is used to keep the line in place, and the bitt to which the line is fastened gives the strength for towing purposes. The decided preponderance of the evidence establishes the facts contended for by appellee, that it is not good seamanship upon the part of the officers and crew of the schooner, when the line is passed through the breast chock, to make it fast to the pawl bitt; that, if the line is passed through the breast chock, it should, in order to be safe, be fastened to the windlass bitt; that when the line is put in the breast chock, and fastened to the pawl bitt, it is at such an angle as to bring a great and uneven pressure on the chock, and a heavy strain upon the line; that the best method is to have as straight a lead as possible; that the straighter the lead, the safer the tow. This testimony is not in any manner weakened by the fact that the schooner had been previously towed in safety, for a longer distance, with the line placed in the breast chock, and fastened to the pawl bitt. The question as to who furnished the line, or who first suggested its use, does not clearly appear. But, in view of the other facts, it is wholly immaterial. There is no suggestion that the line was not a proper, strong, and safe one, and no claim is made as to there being any defect therein. Appellant, as the mate of the schooner, had charge and control of her forward part. He was at his post of duty. Capt. Randall had charge of the tug. He called upon the schooner to give him the end of the line. It was passed to him by appellant. Pederson, in the ordinary discharge of his duty as mate of the schooner, directed where and how the line should be placed. It was laid through the breast chock, and made fast to the pawl bitt, of the schooner. Signals were then given, and the tug started on its course. In the light of these circumstances, it seems to be a self-evident proposition

that the tug could not have been at fault unless at the time of the accident she was towing at an excessive speed. Touching this point, the most that can be said in favor of appellant is that there was a conflict of evidence as to the rate of speed. Appellant's witnesses testified that in their opinion the tug was towing at a rate of 9 or 10 knots an hour, while the testimony on the part of appellee placed it at from 6 to 7 knots an hour. The question as to whether the speed was excessive is not to be determined solely from the rate. It depends upon the condition of the tow, the line, and other surroundings. The questions are whether she was going at such a speed that no damage would be liable to ensue therefrom; whether she was exercising due caution and reasonable diligence. If the speed of the tug caused the accident it was excessive. The great preponderance of the evidence is—taking into consideration the tonnage and size of the schooner, the strength of the line, and state of the weather, wind, and water—that the tug was towing at a reasonable and safe speed, not exceeding 7 knots an hour, and was not guilty of any fault, and that the speed of the tug was not the proximate cause of the breaking of the breast check on the schooner. While there was a slight conflict as to the rate of speed, the witnesses substantially agreed that 7 knots an hour was safe and reasonable. The witness Titchworth, who had been about 4 years on the *Vigilant*, and was on the tug at the time of the accident, and had been engaged over 10 years in the towing business, testified that the *Vigilant* was a steady tug in her pulling, regular in her movements, in perfect condition, and that 7 knots an hour "was a safe speed." Thompson, who was captain of the tug *Rescue*, in the employ of the Merchants' & Ship-owners' Towboat Company, and had been engaged for 20 years in the towing business, on all kinds of boats and ships, in all parts of the coast, including the Santa Barbara Channel, under all conditions of wind and weather, testified, in reply to questions, as follows:

"Q. In towing a schooner of the dimensions and the tonnage of the *Danielson*, I wish you would state to the court whether it would be safe and proper to use a line of from 40 to 50 fathoms length in towing such a schooner in the Santa Barbara Channel, when the water is smooth, the wind fair, and the rope or hawser a 5-inch Manilla line? A. It would if it was smooth and the wind fair, as you say. It would be line enough. I should accept that; yes; new rope, good line,—if the distance was not too long, and I expected not to get different weather, or anything like that. Q. As to the rate of speed that it would be proper towing, with a schooner such as the *Danielson*, under the conditions I have named, would you say that a speed of from 5 to 6 or 7 or 8 knots would be a proper, reasonable, and careful speed to tow? A. I should say a speed of 7 or 8 knots would be all right, if it was smooth, with a new 5-inch line. I should tow that fast if I was doing it; after I got fairly started,—got way on my tow. If it was rough, and I considered it necessary to go slow, I should do so. If it was smooth, I should certainly go as fast as I could; and I think that would be just about the rate of speed,—8 knots on a vessel like that."

Capt. Harvey, assistant superintendent of the Merchants' & Ship-owners' Towboat Company, who had been engaged in the towboat business for 30 years, under various conditions, and upon all kinds and character of vessels, testified as follows:

"Q. Take the schooner *Danielson*, whose dimensions I have given you, in the Santa Barbara Channel, with smooth water, fair wind, being towed by

the tug Vigilant; would a 5-inch line—say, from 35 to 40 or 50 fathoms—be a proper length of line to have out, towing such a schooner? A. I should say it would be. Q. As to the rate of speed, captain, that it would be safe to tow a schooner under those circumstances; what would you say as to that? A. I should say it was safe for a tug to pull all it could. Q. 6 or 8 or 9 knots would be safe, in point of speed? A. Yes, sir; that line will hold that boat, and more too."

Capt. Gray, who was the superintendent of the same towboat company, and had been in the business for over 20 years, and was familiar with the Santa Barbara Channel, testified as follows:

"Q. What would you say as to the speed which it would be safe and proper to tow a schooner of these dimensions in quiet, still water, with a tug such as the Vigilant, and with a 5-inch Manilla rope, of about 40 or 45 fathoms? A. I should tow just as fast as the tug would tow her. Q. Would it be safe speed to go at, say, 5 or 6 or 7 knots an hour? A. Yes, sir; perfectly safe."

Rosenberg, a witness for appellant in rebuttal, on cross-examination, testified as follows:

"Q. What would you say as to the speed of towing a schooner such as the Danielson, \* \* \* smooth water, fair wind, very lightly laden with some wreckage, and it was being towed by a strong steam tug, the Vigilant; the line made fast to the pawl bitt, passing through the after port chock, and the tug ahead; what would you say as to reasonable speed to tow under those circumstances, a 5-inch Manilla rope being used? A. About 6 or 7 miles an hour."

But it is earnestly argued by appellant that the testimony is undisputed that the speed of the tugboat actually caused the breaking of the after chock. This position is sought to be maintained upon the testimony of Capt. Randall, the master of the tug Vigilant, given with reference to the manner in which the line was made fast, as ascertained by him after the accident. The testimony of the other witnesses was on the assumption that the line was properly placed and fastened. To fully understand that portion of the testimony of Capt. Randall relied upon and quoted by appellant, it is necessary to refer to other parts of his testimony. He had testified in chief that the tug started at slow speed, that after towing about 15 minutes the chock was carried away, and that at that time the tug was towing about 6 knots.

"Q. When the vessel started, how fast were you going? A. We started gradually, and gradually got on the way to about 6 knots. Q. How long after you started before you were going at the rate of about 6 knots? A. About 4 or 5 minutes. Q. For 10 minutes you had been going at the rate of 6 knots? A. Yes, sir. Q. No faster? A. No, sir. Q. The same rate of speed? A. The same rate of speed. The engine was not speeded up at all."

He further testified that the tug at the time of the accident slowed up and stopped, and, after ascertaining what had happened, again started ahead at the same rate of speed as before, and after towing 10 or 12 minutes the line parted. Upon his cross-examination the following questions were asked, and answers given:

"Q. Did you notice through which chock the towline was leading? A. Yes, sir; the breast chock. Q. Did you notice where it was made fast to? A. No, sir; I could not see that. Q. Do you think that you could break a chock line like that, towing a schooner such as the Danielson 6 knots an hour, and under the conditions you were towing her that morning? A. No, sir; not with a fair lead. Q. What do you mean by a 'fair lead'? A. A straight lead. \* \* \* Q. You went ahead on that morning without reference to where the towline was made fast to? A. We allowed that the people on the schooner

would aid us in the matter, to help us out, by not making those lines fast to the wrong place."

Next come the questions and answers so confidently relied upon by counsel:

"Q. I ask you whether on that morning you went ahead without reference to what part of the schooner the towline was made fast to? A. Yes, sir. Q. Six miles an hour was too fast, under the condition that that line was made fast? A. No, sir. Q. How did the chock come to break, then? A. It was too fast. It proved it. It certainly was too fast. Q. Under the conditions at which the line was made fast? A. It was too fast."

It is evident that this language had reference to the condition of fastening the line on the pawl bitt after placing it in the breast chock, which was a fact unknown to the officers and crew of the tugboat until after the accident. This is made clear by the answer of the witness when recalled on behalf of the appellee:

"Q. The way in which the line was made fast, then, you did not know? A. I did not know; no, sir. Afterwards I seen where the line had been made fast, and knew the chock it was in; after we went alongside. Q. To what would you, then, attribute,—all told in one answer, covering the whole case,—in your best judgment, the breaking of the chock? A. Bad steering, and the line being made fast in the way it was, and possibly a bad casting. The speed of the vessel had nothing to do with it. It must have broke if we had been going at 2 or 3 knots."

This testimony, instead of showing that the tug was towing at an excessive speed, tends to show that the line, after passing through the breast chock, was fastened to the wrong bitt, and that the negligence was upon the part of the officers and crew of the schooner, instead of upon the part of the tug. It is shown by the testimony that the tug was fully adequate to the work. It was managed with reasonable care, judgment, and skill. It performed its duty in an ordinary, careful, and prudent manner, and did its entire duty, unless, as is claimed by appellant, it was its duty to see that the line was properly placed and fastened on the schooner before it started to tow. A vast number of authorities are cited by appellant to the effect that the tug dominates, guides, and directs; that the tow keeps in her wake, and conforms to her directions; that the tug must furnish the motive power, and direct the location of the tow; how she shall be lashed; with what fastening she shall be secured; to see that her tow is properly made up, and secured with lines of proper strength. Many of these cases are in relation to the duties of the tug in the towing of canal boats and barges, which have no life, voice, or control in making up the tow; and in all these cases it is held that it is the duty of the tug to see that the lines of the tow are properly, sufficiently, and securely fastened, and that, if the tug fails in this duty, she is guilty of a maritime fault. But such cases have no application to a case like this, where the schooner had its own officers and crew on board, and, in pursuance of the custom in this respect, took full charge, management, and control of these matters. The distinction between the cases is too manifest to require extended discussion, and is clearly illustrated in the decision of the court in *The Quickstep*, 9 Wall. 665, 670, which is one of the leading cases relied upon by appellant. In the course of the opinion the court said:

"If the tug, in constructing the tow, used the lines furnished by the different boats, yet, as each boat was independent of the other, no responsibility can attach to either for the breaking of the line which she did not provide, and had nothing to do with making fast."

The testimony shows, without conflict, that it is the custom, in all cases where the tow has its own officers and crew on board and in charge, for the officers of the vessel to arrange all the preliminary matters, such as placing and making fast the towline; that such matters were within the duty of the appellant to perform; and that he did in fact perform that duty. Every case should be determined with reference to its own peculiar facts, circumstances, and conditions. In *The Allie & Evie*, 24 Fed. 745, 749, Brown, J., said:

"In whatever form the question comes up,—whether as to seaworthiness, adequacy for the work, or the time of starting,—it is a practical question of reasonable prudence and judgment; and as regards seaworthiness in general, or the adequacy of the tug for the work undertaken, there is no other final criterion than the judgment of practical men versed in the business, and the customs and usages of the time and place, viewed as representing the judgment and knowledge of the time. To show this, the custom and practice of nautical men is admissible."

See, also, *The Battler*, 62 Fed. 612, 614, and authorities there cited; *The Merrimac*, 2 Sawy. 586, Fed. Cas. No. 9,478; *Burns v. Sennett*, 99 Cal. 363, 33 Pac. 916.

The general rule as to the duty and liability of a tug in towing is clearly expressed in *The Webb*, 14 Wall. 406, 414. Among other things, the court said:

"It must be conceded that an engagement to tow does not impose either an obligation to insure, or the liability of common carriers. The burden is always upon him who alleges the breach of such a contract to show either that there has been no attempt at performance, or that there has been negligence or unskillfulness, to his injury, in the performance. Unlike the case of common carriers, damage sustained by the tow does not ordinarily raise a presumption that the tug has been in fault. The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services."

In *The Margaret*, 94 U. S. 494, 496, the court said:

"The tug was not a common carrier, and the law of that relation has no application here. She was not an insurer. The highest possible degree of skill and care were not required of her. She was bound to bring to the performance of the duty she assumed reasonable skill and care, and to exercise them in everything relating to the work until it was accomplished."

See, also, *The Jacob Brandow*, 39 Fed. 831; *The Argus*, 31 Fed. 481, 483.

The law applicable to this case is that both the tug and the tow must exercise reasonable care and skill. While the tug was bound to exercise reasonable care and skill, she had the right to expect corresponding care and skill on the part of the schooner. *The Jacob Brandow*, 39 Fed. 831; *The Sagua v. The Grace*, 42 Fed. 461; *The Ciampa Emilia*, 46 Fed. 866, 868; *The Invertrossachs*, 8 C. C. A. 87, 59 Fed. 194, 198; *The Margaret*, 5 Biss. 353, Fed. Cas. No. 9,068; *The Allegiance*, 6 Sawy. 68, Fed. Cas. No. 207; *Sproul v. Hemmingway*, 14 Pick. 1. The contention of appellant that the happening of the accident raised a presumption of negligence on the

part of the tug cannot, therefore, be sustained. The burden of proof in this case was upon the appellant to show affirmatively, by a clear preponderance of the evidence, that the tug was guilty of negligence. 1 Shear. & R. Neg. § 57. This he failed to do, and he is not, therefore, entitled to recover any damages. It is true, as was said in *The Webb*, supra, that:

"There may be cases in which the result is a safe criterion by which to judge of the character of the act which has caused it."

In *The Joseph B. Thomas*, 86 Fed. 662, this court said:

"There are cases where the fact that the accident happened under given conditions, and in connection with certain circumstances, will amount to evidence of negligence sufficient to charge the defendant."

See, also, 1 Shear. & R. Neg. § 59.

In cases where no questions are raised as to what caused the accident or the injury, and the circumstances are of such a character as to show that the thing which did happen would not have occurred unless there was negligence upon the part of the person having charge and control of such thing, then the presumption contended for would apply. But it would be a strange construction of this rule to apply it to a case like the one under consideration, where all the facts as to the cause of the accident are in dispute, and nothing occurred which, of itself, tended to show that the tug was at fault. On the other hand, it was the chock on the schooner that first gave way and caused the line to hit appellant, and this was the real cause of the injury to him. The presumption, therefore, if any is to be indulged in, would be that the breast chock was defective, because it broke. The line did not part for several minutes after the accident occurred, and its parting had nothing whatever to do with the injury complained of. Moreover, the testimony tended very strongly to show that it did not part on account of the speed of the tug, but was caused by chafing after the breaking of the chock.

Numerous other minor questions were discussed by counsel, which we deem unnecessary to refer to, as the views already expressed are decisive of the case. Upon the whole case, we are of opinion that the accident was caused by the negligence of those having charge of the schooner, and that the tug was not in any wise at fault. The decree of the district court is affirmed.

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GORMULLY & JEFFREY MFG. CO. v. SAGER MFG. CO. et al.

(Circuit Court, N. D. New York. June 20, 1898.)

1. PATENTS—INVENTION.

In a patent for a bicycle saddle, no invention is involved in merely omitting a coiled spring at the pommel end of a prior construction.

2. SAME.

The Duryea patent, No. 293,725, for an improved bicycle saddle (designed for the old high-wheel vehicle), is void because of anticipation by the Kelley saddle.

This was a suit in equity by the Gormully & Jeffrey Manufacturing Company against the Sager Manufacturing Company and others for alleged infringement of a patent for a bicycle saddle.

Charles K. Offield, for complainant.

Edmund Wetmore, Howard L. Osgood, and Lawrence E. Sexton, for defendants.

COXE, District Judge. This is an equity action based upon letters patent, No. 293,725, owned by the complainant and granted February 19, 1884, to Charles E. Duryea for an improved bicycle saddle designed for the "ordinary," or high-wheeled vehicle which was in vogue at the date of the patent. The specification and drawings describe and show the saddle attached to the "backbone" or long arm which carries the small rear wheel. The alleged infringing saddle is designed solely for use upon a "safety" bicycle. The specification says that the structure of the patent "consists, essentially, in a flexible seat or saddle having its two extremities attached to an elastic supporting-frame composed, essentially, of two longitudinal parallel springs arranged in such manner as to admit of their passing downward on opposite sides of the backbone or reach, and of their maintaining a longitudinal strain or tension to the seat." The patent contains eight claims. The first five are alleged to be infringed. The first claim is the broadest and sufficiently describes the invention. It is as follows:

"(1) The improved saddle for bicycle, consisting of a flexible seat or saddle proper, and a supporting-spring having two substantially parallel arms with upturned ends attached to the seat, and adapted, as described, to apply a longitudinal tension thereto."

The defenses are the usual ones,—anticipation, want of patentability, noninfringement and defective title. A large number of patents and devices have been introduced by the defendants but the discussion at the argument makes it unnecessary to consider them. The great bulk of the anticipatory literature is condensed in the exhibits known as the "Star" or "Kelley" saddles, which are conceded to be prior to the Duryea. To spend time in the examination of the other exhibits would be like studying with laborious care a multitude of antique and musty volumes when everything contained therein, which bears upon the subject in hand, has been condensed and can be found in the encyclopedia in one short and concise statement.

The Kelley saddles are the best references offered by the defendants and possess all of the features of the Duryea saddle with the single exception that the Kelley saddle, as illustrated by the Exhibit No. 6, is provided with a coiled spring at the narrow, or pommel, end. This proposition is undisputed. The sole question, therefore, upon this branch of the controversy, is this: Assuming that the Kelley saddle is not an exact anticipation, did it require invention to copy the Kelley saddle omitting only the coiled spring? It is thought not. If Duryea had been first in the art it might, possibly, have involved invention to add the coiled spring to his structure. Surely it did not require invention to leave off that feature. The attempt to prove patentable distinction in favor of Duryea by reason of the omission of

this single coil is based upon the most technical and visionary considerations. The only conceivable difference is one of degree. The Kelley saddle may have a greater spring action than the Duryea saddle, but there can be no question that Exhibit No. 6, if made after the Duryea patent, would infringe. The court would not listen with toleration to an argument that Kelley had escaped infringement by the addition of the coil in question. Being made prior, if not an exact anticipation, the change to the Duryea structure was wholly within the province of the skilled mechanic. The situation seems similar to that which was disposed of by this court in *Manufacturing Co. v. Walbridge*, 60 Fed. 91. The bill is dismissed.

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AMERICAN ORDNANCE CO. v. DRIGGS-SEABURY CO.

(Circuit Court, D. Connecticut. June 20, 1898.)

No. 962

PATENTS—PRELIMINARY INJUNCTION.

A preliminary injunction on a patent for guns will be denied where defendant is financially responsible, and is under contract to furnish the guns in question to the government, within a limited time, for use in time of war for coast defense, under pressure of impending danger.

This was a suit in equity by the American Ordnance Company against the Driggs-Seabury Company for alleged infringement of a patent. The cause was heard on motion for preliminary injunction.

W. H. Singleton, for complainant.

Wilson & Wallace, for defendant.

TOWNSEND, District Judge. On this motion for a preliminary injunction, complainant claims public acquiescence in the validity of its patent, infringement, and that defendant is estopped to deny validity by reason of the previous relations of the parties in interest. I am not satisfied that defendant's proposed construction will not infringe certain claims of the patent in suit. But, as it is admitted that defendant is financially responsible, the motion will be denied on the ground that defendant is under contract to furnish the guns in question to the government of the United States within six weeks from the present time, for use in time of war for coast defense, and under the pressure of immediate and impending danger. In these circumstances, the defendant should not be restrained from delivering such necessary war material to the government.

## JAKOBSEN v. SPRINGER et al.

## SPRINGER v. JAKOBSEN et al.

(Circuit Court of Appeals, Fifth Circuit. May 17, 1898.)

No. 687.

## 1. COLLISION—STEAMERS IN RIVER—VIOLATION OF NAVIGATION RULES.

Two steamers, one ascending and the other descending along the left bank of a broad, straight stretch of the Mississippi river, *held* both in fault for a collision between them,—the descending vessel for faulty construction, rendering it difficult to check her speed, and for being out of her proper course, in the path of ascending vessels; the ascending vessel for starboarding her helm instead of porting, as required by navigation rules 18 and 19 (Rev. St. § 4233).

## 2. SAME—MUTUAL FAULT—DAMAGES—LOSSES OF CREW.

In case of mutual fault, members of the crew of one vessel, who lose personal effects, may recover from the other only half their damages.

## 3. SAME—PASSENGERS.

In cases of mutual fault, the personal representatives of passengers lost with one of the vessels may recover full damages from the other, but the latter may recoup one-half thereof from the half damages awarded to the owners of the former vessel.

## Appeal from the District Court of the United States for the Eastern District of Louisiana.

This cause arises from a collision on the night of January 27, 1897, between the steam yacht *Argo*, 101 feet long, 6 feet draft, and the Norwegian steamer *Albert Dumois*, a freight vessel, 210 feet long, and 17 feet draft, in a straight stretch of the Mississippi river, half a mile wide, and about 80 miles below the city of New Orleans. The *Argo* was under special charter of a newspaper company to make a quick trip to the mouth of the Mississippi river and return. She started about 7 o'clock p. m. on that day, and had on board at the time a master, who served also as a pilot; an engineer; a fireman; one deckhand; one steward, who served also as a cook. The undertaking was under the direction of H. G. Hester, representative of the newspaper company; and his party consisted of himself, A. Faure Bourgeois de Blesine, A. C. Lindauer, newspaper correspondents, and one Cranz, an invited guest. According to her inspection certificate, the *Argo* should have had one pilot, one engineer, and a crew of five men; but as there was great hurry to get her away, so as to be present at the mouth of the river at the time of the arrival of a congressional committee to inspect the jetties (which had preceded them on the steamship *Whitney*), to report said committee's proceedings, Messrs. Hester, Lindauer, and Blesine, all of whom were said to be familiar with the management of water craft, agreed in case of necessity to lend a hand and act as part of the crew. The *Argo* sped rapidly down the river, without delay or accident, until, between 12 and 1 o'clock in the morning of January 28, 1897, she came in collision with the *Albert Dumois*, striking her on the starboard bow 10 or 12 feet abaft the stem, damaging herself so badly that she sunk in a few minutes thereafter; her crew and passengers all escaping, except Hester and Blesine, who were drowned. The *Dumois* made a search of an hour or more, trying to find the missing men, and then brought the remainder of the crew and passengers to the city of New Orleans. On the same day the *Dumois* reached New Orleans, Oscar M. Springer, owner of the *Argo*, filed his libel in rem against the *Dumois*, claiming that she was entirely in fault, asking \$40,000 damages. Shortly thereafter the crew of the *Argo* filed their intervention, claiming various small sums, to the value of their personal effects lost by the sinking of the *Argo*; and thereafter Mrs. Blesine, mother of the deceased Blesine, filed her libel in personam against Anders Jakobsen, who had appeared, through the steamship's master, and claimed to be the sole owner of said steamship; alleging that said Blesine died without

Issue, having no wife or father living, leaving her his only surviving parent, and alleging said collision and death were solely caused through the fault, negligence, and improper conduct of those in charge of the steamship, and asking for \$20,000 damages. After filing his claim, Jakobsen, owner of the Dumois, filed a petition claiming the benefit of the limited liability act, and asked that the said vessel and her pending freight be appraised and released on bond. Thereupon an appraisal was had, and the value of the vessel and freight appraised at \$31,333.75, and an order was rendered restraining further proceedings against said vessel; and a monition was published for three months, calling on all parties having or pretending to have claims against the said vessel to appear before a commissioner and present the same. Under this monition, Mrs. Hester, the widow of H. G. Hester, filed her petition, alleging that her said husband had lost his life through the fault of those in charge of the said Dumois, and claiming damages in the sum of \$20,000. By agreement the libel of Mrs. Blesine was filed as a claim under said monition, and to be treated as an answer to the petition of Jakobsen, denying fault on the part of the Dumois, and asking that all claims be made against said bond, and not against the steamship. The libellant Springer filed an answer denying all the allegations, and surrendering the wreck of said Argo, and any charter money that might be due to him and to any and all parties in interest. On the hearing the district court decided that the Dumois was solely in fault, and rendered decrees against the fund in favor of Springer, owner of the Argo, for \$11,000; Mrs. Hester, \$5,000; Mrs. Blesine, \$2,500,—and for the crew of the Argo the following amounts: One Broadhurst, \$51.45; Orkney, \$20.25; Jewett, \$25.50; Brown, \$213; Green, \$5; and Diseamus, \$4. From this decree the owners of the Dumois appealed, claiming, among other errors, that the court erred in finding the Dumois in fault, and in not finding the Argo solely in fault; and thereupon O. M. Springer, the owner of the Argo, also appealed, claiming that the court erred in not finding a higher value than \$11,000 for the Argo.

Richard De Gray, for Springer, Mrs. Blesine, and crew.

George Denegre, for Mrs. Hester.

John D. Rouse and William Grant, for claimant Jakobsen.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

PARDEE, Circuit Judge (after stating the facts). Prima facie, a collision between an ascending and a descending steamer, in a straight stretch of the Mississippi river, where it is half a mile wide, can only result from gross mismanagement in the handling of both steamers, unless there is intended and carried out a deliberate purpose on the part of the one to run the other down. In case each vessel is anywhere near its proper place, they are necessarily too far apart to make a collision possible. The case in hand is no exception to the rule. It is admitted by the pleadings and shown by the evidence that at the time the Dumois and the Argo first came in sight of each other the Dumois was ascending the river in her proper place, near the left bank. That the Argo was at the same time descending the river near the same bank, and out of her proper place, which was the middle of the river, is clear, by the preponderance of the evidence, supported as it is by conclusions that necessarily follow from admitted facts. Lombard, the pilot of the Dumois, who was keeping a look-out on the bridge, and Sibitsen, the mate, who was with him, also, on watch, each testify that when he first distinguished the Argo he saw her red, green, and white lights dead ahead,—if anything, a little inside; that is, a little nearer the left bank than the Dumois. Lar-

sen, able seaman, who was on watch, and afterwards at the wheel of the Dumois, says that the Dumois was about a half a ship's length from the left bank when he saw the lights of the Argo to the starboard of the Dumois, and this was after some signals had been exchanged. Nicholas Theodore, pilot on the tug Day Dream, which, with its tow, was about to land at the lugger landing on the left bank, just above where the collision took place, says that the Argo passed so close to him that he could see her color; that she was about 50 feet from him, and he was afraid she would run into him. E. R. Green, cook on board the Argo, says that when he heard the first whistle of the Argo he went up on the steps and looked out, and saw all the three lights of the Dumois. Capt. Brown, master and pilot of the Argo, and who was the only man on watch at the time, although Diseamus, seaman, stood by him, admits passing the tug Day Dream and giving her a signal of passage, and immediately after admits first seeing the Dumois, but only the white and red lights of that vessel, which he says were on his port bow. Diseamus saw only the lights that Capt. Brown saw. One Nicholas Dedes, pilot of the tug Day Dream, says that they were about making a landing on the east bank of the river when the Argo passed, blowing one whistle. He does not undertake to say where the Argo was when she first signaled the Dumois. One Capt. Jurisch, on one of the luggers in tow by the Day Dream, testifies to the signal between the Argo and the Day Dream, but gives no satisfactory evidence as to where the Argo was at the time she first came in sight of the Dumois. From this evidence, and from legitimate conclusions from admitted facts, it is clear that at the time the Argo first sighted the Dumois the Argo was out of her proper course, unnecessarily, in the path of ascending vessels. This fact being established, it is very easy to reconcile the other evidence, conflicting though it may be, as to the lights, course, and management of the respective ships, resulting in the collision. The master of the Argo admits that after sighting the Dumois, and before changing his course, he waited for the Dumois to give the passing signal, and that, the Dumois not giving the passing signal, he himself gave it,—one whistle, meaning to pass to the right,—and thereupon, or very soon thereafter, put his helm to port. Notwithstanding the cross signal of two whistles then given by the Dumois, and the apparent direct change of course of the Dumois in accordance with its signal, and the continuance of the Dumois upon its changed course, the master of the Argo, believing in the speed of his vessel, and that he could run around and pass to the right of the Dumois in any event, kept his course until he struck the Dumois and sunk his vessel. We quote from his deposition:

"Q. Well, how far away was the boat when you first saw her, before you gave the signal? A. She was about three-quarters of a mile away, I guess; about three-quarters of a mile, the way I was going. I understand it now; yes, sir; I saw her some time before I blew the first whistle. Q. You understand, of course, which vessel should blow first? A. It was her place to blow first. That is what I was waiting for. Q. And when she didn't blow—A. I blew. Q. You blew because she didn't blow for you first? A. Exactly. \* \* \* Q. Did you blow for the Dumois after you passed abreast of the luggers at the canal? A. Yes, sir; I blew, but I waited some time for him to

blow, and he didn't blow. Then I blew one whistle as he was on the east shore. Q. After you passed the Day Dream? A. Yes, sir. Q. How far were you past the Day Dream and her luggers when you blew the whistle first? A. I suppose I was not more than about—very little distance—about five or six seconds, seven or eight seconds. \* \* \* Q. Why didn't you blow the signals of alarm when you first discovered the lights of the Dumois? A. Because I had no business blowing the alarm then, because I was on my right course; and I blew one whistle to him, and he answered by two, crossing my signal, which I suppose any man would have altered his signals and stopped his ship, coming that close to each other. Q. You didn't sound that one blast of the whistle until you had passed the Day Dream, when you were less than half a mile from the Dumois? A. No, sir. Q. When did you sound it? A. I sounded the whistle half a mile from the Dumois; that is, the first whistle. I was going very fast, captain. Q. You understand the rule to be, then, that, when an ascending vessel gives the signal for sides, that the descending vessel may give her signal for sides? A. Yes, sir; I was waiting for him to do it, and I thought I would have to do it; couldn't wait any longer; and so I blew one whistle, and he answered me back two whistles, crossing my signal. Then I blew one immediately afterwards,—one whistle,—then immediately afterwards, and ported my helm quick, when he blew his two whistles. Instead of blowing his two whistles, he ought to have stopped according to the rules, and backed his ship. I ported my helm right away, to get out of the road, immediately after the two whistles were blown by him. Q. What interval of time elapsed between your first and second whistle? A. I suppose it was not very long. Let us see; about—not more than about 15 seconds. Q. Then you put your helm hard a-port? A. I put my wheel hard a-port, and, the velocity I was going, I made sure I would go clear of him. That any sane man would go across my bow, I thought it was too much altogether. I have been on this river 40 years, and I never knew anybody to do like that. Q. Why didn't you stop and back after you saw the Dumois crossing your signal? A. It was too late then. I thought I could clear her. Q. It was not too late to port your helm? A. I ported my helm after I blew the second whistle. She never blew any more whistles. Q. Why didn't you stop after you blew the second whistle? A. Because my judgment said I could clear her, with the velocity I was going. Q. That is the reason you never attempted to reverse,—check your speed? A. No, sir; I made sure I would clear her. That is the reason. You could see yourself when I struck her eight feet from the stem. If that ship was backing when they rung the alarm, I would have cleared her two or three hundred feet."

The fault of the Argo is too clear to require further discussion, and it is hardly necessary to add that at the time she was short of her regulation crew. The substitution of passengers to work in case of necessity may satisfy inspection officers, but ought not to deceive the court. She was not constructed so that her speed could be checked when required by the rules of navigation, or that she could be backed within any reasonable time after sighting danger; and, withal, she was running recklessly in the nighttime, with substantially only one man on watch, in the path of ascending vessels, trusting to her speed and management to keep out of trouble.

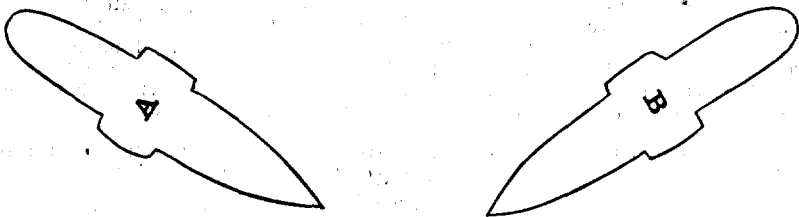
The fault of the Dumois is not so apparent. She was properly officered, manned, and equipped; had a regular licensed pilot on board; carried the regulation lights; was in a place where she had a right to be at the time the Argo was sighted. Ahead of her, almost within hailing or signaling distance, the tug Day Dream was either landing, or had just landed, showing all the lights of such a tow. In addition, coming towards her, showing three lights at an even height (the red, green, and white lights), was the Argo. From the evidence, the Argo signaled first to pass to the right, and ported her helm

accordingly. The Dumois, either not hearing this signal, or not willing to permit the Argo to pass to the right, crossed the Argo's signal, and gave two whistles to pass to the left, and apparently immediately put her helm to starboard, changing the course of the vessel from straight up the river along the left bank to across the river, or towards the right bank. Notwithstanding the failure of the Argo to answer with two whistles, the Dumois kept her course, and only stopped and reversed her engines when the collision was apparently inevitable. Rules 18 and 19 (section 4233, Rev. St.) are as follows:

"Rule 18. If two vessels under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other. Rule 19. If two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her starboard side shall keep out of the way of the other."

According to these rules, the Dumois, instead of insisting on keeping her course, should have ported her helm, and she would have avoided the collision. As soon as the Argo ported her helm, and showed only her red light to the Dumois, and the Dumois had starboarded her helm, showing only the green light to the Argo, the vessels were in the fifth position foreseen and provided for by the rules of the supervising inspectors, to wit:

"This is a situation requiring great caution; the red light of A. in view to B. and the green light of B. in view to A. will inform both that they are approaching each other in an oblique direction. B. should put his helm to port and pass astern of A., while A. should continue on his course or port his helm, if necessary to avoid collision, each having previously given one blast of the steam whistle, as required by the rules when passing to the right."



And the Dumois should have put her helm to port, to pass astern of the Argo.

As to the value of the Argo, we have examined all the evidence. She had had a varied and interesting career, and at different times unquestionably had different values. The district court allowed \$11,000 as her value, probably based upon the testimony of Col. Miller, who testifies that he had had some claim against the owner, and some correspondence with him as to the value of the Argo. In November or December, 1896, the owner expressed himself as willing to sell the Argo for \$12,000, but claimed that it would be a tremendous sacrifice, and that whoever bought her at that price would be getting a bargain. He was anxious to sell, and would allow one or two thousand dollars commission. The owner himself testifies that the day previous to the collision he had sold a half interest in her for \$7,500, and that the sale was not concluded only because the Argo was sunk; and this

evidence is corroborated by one Bagley, the intending purchaser. There seems to be no dispute as to this fact in regard to the value of the Argo, and giving effect to the same, and further considering the general average of the values of the Argo fixed by the witnesses, we find that the value of the Argo at the time of the collision was \$15,000.

The assignments of error not relating to the fault of the vessels nor to the value of the Argo are not well taken.

Hester and Blesine were passengers aboard the Argo. The claim that they were part of the crew of the Argo is not sustained by the evidence.

Finding as we do both the Dumois and Argo in fault, the decree of the district court must be reversed, and a new decree, adjusting the damages, entered. The crew of the Argo who lost effects by the collision are entitled to recover only half their damages from the Dumois, and, as the Argo was in fault, nothing from their own ship. *The Queen*, 40 Fed. 694; *The City of Norwalk*, 55 Fed. 102. Hester and Blesine being passengers on board the Argo, and not in fault, their representatives are entitled to recover full damages from the Dumois; but the Dumois is entitled to recoup half the damages so paid, and deduct the same from the amount awarded to the owners of the Argo. *The Hercules*, 20 Fed. 205; *The North Star*, 106 U. S. 17, 1 Sup. Ct. 41. The Argo, being a total loss, can recover one-half her value from the Dumois, less one-half the damages suffered by the Dumois, shown by the record to be \$185. Decreed accordingly.

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#### THE MARGUERITE.

(District Court, D. Massachusetts. May 14, 1898.)

No. 749.

1. COLLISION—MANEUVERS UNDER PRESSURE OF EXTREME DANGER.

A vessel which has the right to be where she is should not be held to be in fault for an unwise maneuver made in a moment of extreme danger.

2. SAME—RIGHT OF WAY—SAILING VESSEL AND TUG WITH TOWS.

While the rule giving the right of way to sailing vessels as against steamers is based historically upon their assumed inferiority, it is nevertheless an arbitrary rule, which is not to be varied by any estimates which the navigators immediately concerned may make of the comparative maneuvering powers of their respective vessels. Therefore a tug with tows is bound to keep out of the way of a schooner, under ordinary circumstances, though it is manifest that the schooner can much more readily change her course.

3. SAME.

The rule giving a sailing vessel the right of way, as against a steamer, requires the steamer to keep off the course of the sailing vessel if it be practically possible to do so; that is, if she can do so without accident, such as collision with another vessel, running aground, or the like.

4. SAME—CHANGE OF COURSE BY SAILING VESSEL.

A sailing vessel approaching a tug with tows should hold her course, at all events until it becomes evident that the tug will persist in her breach of the rule by refusing to give way.

5. SAME—RIGHT OF WAY—SAILING VESSEL AND TUG WITH TOW.

A tug with tow, meeting a sailing vessel at night in a narrow channel, held not relieved of her obligation to keep out of the latter's way by the

fact that she had wind and tide with her, and that the sailing vessel was under full sail and in a position to maneuver easily.

Carver & Blodgett, for libelant.

W. H. Leonard, for respondent.

LOWELL, District Judge. This was a libel for the loss of the schooner Nickerson by collision with a scow towed by the steamtug Marguerite. The accident occurred October 25, 1895, at about half past 6 in the afternoon, a little below Castle Island, in Boston Harbor. There was a northwest wind, blowing 20 miles an hour or somewhat less, and the tide was about an hour ebb. The schooner, a fisherman of 90 tons, loaded with about 20 tons of fish, was returning from the banks. She was carrying mainsail, foresail, jib, and flying jib. She had a crew of 16 men, all told. Near buoy 6 she came about on the starboard tack, and stood across the channel. Having reached its southern edge, she came about on the port tack below buoy 7. As she was tacking, her captain, who was forward on the lookout with one or two other men, perceived the tug coming down the channel about half a mile away, with towing lights set. He did not see the tow or any lights upon it. Conceiving that the schooner had the right of way, he held his course on the port tack until a few moments before the collision, when he attempted to come about; but, before he could do so fully, the starboard corner of the scow struck the starboard bow of the schooner, making a hole so large that the schooner quickly sank.

The Marguerite was towing two loaded mud scows, lashed together end to end. The towing hawser was about 200 feet long, and the entire length of the tug and tow was something less than 500 feet. The tug's captain saw the schooner crossing the channel on the starboard tack, and from that time to the time of collision had her constantly in observation. He proceeded on the theory, developed by counsel in the argument before me, that the tug and tow had the right of way, and he did nothing to avoid the schooner until a few moments before the collision, when he shouted to her to tack, and slowed down or stopped the tug, thus slacking the hawser between it and the scow.

I find that both vessels had full view of each other for some time before the collision, though the lookout on the tug was sharper than that on the schooner. Until just before the collision, each vessel was maneuvered as if it had the right of way. If the tug should have given way to the schooner, the former was clearly to blame. If it was the duty of the schooner to avoid the tug and tow, the fault was wholly with the schooner. I should add that the testimony given by the captain of the tug seems to me to be, on the whole, more accurate than that of the schooner's crew, but concerning the facts above stated there is little or no conflict of evidence.

Before discussing the principal question presented by this case, viz. which vessel had the right of way, I must dispose of one or two subsidiary complaints made by each vessel of the other. The men on the schooner did not see any lights on the scows, but the evidence is conclusive that there was a white light on each scow from six to eight feet above the water. Not improbably, these lights were hidden

from the schooner by the tug. Libellant's counsel contends that these lights were not those required by rule 8, Rev. St. § 4233. Even though the lights were insufficient, I should have no difficulty in finding that, if the tug and tow had the right of way, it was in the highest degree negligent for the schooner to attempt to sail across the stern of the tug after having seen the tug's towing lights. If, on the other hand, the schooner had the right of way, the tug was in fault, even though there were proper lights upon the tow.

It is contended by those on the tug and tow that the helmsman of the schooner, just before the collision, put his helm to port for an instant, before finally putting it to starboard. I am inclined to think that this testimony arose from an error in observation. The captain of the tug testified that the schooner did not begin to sheer to starboard until she had gone half way from the tug to the first scow. This leaves less than 20 seconds for the schooner to have sheered to starboard, and then sheered to port, so as to oppose her starboard bow to the starboard corner of the scow. Even if the schooner's helm was put to port for an instant, I should have no difficulty in finding that the act was done in a moment of extreme danger, and that, if the schooner had the right to be where she then was, she ought not to be held in fault even if the maneuver was made inadvertently or was unwise. See *Bigelow v. Nickerson*, 17 C. C. A. 1, 70 Fed. 113, 122.

I have, therefore, to consider simply if the ordinary rule which gives to the sailing vessel the right of way did not apply under the peculiar circumstances of this case.

These circumstances are stated by the claimant's counsel substantially as follows: A tug descending a narrow channel with two scows (190 feet) at the end of a hawser (210 feet). Wind and tide behind her. The channel 1,000 to 1,200 feet wide. A small fishing schooner, with all sail set and wind enough to maneuver easily. The schooner about to enter the channel in the opposite direction to the tug and tow. As I understand it, the learned counsel's contention may be stated thus: The rule which gives the right of way to the sailing vessel is based upon the greater freedom of movement ordinarily belonging to the steamer. Hence it follows that when, in a given case, the sailing vessel has a manifest superiority, the rule becomes inapplicable for want of the reason upon which it is based, and the case is governed by rule 24. Doubtless the presumption of inferiority is always with the sailing vessel, and the steamer must affirmatively demonstrate her own inferiority; but, where the steamer's inferiority is both manifest and considerable, she has the right of way. This is, I think, the claimant's contention, stated fairly and strongly.

That the rule which gives the right of way to sailing vessels as against steamers is based historically upon the assumed inferiority of the former there can be no doubt. In some other cases, the rules give to one vessel the right of way as against another quite arbitrarily, and without any such historical reason. But a rule of navigation, whatever its origin, when once established, is an arbitrary rule, and this for an excellent reason. That the rules governing the conduct of vessels should be precisely determined is far more important than

that they should impose upon every vessel a burden of precisely the same weight. As soon as two vessels come within sight of each other, each should know just what it may expect of the other, that it may govern its own movements accordingly. The rules of navigation not infrequently put one vessel to a deviation which the justice of peculiar circumstances would impose upon another, but the hardship of this deviation is rightly deemed a small matter compared to the dangers in which uncertain rules of navigation would involve all vessels.

If, when a sailing vessel sights a steamer, she may not assume that the steamer will give way, but, before holding her own course, must first determine if she or the steamer has the superior ability to maneuver, the perils of navigation will be greatly increased. It is usually easy to distinguish a sailing vessel from a steamer, but the comparative ability of two vessels to maneuver may often remain undetermined until it has been passed upon by the final court of appeal; and, if it be contended that the right of way belongs to the steamer only if her inferiority is manifest in a high degree, the uncertainty is not much lessened. Each vessel must then determine not only which has the superior ability, but, if the superiority is with the sailing vessel, must also determine what is the degree of that superiority.

As has often been said, the right of way is not a right to sail where the privileged vessel chooses. The privileged vessel has its burdens, and the burdened vessel has its privileges. Under ordinary circumstances, the former, indeed, may hold her course; but she may leave that course only at her peril, and, on leaving it, she becomes, in her turn, the burdened vessel. On the other hand, the burdened vessel must leave open the course which the privileged vessel is holding; but, unlike the latter, she may go wherever else on the face of the waters she pleases, and, in every place not within the forbidden course, she, in her turn, is privileged. To cause a sailing vessel and a steamer to exchange privileges and burdens according to their individual ability to maneuver would induce disastrous confusion, and would afford no sure relief to the inferior vessel. A schooner which had come into collision with a steamer by an improper change of course would then be found contending that she was without fault because her superior ability made her the burdened vessel, and thus imposed upon the steamer, as the privileged vessel, the duty of holding her own course.

The need of absolute certainty in rules of navigation has often been declared. In *The Oregon*, 18 How. 570, 572, it is said:

"Practically, when a rule for this purpose is laid down, it is rendered ineffectual by admitting exceptions to it. The mind begins to waiver as soon as the danger arises, and the exception, rather than the rule, becomes a subject of solicitude with the masters of both boats, and this, practically, annuls the rule, and causes the movements of both vessels to be uncertain."

See *Belden v. Chase*, 150 U. S. 674, 699, 14 Sup. Ct. 264.

It is difficult to make a general statement which shall apply to all cases, but it seems to me that the rules require a steamer to keep off the course of a sailing vessel if it is practically possible for the steamer to do so; that is to say, if she can do so without accident, such as collision with another vessel, running aground, or the like.

The reason and the limits of this qualification of the rule are both apparent. If the steamer cannot keep off the course of the sailing vessel, obviously there will be a collision unless the sailing vessel gives way. If the steamer came into its original position without fault, it cannot be held in fault for a collision which no subsequent action by it could have avoided. On the other hand, if the steamer's inability to keep off the course of the sailing vessel be seasonably apparent to the latter, there is no injustice in holding the latter to blame for the collision, if she, in her turn, could have avoided it. In case of the manifest inability of the steamer to give way, therefore, and in that case only, does she have the right of way over a sailing vessel. This general rule, and this exception thereto, seem to me just, and as safe and as easy of application as the nature of the case permits.

The rule is well illustrated by the case at bar. When the schooner first sighted the tug the former was coming about upon the port tack. At that time nothing was visible to those on the schooner but the green light and the towing lights of a steamer. That the schooner actually had the superior maneuvering ability I have no doubt, but the superiority was not then evident to those aboard of her. If my interpretation of the rules of navigation be correct, she had nothing to do but to hold her course, at all events until it became evident that the steamer would persist in her breach of the rules. When this became evident, the schooner should have given way, though her failure to do so would in no way relieve the steamer from fault. If, on the other hand, the claimant has correctly interpreted the rules of navigation, those in charge of the schooner and of the tug, as the vessels approached each other, should have devoted themselves to an estimation of the comparative maneuvering abilities of their several vessels under the existing conditions of wind, tide, and locality, and, if at any time the schooner appeared to be decidedly the superior of the steamer, should have treated the latter as having the right of way. If, practicing this altruism, each of these two vessels, instead of claiming the right of way, had yielded it to the other, and if a collision had ensued, as the natural result of the mutual forbearance, this court, on the claimant's theory, would have had to pass upon the relative ability of the schooner and the tug, with each vessel seeking to establish its own superiority and to fix the right of way upon its opponent.

It may be said that the letter of the rules bears hardly upon tows, which have become a most important means of coastwise commerce,—more important, perhaps, than sailing vessels. To this argument the answer is obvious. If the rules are unjust,—that is to say, if they put the burden upon what is ordinarily the inferior vessel,—the legislature should change them, but, until the change is made, the court will bear in mind that public safety is less endangered by the injustice of the rules than by their uncertainty. Certainty is the primary requirement of rules of navigation; the requirement of fairness is only secondary.

The decided cases, including those cited by the claimant and those cited by the libellant, support the principles just set out.

In *The M. W. Page*, 36 Fed. 329, the schooner which was held in fault was fickle, and brought about the collision by an unreasonable change of course. It is doubtful, moreover, if the tug and tow could have changed their course so as to avoid the collision, without running into a third vessel. It was daylight, and the situation was plain to the schooner. The dicta in the opinion, indeed, go somewhat beyond the decision, and seem to allow to a long tow certain rights which the circuit court of appeals of this circuit has denied to it. *The Gladiator*, 25 C. C. A. 32, 79 Fed. 445; *The Mount Hope*, 29 C. C. A. 365, 84 Fed. 910.

In *The Rose Culkin*, 52 Fed. 328, the schooner changed her course improperly. Here again the dicta go beyond the decision.

The case of *The A. P. Cranmer*, 1 Fed. 255, cited in *The Rose Culkin*, holds that a tug and tow are not a steamer within the rules, and upon this point has been overruled. *The Civilta*, 103 U. S. 699. And see *The Harold*, 84 Fed. 698. It is true that the judgment of the district court was affirmed on appeal, but the affirmance was upon another ground. 8 Fed. 523.

In *The Minnie C. Taylor*, 52 Fed. 323, the tug and tow could not turn to starboard without striking a third vessel, and could not turn to port without running aground. To stop the tug, and thus allow the barges to huddle together, would hardly have been safe. The case was very close to the line of distinction, and the learned judge, though he seems to have held that the tug and tow had the right of way, yet found that the tug, also, was in fault. *The Philadelphian*, 10 C. C. A. 127, 61 Fed. 862, was a case in which the sailing vessel did not sail out her tack.

In *The Excelsior v. The Bruce*, 38 Fed. 271, the tug and tow and the sailing vessel, as in this case, held their courses until collision was probable, if not inevitable, when the latter made an unsuccessful attempt to tack. It was held that the tug was to blame, and the learned judge said:

"The allegation that the bark should have gone about earlier, or should have turned southward, and endeavored to go astern of the tow, finds no support in the facts of the case. Her tack was not run out by several hundred yards. She had a right, therefore, to hold her course, and it was her duty to do so until threatened with collision, and then it was proper to make the effort which she did to avoid the danger." "Was the tug in fault? I believe she was. It was her plain duty to go astern of the bark. There was nothing, I think, in the way of her doing so. It seems quite evident that she desired to avoid loss of time by change of course, and therefore took the risk of crossing the bark's bows, hoping to get by in time. She took the chances, and must bear the consequences. Had there been anything in the way of turning slightly eastward to go astern, when she saw the bark turn westward, she should have slowed down, and stopped, if necessary. The use of her anchors and those of the ship would have enabled her to do this with safety."

In *The Howard Carroll*, 41 Fed. 159, a tug and tow were held in fault for a collision with a schooner beating up East river, and it was said:

"In this case the sailing vessel was beating in a narrow channel, where, in order to do anything to avoid the tow, it would be necessary for her to shorten her tack." "Instead of taking means to avoid the sailing vessel, as she ought

to have done, the tug took and maintained her course, upon the chance that the sailing vessel would know her intention and break her tack upon being signaled by the tug. But if the tug was not able, through lack of power, to control the float, she was nevertheless in fault; for the safety of the harbor requires that the tugs which undertake to tow the large floats should be of sufficient power to handle their floats easily and properly, and able to avoid sailing vessels when they are met in the course of their navigation about the harbor."

See, also, *The Maverick*, 28 C. C. A. 562, 84 Fed. 906.

In *The George S. Shultz*, 28 C. C. A. 476, 84 Fed. 508, it was held that an unincumbered steamer, making 14 miles an hour, had the right of way as against a tug and tow in narrow waters and in broad daylight, when the steamer had the tug on her port hand. In that case the rule which required the tug to give way was purely arbitrary in its origin.

I am of opinion, therefore, that the schooner had the right of way, and that the tug should have avoided her by porting her helm, and passing her to the southward, or by slowing down, or by some other means. That the tug could have avoided the schooner, if she had tried to do so, seems clear. I do not think that she need have anchored, as was suggested in *The Excelsior*.

Although the tug was thus in fault, I have further to determine if the schooner did not contribute to the accident by holding her port tack as long as she did. At some time it should have become plain to those on board her that the tug meant to hold its course, and that a tack on the schooner's part was the only way of avoiding a collision. However clear may have been the schooner's right of way, yet she had no right wantonly to run into another vessel, however blame-worthy. But it must be observed that the schooner could tack only by disregarding the ordinary rules of navigation, and by taking upon herself all the risks of this disregard. Had she done so, and had the tug changed her own course to starboard at the same time, the former would have been held liable for the collision which would have ensued. That the court should hold a vessel in fault for assuming that an approaching vessel will be properly navigated, and for not taking the risks of disregarding the ordinary rules, the case must be very plain, at all events where the complaining party is the vessel whose improper navigation was the real cause of the accident. As things turned out, the *Marguerite* might well have tacked a minute sooner; but I do not think that the tug, which made no signal to indicate that she intended to transgress the ordinary rule of navigation, can complain of the delay. In *The Excelsior* the sailing vessel seems to have persisted in her tack as long as in the case at bar, and that in broad daylight, when the danger of a change would have been less.

In *The Delaware*, 161 U. S. 459, 468, 16 Sup. Ct. 516, 521, there is a discussion of the duty, under certain circumstances, of the privileged vessel to avoid the burdened vessel. "The weight of English, and perhaps of American authorities," it is said, "is to the effect that, if the master of the preferred steamer has any reason to believe that the other will not take measures to keep out of her way, he may treat this as a 'special circumstance,' under rule 24, 'rendering a departure' from the rules 'necessary to avoid immediate danger.' Some even go

so far as to hold it the duty of the preferred vessel to stop and reverse, when a continuance upon her course involves an apparent danger of collision. Upon the other hand, other authorities hold that the master of the preferred steamer ought not to be embarrassed by doubts as to his duty, and, unless the two vessels be in extremis, he is bound to hold to his course and speed."

The cases of *The Britannia*, 153 U. S. 130, 14 Sup. Ct. 795, and *The Northfield*, 154 U. S. 639, 14 Sup. Ct. 1184, must be regarded, however, as settling the law that the preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting, at least in the absence of some distinct indication that she is about to fail in her duty. If the master of the preferred steamer were at liberty to speculate upon the possibility, or even upon the probability, of the approaching steamer failing to do her duty and keep out of his way, the certainty that the former vessel will hold her course, upon which the latter has a right to rely, and which it is the very object of the rule to insure, would give place in the mind of the master of the obligated steamer to doubts whether she would do so or not, and would produce a timidity and feebleness of action on the part of both masters which would bring about more collisions than it would prevent. *Belden v. Chase*, 150 U. S. 674, 14 Sup. Ct. 264; *The Highgate*, 62 Law T. (N. S.) 841; 6 Asp. 512. See, also, *The Isaac Newton*, 18 How. 581; *The Oregon*, 158 U. S. 186, 202, 15 Sup. Ct. 804; *The Maggie J. Smith*, 123 U. S. 349, 355, 8 Sup. Ct. 159; *The Bywell Castle*, 4 Prob. Div. 219; *The Warrior*, L. R. 3 Adm. & Ecc. 553; *The American*, L. R. 6 P. C. 127.

In *The City of New York*, 147 U. S. 72, 85, 13 Sup. Ct. 211, 216, it is said:

"Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is of itself sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption, at least, adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of the other vessel should be resolved in its favor." "The evidence of contributing negligence on the part of the sailing vessel should be clear and convincing."

In the case at bar the evidence of contributory negligence on the part of the *Nickerson* seems to me far from conclusive. For the reasons mentioned I find that the neglect of the rules by the *Marguerite* was the sole cause of the collision. Decree for libellant.

## THE ANNIE FAXON.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1898.)

No. 414.

## CIRCUIT COURT OF APPEALS—JURISDICTION.

The circuit court of appeals has no jurisdiction of an appeal in proceedings in admiralty for limitation of liability, when the only question presented for review on the record is whether the district court had power and jurisdiction, after final disposition of the questions of limitation, to enter a decree in personam against the owners of the vessel for damages suffered by some of the interveners.

Appeal from the District Court of the United States for the Southern Division of the District of Washington.

Cox, Cotton, Teal & Minor, for appellants.

Charles H. Taylor and Hubbard & Taylor, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. This was a petition by the Oregon Railway & Navigation Company, as owner, and the Oregon Short Line & Utah Northern Railway Company, lessee, for limitation of liability in respect to the damages caused by the explosion of the boiler of the steamer Annie Faxon on August 14, 1893, while the vessel was navigating the Snake river, in the state of Washington. The steamer was owned by the Oregon Railway & Navigation Company, but at the time of the accident it was leased to, and was being operated by, the Oregon Short Line & Utah Northern Railway Company. On September 18, 1893, both of these companies filed their joint and separate libels and petition in the district court for the district of Washington, in accordance with the provisions of the fifty-fourth admiralty rule, for the purpose of obtaining a limitation of their liability under section 4283 of the Revised Statutes of the United States, and such proceedings were thereupon had that an appraisement of the wreck was had, fixing its value at \$3,520, and a bond in the sum of \$4,020, in lieu of the appraised value, was made and given by the appellants. Thereafter various persons who were passengers upon said steamer, and injured by the explosion, and representatives of deceased passengers killed by the explosion, as well as various persons who were employes upon the steamer, injured by the explosion, and representatives of deceased employes killed by the explosion, appeared in the proceedings, and presented and filed their claims for damages, and also made and filed separate answers in the nature of cross bills, contesting the right of the appellants to an exemption from or a limitation of their liability in the premises. Among the claims so filed, and for which judgments were asked against the appellants, and each and both of them, were the following for and on behalf of the appellees: Lewis T. Lawton, a passenger, \$176,000; Mary A. McIntosh, as administratrix of the estate of John McIntosh, deceased, a passenger, \$50,000; and Susan McIntosh, as widow and sole heir at law of Thomas McIntosh, deceased, a passenger, \$50,000. The district court held that the appellants were entitled to limit their liability with respect to the

claims of all the persons injured, and a decree was entered accordingly. From this decree an appeal was taken to this court, and this court held that the appellants were entitled to have their liability limited for damages resulting from the explosion with respect to the claims of the employes, but were not entitled to have their liability so limited with respect to the claims of passengers. 21 C. C. A. 366, 75 Fed. 312. The decree was, therefore, reversed as to the claims of the appellees, and the cause was remanded for further proceedings in the court below, not in conflict with the opinion of this court. When the mandate of this court was entered in the district court, the appellees filed a petition praying that the fund in court be distributed, and a commissioner appointed to take testimony as to the damages suffered by the appellees. Testimony was accordingly taken as to such damages, and an order was made, distributing the fund in court to the various claimants, including a portion of it to the appellees. The court then proceeded and ascertained the amount of damages suffered by the appellees, and entered a personal judgment against the Oregon Short Line & Utah Northern Railway Company, for such damages in favor of the claimants as follows: Lewis T. Lawton, \$20,000; Mary A. McIntosh, as administratrix of the estate of John McIntosh, deceased, \$10,000; and Susan McIntosh, as widow and sole heir at law of Thomas McIntosh, deceased, \$10,000. From this judgment the appellants have prosecuted the present appeal.

The errors assigned—six in number—may be reduced to the following: First. The district court erred in making the order appointing a commissioner to take evidence as to the damages claimed to have been sustained by the appellees, for the reason that the district court had no power, under the mandate of the circuit court of appeals, or under the practice in such proceedings, to enter a personal judgment or decree against the appellants in excess of the limited liability fund in the district court represented by the bond taken in that behalf. Second. The district court erred in depriving the appellants of a trial by jury as to the claims of the appellees in excess of the limited liability fund in the district court. Third. The district court erred in entering a personal judgment against the Oregon Short Line & Utah Northern Railway Company in favor of the appellees. Fourth. The district court erred in entertaining jurisdiction of the proceedings for the purpose of ascertaining the liability of the appellants, or either of them, in excess of the fund represented by the bond given by the appellants. It is contended on the part of the appellants that the only decree which could have been entered in the court below upon the mandate of this court was one dismissing the injunction restraining the appellees from pursuing appropriate remedies to collect from the appellants the damages claimed to have been suffered by the appellees, and that the district court had no power to retain jurisdiction of the proceedings for the purpose of entering a judgment against the appellants, or either of them, for damages.

It appears that before the taking of the testimony in the case it was stipulated that no action or appearance on the part of the ap-

pellants should be taken or held as a waiver of any objection to the jurisdiction of the court, or to the jurisdiction of the court to enter up any judgment or decree assessing damages in favor of the appellees, or either of them; that, upon the commissioner of the court proceeding to take testimony, the appellants appeared specially, and reserved the right to make any and all objections to the jurisdiction of the court to further try, hear, and determine any matter whatsoever in the proceedings, or to the jurisdiction of the court to render any judgment or decree therein, assessing damages in favor of the appellees; that no other objection or exception whatever to any testimony, evidence, ruling, direction, or proceeding was made, taken, or suggested, and no error of law noted or excepted to, or called to the attention of the district court by the appellants, or either of them, in the proceedings or at the trial; and that neither of the appellants, by their attorneys or otherwise, made any request, application, or motion for a jury trial in the district court. The only question contained in the record on the present appeal is, therefore, the question of the jurisdiction of the district court to hear and determine the issues as to the liability of the appellants for the damages sustained by the appellees, and to enter a judgment against the Oregon Short Line & Utah Northern Railway Company and in favor of the appellees in excess of the fund in the district court represented by the bond given by the appellants. The act of March 3, 1891 (26 Stat. 826), creating the circuit court of appeals, provides in section 5 of the act:

"That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the supreme court in the following cases: In any case in which the jurisdiction of the court is in issue in such cases the question of jurisdiction alone shall be certified to the supreme court from the court below for decision. \* \* \*

"Sec. 6. That the circuit court of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law."

In *McLish v. Roff*, 141 U. S. 661, 668, 12 Sup. Ct. 118, 120, the supreme court held that, after a final judgment in the circuit court, "the party against whom it is rendered must elect whether he will take his writ of error or appeal to the supreme court upon the question of jurisdiction alone, or to the circuit court of appeals upon the whole of the case. If the latter, then the circuit court of appeals may, if it deem proper, certify the question of jurisdiction to this court."

In the case of *The Alliance*, 44 U. S. App. 52, 17 C. C. A. 124, and 70 Fed. 273, this court held that, to give the circuit court of appeals jurisdiction to review an appeal from the district court in admiralty under the act of March 3, 1891, it was necessary to present for review some question other than that of jurisdiction, and, as the case did not present such a question, the appeal was dismissed.

In *Manufacturing Co. v. Barber*, 18 U. S. App. 476, 9 C. C. A. 79, and 60 Fed. 465, the circuit court of appeals for the Seventh judicial circuit held the same doctrine upon a writ of error from the cir-

cuit court, and in that case the writ of error was dismissed. In the present case the substantial and only question is as to the power of the district court to render a personal judgment or decree against the company having the custody, control, and management of the steamer at the time of the accident. This is clearly a question of jurisdiction, which this court is not authorized to review. The appeal is therefore dismissed, at appellants' costs.

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SMITH v. RACKLIFFE.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1898.)

No. 422.

1. JURISDICTION OF FEDERAL COURTS—ACTION AGAINST STATE OFFICER.

An action by a citizen of another state or by an alien against a state treasurer to recover taxes alleged to have been illegally collected by the state is, in effect, an action against the state, and cannot be maintained in a federal court in view of the prohibition of the eleventh amendment.

2. SAME.

Pol. Code Cal. § 3669, which provides for bringing suits against the state to recover taxes illegally collected, is not to be construed as a consent that such suits may be brought in the federal courts, since it contains provisions wholly inapplicable to the procedure of the federal courts, among them being a provision that, at a certain stage of the case, the treasurer may cause it to be removed into the superior court for the county of Sacramento.

3. SAME—CITIZENSHIP—RECEIVERS OF CORPORATIONS.

It is only where the jurisdiction of the federal courts depends upon diverse citizenship that the citizenship of a receiver of an incorporated party is material. If the jurisdiction is asserted on any other ground, the receiver stands upon the same footing as the corporation itself.

4. SAME.

The provision in the constitution giving the federal courts jurisdiction of controversies "between a state and citizens of another state, \* \* \* and between a state, or the citizens thereof, and foreign states, citizens or subjects" (article 3, § 2), does not include an action against a state by a corporation created by act of congress.

Appeal from the Circuit Court of the United States for the Northern District of California.

C. N. Sterry and E. S. Pillsbury, for plaintiff in error.

W. F. Fitzgerald and W. H. Anderson, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The plaintiff in error, as receiver for the Atlantic & Pacific Railroad Company, was the plaintiff in an action which was brought against the state treasurer of the state of California, under section 3669 of the Political Code of California, to recover \$2,272.80 taxes paid by said company for the year 1893, alleging, in his complaint, that said railroad company was operating, under a lease from the Southern Pacific Railroad Company, a certain line of railroad in the state of California, over which leased line the lessor company also ran its trains; that said line of road, and the

rolling stock thereon, owned and operated by the Southern Pacific Railroad Company, were returned by that company to the state board of equalization for assessment for the year 1893, and were assessed to said Southern Pacific Company at a certain apportioned valuation per mile for all of the road which is covered by the lease; that the rolling stock on said leased road, owned and operated by the Atlantic & Pacific Railroad Company, was returned under protest by that company to the state board of equalization, and was by said board assessed for the year 1893 to its said owner; that each of said companies paid the taxes levied upon its property: that the said rolling stock of the Atlantic & Pacific Railroad Company so assessed was not used alone upon the line of the leased road in California, but was used in said company's traffic in other states, and was constantly coming and going into and out of said state, and that the Atlantic & Pacific Railroad Company's headquarters and the situs of its rolling stock is in the county of Bernallio, N. M., in which county all of its rolling stock was returned for taxation in 1893; that said assessment on the rolling stock of both companies using said road resulted in double taxation. The action was begun in the name of J. W. Reinhart, the former receiver of said road, and against J. R. McDonald, then the state treasurer. To the said complaint a demurrer was interposed, upon the grounds—First, that the court had no jurisdiction of the subject-matter of the action; and, second, that the complaint failed to state facts sufficient to constitute a cause of action. The circuit court, McKenna, J., sustained the demurrer upon the second ground, but disposed of the question of the jurisdiction in the following language:

"The view that this is a suit against the state is presented by the attorney general with great strength and plausibility. But, even if the contention be true, I think it is a fair deduction from the authorities, as from principle, that, the right of suit against the treasurer of the state being given, it may be brought in the federal courts when other grounds of jurisdiction exist, as they do in this case. I do not think it is necessary to review the cases. They are very numerous, and the care of counsel has cited all of them." *Reinhart v. McDonald*, 76 Fed. 403.

Upon writ of error from this court, the plaintiff in error contends that the circuit court erroneously sustained the demurrer, and the defendant in error again raises the objection which was presented in the lower court, that the court is without jurisdiction of the subject-matter of the action upon the ground that it is an action against the state of California, and subject to the inhibition of the eleventh amendment to the constitution of the United States, which provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." There can be no doubt that the action, although nominally against the state treasurer, is in fact an action against the state of California. From the time of the adoption of the eleventh amendment the supreme court of the United States has held that it should be construed fairly and liberally, and in consonance with its manifest purpose, and has established the doctrine that when, "the nominal defendants have no personal

interest in the subject-matter of the suit, but defend only as representing the state, the state is the real party against whom the relief is sought, and this suit is substantially within the prohibition of the eleventh amendment." *Hagood v. Southern*, 117 U. S. 52, 6 Sup. Ct. 608; *Louisiana v. Jumel*, 107 U. S. 711, 2 Sup. Ct. 128; *In re Ayers*, 123 U. S. 443, 8 Sup. Ct. 164, *Louisiana v. Steele*, 134 U. S. 230, 10 Sup. Ct. 511. *In re Ayers*, 123 U. S. 443, 8 Sup. Ct. 164, Mr. Justice Matthews said, of the purpose of the eleventh amendment:

"It was thought to be neither becoming nor convenient that the several states of the Union invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other states or aliens, or that the course of their public policy and administration of their public affairs should be subject to, and controlled by, the mandates of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the eleventh amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as to effectually accomplish the substance of its purpose. In this spirit, it must be held to cover, not only suits brought against a state by name, but those also against its officers, agents, and representatives, where the state, though not named as such, is, nevertheless, the only real party against which alone, in fact, the relief is asked, and against which the judgment or decree effectively operates."

The present case comes clearly within the line of cases to which these words apply. It is a case in which the state of California is alone interested as defendant. No personal relief is sought as against the state treasurer, no act of his is brought in question, and no official misconduct is charged against him. So far as he is concerned, the action is purely impersonal. It was originally begun against McDonald, his predecessor in office. It is the aim of the action to recover from the state treasurer, in his official capacity only, money which has been paid to the state for taxes, and mingled with other funds of the state. The money which the treasurer receives as such is kept by him in the vaults of the state treasury. It is so required by subdivision 1 of section 452 of the Political Code. If a judgment were rendered for plaintiff in the action, the treasurer, upon the controller's warrant, would be required to repay the tax money out of taxes so illegally collected, and to pay the costs out of the general fund of the treasury. The money sued for was not originally paid to the treasurer. It did not pass through his hands, but came into the treasury through other officers. The state is the only party in interest.

But, notwithstanding the eleventh amendment, the state may, by an act of its legislature, permit itself to be sued, either in a federal court or in its own courts. It is contended by the plaintiff in error that such permission has been granted in the present case by the provisions of section 3669 of the Political Code of California, which reads as follows:

"Sec. 3669. Each corporation, person, or association assessed by the state board of equalization, must pay to the state treasurer upon the order of the controller, as other moneys are required to be paid into the treasury, the state and county, and city and county, taxes each year levied upon the property so assessed to it or him by said board. Any corporation, person, or association, dissatisfied with the assessment made by the board, upon the payment

of the taxes due upon the assessment complained of, and the five per cent. added, if to be added, on or before the first Monday in February, and the filing of notice with the controller of an intention to begin an action, may, not later than the first Monday of February, bring an action against the state treasurer for the recovery of the amount of taxes and percentage so paid to the treasurer, or any part thereof, and in the complaint may allege any fact tending to show the illegality of the tax, or the assessment upon which the taxes are levied, in whole or in part. A copy of the complaint and of the summons must be served upon the treasurer within ten days after the complaint has been filed, and the treasurer has thirty days within which to demur or answer. At the time the treasurer demurs or answers he may demand that the action be tried in the superior court of the county of Sacramento. The attorney general must defend the action. The provisions of the Code of Civil Procedure relating to pleadings, proofs, trials, and appeals are applicable to the proceedings herein provided for. If the final judgment be against the treasurer, upon presentation of a certified copy of such judgment to the controller, he shall draw his warrant upon the state treasurer, who must pay to the plaintiff the amount of the taxes so declared to have been illegally collected, and the cost of such action, audited by the board of examiners, must be paid out of any money in the general fund of the treasury, which is hereby appropriated; and the controller may demand and receive from the county, or city and county, interested, the proportion of such costs, or may deduct such proportion from any money then or to become due to said county, or city and county. Such action must be begun on or before the first Monday in February of the year succeeding the year in which the taxes were levied, and a failure to begin such action is deemed a waiver of the rights of action."

By this statute the state of California has made a general provision whereby it consents to be sued in its own courts in actions of the nature of the case at bar. Has it consented to be sued in the federal court? The state has the unquestioned right to select the forum in which it shall be sued, to prescribe the manner in which the suit shall be conducted, and to impose upon the prosecution of the action any condition that may be deemed proper. It may even retract its permission to be sued after an action has been begun. *Railroad Co. v. Alabama*, 101 U. S. 832. Examining the section just quoted, it will be seen that conditions are imposed which are wholly incompatible with a consent to be sued in the United States courts. It is made a condition of the action that, at the time when the treasurer demurs or answers, he may demand that the case be tried in the superior court of the county of Sacramento. That condition is a valid one, and it conserves a substantial right to the state. It could not be complied with in an action in the United States court. No cause can be transferred from the United States circuit court for the Northern district of California to the superior court of the state of California for Sacramento county. Again, it is provided in the same section that "the provisions of the Code of Civil Procedure, relating to pleadings, proofs, trials and appeals are applicable to the proceedings herein provided for." Although practice in the federal courts conforms as nearly as may be to that of the state courts in actions at law, there are certain features in which their procedure is controlled by acts of congress, from which the federal courts are not at liberty to deviate in response to any provision of a state statute, and the clause of the language just quoted in reference to appeals could have no application whatever in a proceeding in the United States court. By this provision in regard to appeals, it was clearly the intention of the legislature to make the supreme court of

the state of California the court of last resort to pass upon all questions which might arise in such an action. It was intended that the rights of litigants in such a suit should be subject to the construction which that court should finally adopt. That provision secures to the state the most substantial right which is conserved to it in the section just quoted, and presents an insurmountable obstacle to the prosecution of the action in a court of the United States.

But it is urged by the plaintiff in error that the Atlantic & Pacific Railroad Company is not a citizen of another state, nor a citizen or subject of a foreign state, but is a corporation created under an act of congress for the express purpose of acting as an agent for the federal government, and is therefore not among those from whom, by the terms of the 11th amendment, the power to sue a state is withheld. The receiver stands upon the footing of the corporation itself. If the corporation had the right to sue the state of California, the receiver undoubtedly has succeeded to the right. It is only where the jurisdiction of the United States courts depends upon diverse citizenship that the citizenship of the receiver is to be regarded. *New Orleans v. Gaines'* Adm'r, 138 U. S. 595, 11 Sup. Ct. 428; *American Nat. Bank v. National Benefit & Casualty Co.*, 70 Fed. 420; *Brisenden v. Chamberlain*, 53 Fed. 307. The effect of the eleventh amendment was to overrule the decision of the supreme court in the case of *Chisholm v. Georgia*, 2 Dall. 419, in which it had been said, under the terms of article 3 of the constitution, extending the judicial power of the United States to controversies between a state and the citizens of another state, that a state was subject to a suit by a citizen of another state. Said Mr. Justice Matthews in *Re Ayers*, above cited: "The very object and purpose of the eleventh amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties." In *Hans v. Louisiana*, 134 U. S. 1, 10 Sup. Ct. 504, it was held that the purpose of the eleventh amendment was to recognize the sovereignty of the state, and to declare that the judicial power of the United States was never intended by the framers of the constitution to extend to suits by individuals against a state, and that the amendment should not be so construed as to inhibit only suits at the instance of the particular classes of citizens named therein, but that it applied as well to suits against a state by its own citizens. The jurisdiction of the court in that case was invoked upon the ground that a federal question was involved in the controversy. The principles announced in the decision are conclusive of the question which is now before us. But we find a further and complete answer to the contention of the plaintiff in error. The jurisdiction of the United States court in the present case is not invoked upon the ground that the controversy presents a case arising under the constitution or laws of the United States. Nor can jurisdiction be claimed upon the ground of the diverse citizenship of the parties, since, as we have seen, the state itself is a party. It must rest upon some other grant of jurisdiction. The only other grant under which it could be claimed is that which is contained in section 2 of article 3 of the constitution, declaring that the judicial power of the United States shall extend to controversies "between a state and citizens of another state, \* \* \* and between a

state or the citizens thereof and foreign states, citizens or subjects." The plaintiff in error must find in this provision his right to proceed in a federal court, and if the Atlantic & Pacific Railroad Company is not a citizen of a state, or a citizen or subject of a foreign state, the controversy is not among those of which jurisdiction is conferred upon the United States courts by the constitution. It follows that the circuit court erroneously entertained jurisdiction of the cause. For want of jurisdiction the judgment of dismissal is affirmed.

## KNOX ROCK-BLASTING CO. v. RAIRDON STONE CO.

(Circuit Court, S. D. Ohio, W. D. June 21, 1898.)

### 1. EQUITY PLEADING—FORM OF PLEA.

A plea should state some single objection to the plaintiff's case which would be a complete defense either to the whole bill or to some distinct part of it.

### 2. SAME—PLEA IN PATENT SUIT.

A plea to a bill in the usual form, charging infringement of a patent, is bad where it alleges that during a certain period the patented device was experimented with by defendant by consent of complainant, and that with respect to other occasions it did not infringe.

### 3. SAME.

A plea to the bill is inappropriate to suits in equity for infringement of a patent unless in very special circumstances.

This was a suit in equity by the Knox Rock-Blasting Company against the Rairdon Stone Company for alleged infringement of a patent. The cause was heard on motion to strike from the files a plea to the bill.

Wood & Boyd and Bakewell & Bakewell, for complainant.  
J. R. Ramsey, for defendant.

SEVERENS, District Judge. The motion to strike the defendant's plea from the files must be sustained. To a bill in the usual form, charging infringement of a patent, the defendant pleads that during a certain period the patented device was experimented with by the defendant by consent of the complainant, and that with respect to other occasions it did not infringe. A plea should state some single objection to the plaintiff's case which would be a complete defense either to the whole bill or to some distinct part of it. This plea does neither, but consists of matter which would be a defense for some of the period covered by the allegations of the bill and answers for the rest of the period. It has been several times decided that a defense by plea is inappropriate to this class of cases unless in very special circumstances, and I think the objections to it are re-enforced in this case by the general rule of equity pleading to which I have referred. *Sharp v. Reissner*, 9 Fed. 445; *Hubbell v. De Land*, 14 Fed. 471-474; *Korn v. Wiebusch*, 33 Fed. 50; *Union Switch & Signal Co. v. Philadelphia & R. R. Co.*, 69 Fed. 833-835; *Chishohn v. Johnson*, 84 Fed. 384. Such cases as *Leatherbee v. Brown*, 69 Fed. 590, are distinguishable. There the whole matter of

defense in the case consisted of a single point, and the cases fall within the exception to the general rule above stated. The motion is sustained. Leave is given to answer within 20 days.

**SOUTHERN PAC. R. CO. v. GROECK et al.**

(Circuit Court of Appeals, Ninth Circuit. May 2, 1898.)

No. 398.

**1. RAILROAD LAND GRANTS—WITHDRAWAL OF LANDS—PRE-EMPTION.**

No valid pre-emption can be made of lands which have been withdrawn from settlement and sale by the officers of the land department; and even if the order of withdrawal is subsequently canceled, and a patent then issues, no title passes, for the acts of the settler were in violation of law, and void.

**2. SAME—WITHDRAWAL BY OPERATION OF LAW.**

The act of July 27, 1866, § 3, granting lands to aid in the construction of the Southern Pacific Railroad Company, of itself operated to withdraw from settlement the lands lying within the indemnity as well as the grant limits, from the date of filing of the map of the general route; and the secretary of the interior had no power to affect the grantee's rights, or to authorize a pre-emption settlement on the lands, by subsequently canceling his order withdrawing the lands from settlement.

**3. SAME—FORFEITURE OF LAND GRANT—POWER OF SECRETARY OF INTERIOR.**

Delay in constructing the road, beyond the time limited by law, gives the secretary of the interior no authority to reopen the lands to settlement by canceling his order of withdrawal. A forfeiture of the railroad grant can be declared by congress alone.

**4. SAME—LACHES OF GRANTEE.**

Where the granting act of itself operates to withdraw from settlement lands lying within the indemnity limits as well as within the grant limits (as in the case of the grant of 1866 to the Southern Pacific Railroad Company), laches is not imputable to the grantee, because of delay in completing its road and making its indemnity selections, in a contest with one who has attempted to make a pre-emption entry after the filing of the map of general route.

Appeal from the Circuit Court of the United States for the Southern District of California.

William F. Herrin, John Garber, and William Singer, Jr., for appellant.

W. B. Wallace, for appellees.

Before GILBERT and MORROW, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The Southern Pacific Railroad Company brought suit against the appellees to obtain a decree that the appellees hold in trust a patent which Otto Groeck received from the United States to a certain tract of land, which it is contended was land granted by the United States to the railroad company by the act of date July 27, 1866. Section 18 of said act authorized the appellant to construct the railroad which now extends from San Francisco, by way of Mojave, to the Needles on the Colorado river. Section 3 provided as follows:

"That there be, and hereby is, granted \* \* \* every alternate section of public land, not mineral, designated by odd numbers, to the amount of \* \* \* ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title \* \* \* at the time the line of said railroad is designated by a plat thereof, filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of the said alternate sections."

Section 6 of the act provided as follows:

"That the president of the United States shall cause the land to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad, and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided in this act."

The bill alleges that the appellant accepted the terms of the grant, fixed the general route of its road as contemplated by the act, and on January 3, 1867, filed a map thereof in the office of the commissioner of the general land office; that on that date the commissioner accepted and approved the map and the route designated by it, and on March 22, 1867, under the direction of the secretary of the interior, he withdrew the odd sections of land lying within 30 miles of the line of road from sale or location, pre-emption or homestead entry; that on November 2, 1869, the secretary of the interior made an order declaring the withdrawal revoked; that on December 15, 1869, the secretary suspended his order of November 2d; that on July 26, 1870, the secretary restored the withdrawal of March 22, 1867; that on August 15, 1887, the secretary declared the withdrawal of March 22, 1867, revoked, as to the indemnity sections thereof; that the appellant commenced to build its road during the year 1870, and completed the construction in different sections between that date and the year 1889,—the last section, extending from Huron westerly to Alcalde, having been constructed during the year 1888; that the land in suit is opposite to, and coterminous with, that section, and is within the indemnity limits of the grant, and is not included in any exception therefrom; that on September 2, 1885, the appellee Groeck settled on the land in controversy, and during the same month filed his pre-emption claim therefor in the proper land office of the United States, and thereafter complied with the land-office regulations, and on June 7, 1886, made pre-emption proof and payment for the land; that on April 11, 1890, patent was issued from the United States, conveying the land to him; that, as the appellant's road was constructed in several sections, such sections were examined by commissioners appointed by the president, as provided by section 4 of the act, and that said commissioners reported that such sections had been completed as required by the act, and thereupon the president accepted and approved the reports; that a map of the definite location of said section between Huron and Alcalde was filed with and approved by

the secretary of the interior on April 2, 1889, and the president accepted and approved the commissioners' report on that section on November 8, 1889; that on July 13, 1891, the appellant, acting under the direction of the secretary of the interior, selected the land in suit, as granted to it by the act. To the bill of complaint the appellees filed a plea asserting the validity of Groeck's pre-emption, and the title thereby acquired, and further alleging that in any event the appellant, "by its long delay in asserting any claim to said land, in filing its map of definite location, and in offering to select said land, is barred by its laches from asserting claim thereto." Upon the plea so interposed the court denied the right of the appellant to the relief prayed for, upon the ground of its laches, and decreed that the bill be dismissed. The questions presented upon the appeal are: First, was the land in controversy lawfully subject to the pre-emption entry of Groeck? and, second, is the appellant's right to the relief sued for barred by its laches, as alleged in the plea?

The land in controversy was at the time of the entry by Groeck, and at the time when he took steps to acquire title thereto, withdrawn from settlement by the act of the secretary of the interior. It was land to which section 2258 of the Revised Statutes applied, in declaring that:

"The following classes of lands, unless otherwise specifically provided by law, shall not be subject to the rights of pre-emption, to wit: First, lands included in any reservation by any treaty, law, or proclamation of the president, for any purpose."

It is true that in 1891, at the time when patent issued, the order of withdrawal of March 22, 1867, had been set aside by the secretary of the interior; but, as we understand the decision of the supreme court in the case of *Riley v. Welles*, 154 U. S. 578, 14 Sup. Ct. 1166, no valid pre-emption could be made of lands which were withdrawn from settlement by the officers of the land department, and such entry, if made, could not become the basis of title, even upon the subsequent cancellation of the order of withdrawal, since the acts of the settler upon such lands were acts done in violation of law, and void. This was held in a case in which "it was afterwards found that the law by reason of which this action was taken did not contemplate such a withdrawal." *Wood v. Beach*, 156 U. S. 550, 15 Sup. Ct. 410. But it is urged that the act of withdrawal was a ministerial act upon the part of the secretary of the interior, such as could be set aside at any time by that officer, and that to permit a pre-emption entry to be made, as was done in this case, and to recognize its validity, was, in effect, to set aside the order of withdrawal, and was tantamount to a cancellation thereof, so far as it included the particular lands so entered. The case of *Riley v. Welles* may be cited likewise in opposition to this contention. But it is not necessary to rest the question of the appellees' title upon the doctrine of that case alone. A careful consideration of other decisions of the supreme court determining the nature of the right which the grantee of such a grant acquires to lands within the indemnity limits, prior to the time when definite location and

selection of lieu lands is made, leads us to the conclusion that, in the case of a grant such as that now under consideration, by the operation of the terms of the grant itself the indemnity lands are withdrawn from settlement from the moment when a map of the general route of the road is made and filed. It may be deduced from those decisions that the grant to the appellant conferred upon the grantee, within the indemnity limits, more than the mere right to initiate a title by selection, and that the lands in the indemnity limits are as truly granted lands, within the terms of the act, as are the lands within the place limits. The difference is in the preliminary steps which are requisite to attach the title to the particular tracts which are granted. Thus, the supreme court has held that, when the lands within the indemnity limits are all needed to make up the granted quantity, the grant to the indemnity lands takes effect at the same time, and is of the same nature, as the grant of the lands in the place limits. *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 720, 726, 5 Sup. Ct. 334. In *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1, 11 Sup. Ct. 389, answering the objection that no evidence was offered showing a selection of lieu lands, the court said:

"It is sufficient to observe that all the lands within the indemnity limits only made up in part for those deficiencies. There was therefore no occasion for the exercise of the judgment of the secretary of the interior in selecting from them, for they were all appropriated."

But, where the lands in the indemnity limits exceed the total quantity which is granted by the act, they remain afloat until selection is made as required by the act. In *Buttz v. Railroad Co.*, 119 U. S. 55, 7 Sup. Ct. 100, Mr. Justice Field, referring to section 6 of the Northern Pacific Company's act, said:

"The act of congress not only contemplates the filing by the company in the office of the commissioner of the general land office of a map showing the definite location of the line of its road, and limits the grant to such alternate odd sections as have not at that time been reserved, sold, granted, or otherwise appropriated, and are free from pre-emption, grant, or other claims or rights, but it also contemplates a preliminary designation of the general route of the road, and the exclusion from sale, entry, or pre-emption of the adjoining odd sections within forty miles on each side until the definite location is made."

In *Northern Pac. R. Co. v. Musser-Sauntry Land, Logging & Manufacturing Co.*, 168 U. S. 608, 611, 18 Sup. Ct. 205, 206, the court said:

"But beyond the significance of the word 'reserved,' alone, there are other words in the act which, taken in connection with it, make it clear that these lands do not fall within the grant. 'Otherwise appropriated' is one term of description, and evidently when the withdrawal was made in 1866 it was an appropriation of these lands, so far as might be necessary for satisfying that particular grant. It is true, it was not a final appropriation, or an absolute passage of title to the state or the railway company, for that was contingent upon things thereafter to happen—First, the construction of the road; and, second, the necessity of resorting to those lands for supplying deficiencies in the lands in place; still, it was an appropriation for the purpose of supplying any such deficiencies."

Continuing, on page 611, 168 U. S., and page 207, 18 Sup. Ct., the court said:

"Neither is it intended to question the rule that the title to indemnity lands dates from selection, and not from the grant. All that we here hold is that when a withdrawal of lands within indemnity limits is made in aid of an earlier land grant, and made prior to the filing of the map of definite location by a company having a later grant,—the latter having such words of exception and limitation as are found in the grant to the plaintiff,—it operates to except the withdrawn lands from the scope of such later grant."

In *U. S. v. Southern Pac. R. Co.*, 146 U. S. 570, 600, 13 Sup. Ct. 152, 158, the court said:

"When the general route of the road is thus fixed in good faith, and information thereof given to the land department by filing a map thereof with the commissioner of the general land office or the secretary of the interior, the law withdraws from sale or pre-emption the odd sections, to the extent of forty miles on each side. The object of the law in this particular is plain. It is to preserve the land for the company to which, in aid of the construction of the road, it is granted."

In the case of *Wood v. Beach*, 156 U. S. 548, 15 Sup. Ct. 410, the land which was in controversy lay within the indemnity limits of two railroad grants,—a grant to the Leavenworth, Lawrence & Galveston road, and a grant to the Missouri, Kansas & Pacific Railway. Act July 26, 1866. Wood made a homestead entry prior to the selection of the lands in the indemnity limits by the railroad companies, but years after the lands had been withdrawn from sale, pre-emption, or homestead entries, under two orders of withdrawal,—one for each company. In construing section 4 of the act granting lands to aid the construction of the second road, in which it was provided "that as soon as said company shall file with the secretary of the interior maps of its line, designating the route thereof, it shall be the duty of said secretary to withdraw from the market the lands granted by this act in such manner as may be best calculated to effect the purposes of this act and subserve the public interest," the court said, "These withdrawals were not merely executive acts, but the latter one, at least, was in obedience to the direct command of congress." If such withdrawal takes place by operation of law, as has been said by the supreme court in these decisions, the secretary of the interior is powerless to affect the rights of the grantee by setting aside his order of withdrawal. Nor does he acquire such power from the fact that the period has expired within which the grantee is required to complete the road. The expiration of the time so limited by law for the construction of the road is a matter which rests between congress and the grantee. The delay may afford congress excellent reason to declare the land grant forfeited, but congress alone has the power to declare such forfeiture. After such lands have once been set aside by congressional act, no authority is vested in the secretary of the interior, or in any officer of the land department, to restore them, or open them to settlement. Nor is any right conferred upon a pre-emption settler to take advantage of such default of the grantee.

It follows from the rulings of the supreme court in the decisions to which we have referred that the plea of laches cannot avail the appellees. The laches is said to consist in the long delay of the railroad company in constructing the road and selecting the indemnity lands. We are unable to perceive how that delay has conferred rights upon the pre-emption settler, or how it now affords him ground

to impute inequity to the company. The company owed no duty to any intended settler upon the public domain. The United States did not offer this land to Groeck, nor did it invite his occupancy or entry. He was a trespasser on the premises. His pre-emption entry was not only void, but it was unlawful. Neither such an entry, nor the payment of the purchase price, nor the issuance of the patent, could place him in a position to plead laches, as against the title asserted by the railroad company. Said the court in *Wood v. Beach*:

"It is clear that Mr. Wood acquired no equitable rights by his occupation and settlement. He went upon lands which were not open to homestead or pre-emption entry, and cannot make his unauthorized entry the foundation of an equitable title."

The appellees cite and rely upon the cases of *Railroad Co. v. Herring*, 110 U. S. 27, 3 Sup. Ct. 485, and *Galliher v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. 873. In the first of these cases the grant to the railroad company provided for the withdrawal when a map definitely showing the line of road should be filed. The map was not filed until three years and a half after the passage of the act. During this period homestead and pre-emption entries were made. The court held that no obligation rested upon the government to withdraw the lands from sale until the grantee filed a map in the general land office, definitely showing the entire line of its road, and that in the meantime the lands were open to pre-emption and homestead entry. It is readily seen that the facts in that case clearly distinguish it from the case at bar. In *Galliher v. Cadwell* it was said by the court:

"Laches is not, like limitation, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced,—an inequity founded upon some change in the condition or relations of the property or the parties."

There are no facts in the present case to which that language is applicable. The appellant and Groeck were not in the attitude of persons to whom the land in controversy was offered upon equal terms, giving to the first entryman the prior right. It was offered only to the railroad company. The facts stated in the bill and in the plea are insufficient to show that the company has in any respect dealt inequitably with Groeck. This is not a case in which it has delayed enforcing its rights to the detriment of another. The delay in constructing the road and in selecting the lieu lands has worked no wrong to Groeck. So long as the United States made no complaint of the delay, no equity was created thereby in favor of any intending settler. And no such settler could take it upon himself to say that the grantee had forfeited any of the rights specified in the grant. The company was not required to give Groeck notice of its rights in the premises. He was bound to take note of the law, which itself gave him notice. In short, no facts exist on which laches may be imputed to the railroad company for any delay upon its part short of the statutory period of limitation whereby its right to obtain the relief sued for would be absolutely barred. The suit was brought within less than three years after definite location, which was the earliest time when selection could have been made, in less than two

years after the issuance of Groeck's patent, and within less than one year after selection was made. The decree will be reversed, and remanded to the circuit court for further proceedings not inconsistent with this opinion.

### RYLE et al. v. KNOWLES LOOM WORKS.

(Circuit Court of Appeals, Third Circuit. June 29, 1898.)

**1. CONDITIONAL SALES—RIGHTS OF CREDITORS.**

In Pennsylvania a sale and delivery of personal property, with an agreement that the ownership shall remain in the vendor until the purchase price is paid, is void as to creditors of the vendee and innocent purchasers; and this rule applies, whatever the form of the agreement.

**2. BAILMENT—RIGHTS OF CREDITOR.**

Where personal property is delivered under a contract of bailment, accompanied with an agreement for a future sale to the bailee on the payment of a certain price, the ownership of the bailor is preserved, and the transaction is valid, even as against the creditors of the bailee and innocent purchasers.

**3. CONDITIONAL SALES—RIGHTS OF CREDITORS—LEASE AS SECURITY.**

In Pennsylvania, a reservation of title, by an instrument in the form of a lease, as security for the purchase price of personal property sold and delivered, is unavailing as against creditors and innocent purchasers; and it matters not that the lease was contemplated from the beginning, and the property delivered in pursuance of that contemplation.

**4. REPLEVIN—DEFENSES—RIGHTS OF MORTGAGE BONDHOLDERS.**

In replevin for machinery sold by the plaintiff, with reservation of title as security for the purchase price, the rights of innocent mortgage bondholders under a mortgage executed by the vendee are available as a defense.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was an action of replevin by the Knowles Loom Works against William Ryle and others to recover possession of certain machinery. In the circuit court, verdict and judgment were given for plaintiff, and the defendants sued out this writ of error.

Robert B. Honeyman, for plaintiffs in error.

Benno Loewy and J. M. Rommell, for defendant in error.

Before ACHESON and DALLAS, Circuit Judges, and BRADFORD, District Judge.

ACHESON, Circuit Judge. It is, and long has been, the established rule in Pennsylvania that a sale and delivery of personal property, with an agreement that the ownership shall remain in the vendor until the purchase price is paid, is ineffectual and void as respects the creditors of the vendee and innocent purchasers; and the rule applies, whatever may be the form of the agreement. *Haak v. Linderman*, 64 Pa. St. 499; *Stadtfeld v. Huntsman*, 92 Pa. St. 53; *Thompson v. Paret*, 94 Pa. St. 275; *Brunswick & Balke Co. v. Hoover*, 95 Pa. St. 508; *Forrest v. Nelson*, 108 Pa. St. 481; *Dearborn v. Rayson*, 132 Pa. St. 231, 20 Atl. 690; *Farquhar v. McAlevy*, 142 Pa. St. 233, 21 Atl. 811; *Ott v. Sweatman*, 166 Pa. St. 217, 31 Atl. 102. But where personal

property is delivered under a contract of bailment, accompanied with an agreement for a future sale to the bailee on the payment of a certain price, the ownership of the bailor is preserved, and the transaction is valid, even as against the creditors of the bailee and purchasers. *Rowe v. Sharp*, 51 Pa. St. 26; *Enlow v. Klein*, 79 Pa. St. 488; *Printing-Press Co. v. Jordan*, 171 Pa. St. 474, 32 Atl. 1031. Within which of the two above-stated rules does the present case fall? The material facts are these:

On March 16, 1895, the Cutter Silk Manufacturing Company signed and delivered to the plaintiff in this replevin suit (Knowles Loom Works), and the latter accepted and agreed to, the following written proposal or order:

"New York, March 16th, 1895.

"Knowles Loom Works—Gentlemen: Please build for us one hundred silk looms, 35 in. 20 harness 4x4 box, with multipler and angular drive  $\frac{1}{2}$  each right and left, with Jacquards, 600 hooks rise and fall, three levers; price, two hundred and eighty dollars each. Terms of payment: Notes bearing interest, 6 per cent. per annum, and maturing twelve months from the average date of delivery, but to be written 'six months,' for convenience, and renewed as per above. The Knowles Loom Works to own the machinery until paid for, as per their usual form, and to hold, also, in first mortgage bonds of the Cutter Silk Mfg. Co., fifteen thousand [dollars], as collateral security towards the payment of said notes.

Cutter Silk Mfg. Co.,

"By John D. Cutter, Prest."

In pursuance of the contract thus entered into, the plaintiff delivered to the Cutter Silk Manufacturing Company the specified machinery, and the same was set up in the company's mill at West Bethlehem, Pa.; the looms being fastened to the floor by the ordinary leg screws, and the Jacquards attached to the looms. The delivery began early in April. One-half of the machinery was delivered and set up in the mill before May 18th, and all of it was delivered and set up before July 12, 1895, except 18 Jacquards, of the value of \$810, which were delivered shortly after the date last mentioned. On May 18, 1895, the Cutter Silk Manufacturing Company executed and delivered its mortgage on its mill, including "all machinery now placed or hereafter to be placed on said mortgaged premises," to the E. P. Wilbur Trust Company, in trust to secure an issue of \$100,000 of the mortgagor's bonds, payable to bearer; and on May 22, 1895, the mortgagee accepted the trust. The mortgage was duly recorded on May 23, 1895. The price of the entire machinery delivered as above mentioned by the plaintiff was \$29,650. For this sum the Cutter Silk Manufacturing Company on July 12, 1895, gave to the plaintiff its promissory notes, namely, its two notes dated July 12, 1895, payable in 30 days, one for \$3,650, with interest, and one for \$4,000, with interest; its four notes dated July 1, 1895, each for \$5,000, payable six months after date, with interest; and its note dated July 1, 1895, for \$2,000, payable six months after date, with interest. On the same day these notes were given, namely, July 12, 1895, the plaintiff and the Cutter Silk Manufacturing Company executed the following instrument of writing:

"Articles of agreement made and concluded this first day of July, A. D. 1895, between the Knowles Loom Works, of Worcester, in the county of Worcester and commonwealth of Massachusetts, of the one part, and Cut-

ter Silk Mfg. Co., of Bethlehem, county of Lehigh, state of Pennsylvania, of the other part; I. The said Knowles Loom Works doth hereby rent unto the said Cutter Silk Mfg. Co. the following described property, to wit: 100--35"—20 harness 4x4 box silk loom, with Jacquards; piano card-cutting machine, repeater, and press,—for the period of one year from the date hereof, at a rental or price of twenty-two thousand dollars per annum; said rental to be paid on or before the first day of July, 1896. II. The said Knowles Loom Works doth agree to make a sale of said machinery to said Cutter Silk Mfg. Co., at any time prior to the expiration of this lease, for the cash price or sum of twenty-two thousand dollars, provided the herein reserved rental and insurance shall have been promptly paid, and will allow as a credit on such purchase all of the said rental so paid. III. The said Cutter Silk Mfg. Co. agrees to pay, promptly as they shall become due, to the said Knowles Loom Works, both the said rental and all expenses incurred by it during the continuance of this lease in keeping said machinery insured; to maintain the same in good order and repair during said term; and in the event of any failure to pay the said rent as it becomes due, or at the termination of this lease, to immediately surrender said machinery to said Knowles Loom Works, its successors or assigns, or allow it or them to retake possession of the same. In witness whereof, the said parties hereunto set their hands and seals the day and year first above written.

Knowles Loom Works. [Seal.]

"J. M. Russell, Cashier.

"Cutter Silk Mfg. Co. [Seal.]

"John D. Cutter, Prest.

"Sealed and delivered in presence of Frank E. Stevens."

The oral testimony respecting this paper was conflicting. Mr. Stevens, the vice president of the Cutter Silk Manufacturing Company, testified that a lease was never mentioned prior to July 12, 1895. On the other hand, Mr. Markoe, who conducted the original negotiations on the part of the plaintiff, stated that it was "understood between Mr. Cutter and myself that a lease would be drawn up to that effect"; and upon cross-examination he testified thus:

"X-Q. Was the word 'lease' used between you and Mr. Cutter, or a suggestion about reservation of title? A. The question of lease,—that the looms were to remain the property of the Knowles Loom Works until paid for. By the Court: X-Q. Was it said how? A. The usual form that our people used for lease at that time. X-Q. Then the word 'lease' was mentioned? A. It was."

The Cutter Silk Manufacturing Company paid its two notes at 30 days, aggregating \$7,650, at or before the maturity thereof. Its other notes, aggregating \$22,000, were renewed at maturity. The renewal notes were not paid. On March 30, 1896, the Cutter Silk Manufacturing Company made a voluntary assignment for the benefit of its creditors. Before this assignment at least \$45,000 of the bonds secured by the mortgage of May 13, 1895, had been negotiated, and were in the hands of bona fide holders for value. Prior to the bringing of this suit the defendant William Ryle had become the purchaser and holder of these bonds, and he had also purchased the equity of redemption in the mortgaged premises from the voluntary assignee, and he was in possession of the mill and machinery when the writ of replevin issued.

The court below instructed the jury, as matter of law, that the transaction between the plaintiff and the Cutter Silk Manufacturing Company respecting this machinery was a bailment, and, therefore, that the plaintiff had a right to recover the value of the machinery in this

action. The only question submitted to the jury was that of value. We are now to determine whether these instructions were correct.

In our treatment of this case, we naturally begin with the paper of March 16, 1895, showing the original contract relating to this machinery. Substantially the whole of the machinery was delivered on the footing of that paper alone. It was the only contract on the subject in existence when the trust mortgage took effect. Now, the paper of March 16th fixed the purchase price of the machinery, and the terms of payment. Interest-bearing notes were to be given and received in payment; and, what is very significant, the Knowles Loom Works was to take and hold \$15,000 of the mortgage bonds of the Cutter Silk Manufacturing Company as collateral security for the payment of the notes. These provisions, we think, plainly import a sale of the machinery. The stipulation that the Knowles Loom Works was "to own the machinery until paid for" seems to us to negative the idea that the parties had in view a bailment (*Summerson v. Hicks*, 134 Pa. St. 566, 569, 19 Atl. 808); for, upon a bailment, ownership remains in the bailor, as of course. This stipulation implies a sale with a reservation of title, to secure the purchase price. A lease is not named in the paper. If, however, the words "as per their usual form" are referable to a lease, they must be read in connection with the context: "The Knowles Loom Works to own the machinery until paid for, as per their usual form, and to hold, also, in first mortgage bonds of the Cutter Silk Mfg. Co., fifteen thousand [dollars], as collateral security towards the payment of said notes." If a lease was here contemplated, undoubtedly it was a lease to secure the purchase price of the machinery. The oral testimony put no different face upon the matter. But it is the declared law of Pennsylvania that a reservation of title, by an instrument in the form of a lease, as security for the purchase price of personal property sold and delivered, is unavailing as against creditors and innocent purchasers; and it matters not that the lease was contemplated from the beginning, and the property was delivered in pursuance of that contemplation. *Brunswick & Balke Co. v. Hoover*, supra; *Farquhar v. McAlevy*, supra. In *Cooper v. Whitmer*, 6 Atl. 571, the supreme court of Pennsylvania said:

"The word 'lease' being by common consent part of the written contract of the parties, the case comes clearly within the ruling of this court in *Brunswick & Balke Co. v. Hoover*, 95 Pa. St. 508. The agreement is, beyond doubt, a sale of the property, with a provision for a lease security which was good enough between the parties, but worthless as against creditors."

In *Farquhar v. McAlevy*, as in *Brunswick & Balke Co. v. Hoover*, the lease was stipulated for in the original contract, which, as here, was in the form of an order for machinery.

We find nothing in what was done on July 12, 1895, to change the complexion of the case. Evidently the short-time notes for \$7,650 were given and taken on account of the purchase money of the machinery. It is idle to suggest that these notes represent rent. They were not embraced in the so-called lease executed that day. That instrument covered only the balance of the purchase price, namely, \$22,000, for which the other notes were given. The paper calls for

"a rental or price of twenty-two thousand dollars per annum." This was rental in name, but price in fact. The lease ran for a single year only, and this large lump sum was to be paid at the end of the year, or before. Regarding the two instruments of March 16th and July 12th as parts of one and the same transaction,—which is the most favorable view that can be taken for the Knowles Loom Works,—the conclusion is irresistible that the transaction was not a bailment, but a sale, of the machinery, with a lease security for the price. The case is not distinguishable from those of Brunswick & Balke Co. v. Hoover, Cooper v. Whitmer, and Farquhar v. McAlevy, *supra*.

In *Summerson v. Hicks*, *supra*, the parties, under date of October 31, 1885, signed the following paper:

"This is to certify that I have this day leased to John Summerson 1 pair of dark-bay horses, for the sum of one hundred and twenty-five dollars, to be paid by the first of April, 1886; and in case the said John Summerson shall fail to make such payment as above agreed, to me (Mary Hicks), then I shall have full and free possession of said horse team; and it is further agreed that the ownership shall remain in hands of Mary Hicks until payment is made in full."

Concerning this paper the supreme court of Pennsylvania, speaking by Mr. Justice Mitchell, said:

"It is called a lease, but it is manifestly a sale. No term is stipulated for the hiring, or any rate per month or per annum. On the contrary, it is merely said that the horses are leased for a lump sum of one hundred and twenty-five dollars. But what is conclusive of the character of the transaction, is the stipulation that 'the ownership shall remain in Mary Hicks until payment is made in full.' If it was merely a hiring, the ownership would have remained in Mrs. Hicks all the time, without any such stipulation."

All the indicia of a sale here commented on are present in this case, taking into account the two papers of March 16th and July 12th.

The authority of the decisions upon which we base our judgment is not in any degree shaken by the case of *Printing-Press Co. v. Jordan*, 171 Pa. St. 474, 32 Atl. 1031. There, while the original intention of the parties was to make a sale, yet, before their purpose was consummated, and when the first agreement still remained wholly executory, it was superseded by a contract of bailment. The printing press had not been delivered or accepted, but had been set up for trial, merely. No intervening rights had sprung up, and the parties were entirely free to contract with respect to the press. Here the facts are essentially different. As we have seen, the great bulk of the machinery was delivered and accepted under the first contract, and the property had become subject to the trust mortgage before the second instrument was executed.

To the amount of \$45,000 of the mortgage bonds, the defendant William Ryle is clothed with the rights of the original bona fide holders, who took them, it would seem, free from notice of the alleged lease. *Porter v. Steel Co.*, 122 U. S. 267, 283, 7 Sup. Ct. 1206. As against the innocent mortgage bondholders, and those claiming under them, the plaintiff had no right to strip the mill of this machinery and carry it away. Undoubtedly the rights of the mortgage bondholders are available as a defense here. In replevin a plea of property puts the plaintiff to proof of title in himself, and his right to exclusive pos-

session. *Reinheimer v. Hemingway*, 35 Pa. St. 432, 438; *Mathias v. Sellers*, 86 Pa. St. 486, 492. The judgment is reversed, and the cause is remanded to the circuit court, with direction to set aside the verdict and grant a new trial.

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In re BLOCH.

(District Court, W. D. Arkansas. March 18, 1898.)

1. HABEAS CORPUS—ARREST FOR EXTRADITION—IDENTITY OF PRISONER.

In habeas corpus proceedings for the discharge of a prisoner held under an extradition warrant issued by the governor of a state, the question of the prisoner's identity cannot be raised by demurrer to the return of the officer to the writ.

2. SAME—RECITALS IN EXTRADITION WARRANT—BURDEN OF PROOF.

In habeas corpus proceedings for the discharge of a prisoner held under an extradition warrant issued by the governor of a state in conformity with the requirements of the act of congress, a recital in the warrant that the prisoner is a fugitive from justice will be taken as true until overcome by satisfactory proof.

3. EXTRADITION—FUGITIVE FROM JUSTICE.

Where one has left the state in which he is indicted for a crime, he is a fugitive from justice, in the sense of the act of congress relating to the extradition of criminals, whatever may have been his motive in leaving the state.

4. SAME—HABEAS CORPUS PROCEEDINGS—MATTERS CONSIDERED.

In habeas corpus proceedings for the discharge of a prisoner held under an extradition warrant issued by the governor of a state, the federal court will not consider or pass upon any matters of defense to the indictment upon which the extradition is based, nor a charge that the requisition proceedings are instigated by malice, and intended to annoy and harass the petitioner.

Hill & Brizziliara, for petitioner.

Haynie R. Pearson and Read & McDonough, for People of State of Illinois.

ROGERS, District Judge. The petitioner sued out a writ of habeas corpus for his release from the arrest of T. W. Bugg, sheriff of Sebastian county, Ark., and his deputies, and one Frank Tyrrell. The said sheriff, having said Bloch in custody, filed his response to the writ, alleging, in substance, that he had arrested the defendant and held him in custody under a writ issued by the governor of Arkansas, commanding him to arrest the said Abe Bloch for a crime under the laws of the State of Illinois, known as "confidence game," the said warrant for the arrest of the said Abe Bloch being issued by the governor of the state of Arkansas upon demand by the governor of the state of Illinois, the said demand being accompanied by a copy of the indictment against the said Abe Bloch, which indictment was duly authenticated, all of which is shown in said warrant, which is thereto attached, and the said Abe Bloch being a fugitive from justice from the said state of Illinois, which is also shown by the said warrant thereto attached, and that he holds the said Abe Bloch in obedience to the said warrant, ready to be turned over and delivered to the agent of the state of Illinois,

Frank Tyrrell, who is present to receive the said Abe Bloch, and convey him to the state of Illinois, to be dealt with according to law and justice. The writ of the governor attached to said response recites the following facts: That the governor of the state of Illinois had issued a writ or requisition, accompanied by a copy of the indictment in said state of Illinois, which is duly authenticated, demanding the body of Abe Bloch, charged in said state with the crime of confidence game, which is duly certified to be a crime under the laws of said state; and that it having been shown by satisfactory evidence that the said Abe Bloch fled from the justice of said state, and has probably taken refuge in the state of Arkansas, to the end, therefore, that justice may be done in the premises, the sheriff of any county, in the state of Arkansas, is commanded to take the body of the said Abe Bloch, and him safely keep and cause him to be delivered to Frank Tyrrell, the agent of the state of Illinois, to be taken into said state, that he may be dealt with as law and justice require. This response with the writ attached thereto is sufficient in form, and conforms in all substantial particulars to the requirements of the constitution and laws of the United States for the extradition of fugitives from justice. The authority for the issuance of the writ by the governor, and its execution by the sheriff, are fully made to appear, and it is not contended that the papers are not, in every respect, regular on their face.

A demurrer was interposed to the response of the sheriff. This demurrer concedes the truth of all the allegations set forth in the response. It seeks to raise two questions: First, that the Abe Bloch under arrest is not identified as the Abe Bloch under arrest; second, that the response is insufficient in law. The first question cannot be raised by demurrer. That ground of demurrer is in the nature of a speaking demurrer; that is to say, it undertakes to raise a question of fact, whereas the office of a demurrer is to test the sufficiency of the facts, admitting them to be true. The second ground of the demurrer, namely, that the response is insufficient, I think, is wholly without merit. Every fact required by the act of congress for the extradition of fugitives from justice is made to appear by the response of the sheriff, and the exhibits attached thereto. The demurrer therefore should be overruled.

The petitioner also filed a reply to the response. It is long, and no good purpose can be subserved by setting it out at length. Suffice it to say, I regard the matter set up therein as irrelevant and immaterial. It appears by the response, and I think conclusively in connection with the record introduced in evidence, that the petitioner is the Abe Bloch named in the writ. The chief point sought to be raised by the response is as to whether or not Abe Bloch is a fugitive from justice. Prima facie the finding of fact by the governor, and which is recited in the body of the writ, to wit, "and it having been shown by satisfactory evidence that the said Abe Bloch fled from the justice of said state, and has probably taken refuge in the state of Arkansas," must be treated as true. Has this prima facie case been overturned by the response? I

do not think it has. It is shown on the face of the response, and appears from a copy of the indictment filed with the papers in the case, that the crime alleged against him was committed on the 1st day of November, 1897, in Cook county, Ill.; and it also appears from the response that the said Abe Bloch was in Cook county, Ill., on the 1st day of November, 1897, and remained there "many days after the first." It also appears from the response that after that time, and during the month of November, defendant absented himself from the state of Illinois, and since that time has been in the state of Arkansas. Under the law, the court is of the opinion that this response, instead of removing the prima facie case made by the governor's writ, confirms the fact recited in the governor's writ that the said Abe Bloch is a fugitive from justice.

The supreme court of the United States, in *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. 291, in considering the question as to whether a person demanded was a fugitive from justice, say:

"It is conceded that the determination of the fact by the executive of a state, in issuing his warrant of arrest upon a demand made on that ground, whether the writ contains the recital of an express finding to that effect or not, must be regarded as sufficient to justify the removal until the presumption in its favor is overturned by contrary proof. *Ex parte Reggel*, 114 U. S. 642, 5 Sup. Ct. 1148. \* \* \* To be a fugitive from justice, in the sense of the act of congress regulating the subject under consideration, it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution, anticipated or begun, but simply that having within a state committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process, to answer for his offense, he has left its jurisdiction, and is found within the territory of another."

This decision is supported by innumerable authorities, and I think is settled law in the federal and other courts. I need not take the time to collate them. See *Ex parte Brown*, 28 Fed. 653; *In re Voorhees*, 32 N. J. Law, 141; *People v. Pinkerton*, 17 Hun, 199; *U. S. v. Smith, Bruner*, Col. Cas. 87, Fed. Cas. No. 16,332; *In re Keller*, 36 Fed. 681; *In re White*, 5 C. C. A. 29, 55 Fed. 54; *State v. Richter*, 37 Minn. 436, 35 N. W. 9; *Hibler v. State*, 43 Tex. 197; *In re Roberts*, 24 Fed. 132; *In re Kingsbury's Case*, 106 Mass. 223; *Ex parte Swearingen*, 13 S. C. 74; *In re Greenough*, 31 Vt. 279; *In re Adams*, 7 Law Rep. 386; *Jackson's Case*, 12 Am. Law Rev. 602; *Ex parte Smith*, 3 McLean, 131, Fed. Cas. No. 12,968.

In *Ex parte Dawson*, 28 C. C. A. 681, 83 Fed. 306, the court of appeals of the Eighth circuit say:

"And where the requisition and a copy of the indictment accompanying it are not made a part of the return, and the warrant alone, as in this case, is before the court, it must show: First, that a demand by requisition has been made for the party in custody as a fugitive from justice; second, that the requisition was accompanied by a copy of an indictment or affidavit charging the commission of the offense; that the copy of such indictment or affidavit was certified by the governor of the state making the demand, as authentic,"—citing *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. 291; *Ex parte Reggel*, 114 U. S. 642, 5 Sup. Ct. 1148; *In re Doo Woon*, 18 Fed. 898; *Ex parte Smith*, 3 McLean, 121, Fed. Cas. No. 12,968; *People v. Donohue*, 84 N. Y. 438.

The papers in that case did not strictly conform to the requirements of the act of congress. In the case at bar they do. In that case the court said:

"The federal court will not, however, on habeas corpus, discharge a prisoner charged with a violation of the criminal laws of one state, and apprehended in another, where it appears by the recitals contained in the warrant by virtue of which he was arrested, and the record of the extradition proceedings, that any right, privilege, or immunity secured him by the constitution and laws of the United States will be violated by remanding him to the custody of the agent of the state demanding him."

It will be seen from an examination of the cases cited precisely what is required under the act of congress in order to secure the extradition of a fugitive from justice, and it will appear that where the papers show on their face that the petitioner is indicted for the commission of a crime in another state, and has left that state, in law he is a fugitive from justice, whatever his motive in leaving the state where the offense was committed may have been.

The response sets up the statute of limitations of former trial and acquittal for the same offense. It is sufficient to say that matters of that kind, and all other matters of defense, must be referred to the courts in Illinois. The response also contains matter tending to show that the requisition papers have been set on foot and are instigated by malice, and not in good faith, and are intended to harass and annoy the petitioner. It is sufficient to say that these are matters which must either go to the courts in Illinois, or to the governor of the state of Arkansas, who issued the warrant. It is not a question that this court has a right to pass upon under habeas corpus. Nor do they, if true, constitute any predicate for affirmative relief by the court.

The court will overrule the motion to strike, and let the answer stand, but finds the fact to be that the Abe Bloch under arrest is the Abe Bloch designated in the writ of the governor, and is, in law, a fugitive from justice from the state of Illinois. The court is therefore of opinion that the writ should be denied; that his petition be dismissed; and that he be remanded to the custody of the sheriff of Sebastian county, Ark., to be dealt with according to law, and in conformity with the writ under which he was held when the writ of habeas corpus was sued out.

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#### UNITED STATES v. PETERS.

(Circuit Court, D. Washington. June 15, 1898.)

##### 1. CRIMINAL LAW—PLEA OF FORMER JEOPARDY.

A plea of former jeopardy set up certain prior proceedings had in the same court under the same indictment. Counsel for the government having objected thereto, the court treated his objection as a demurrer to its sufficiency in law, and thereupon overruled the plea. The trial then went on, without objection by defendant to the subsequent proceedings. *Held*, that there was no error in thus proceeding with the cause without first setting down the plea for trial, as the only question arising thereon was one of law, which was finally disposed of by the former ruling.

##### 2. SUFFICIENCY OF INDICTMENT—MOTIONS TO QUASH.

Rev. St. § 1025, forbidding the court to quash an indictment for defect of form, makes it unnecessary, in criminal indictments, to repeat an aver-

ment contained in the first count, where subsequent counts refer back to the first, and are thereby rendered sufficiently explicit in stating the offense.

**3. SAME—EVIDENCE.**

An indictment charged the making of false entries in the books of a national bank for the purpose of showing that on a certain date a county treasurer deposited \$10,000 "special," which was drawn out again a few days later. Evidence was offered by the government to prove that no such deposit was made, and the treasurer himself was called by it, and testified that he had some recollection of having deposited a large sum about the time in question. Thereupon his books were produced, and, after he had testified that he believed them to be correct, he was permitted to testify as to the entries therein on the dates referred to. By these entries it did not appear that \$10,000 had been either deposited in bank, or drawn from the cash on hand. The treasurer, however, then reiterated his former statement, and was even more positive that he had made the deposit. *Held* that, in view thereof, there was no prejudicial error in admitting his testimony as to the book entries.

**4. NATIONAL BANKS—FALSE ENTRIES—"SPECIAL" DEPOSITS.**

If money is left with a national bank in a sack, with the express understanding that it is not to be mingled with the bank's funds, but the identical bills or coins are to be returned in the same condition, and this is done to make a showing of money to a bank examiner, as if it were the money of the bank, then the entry thereof on the books of the bank as money deposited is a false entry.

**5. SAME—INSTRUCTIONS—INTENT.**

If the jury be charged that a false entry on the books of a national bank alone gives rise to the presumption, not only that the entry was made with criminal intent, but also with knowledge of its falsity, but elsewhere in the charge it was said that a false entry must be known to be false, and designed and intended to deceive, the charge is not erroneous.

**6. SAME.**

Where the court has several times stated to the jury that the indictment charges the making of false entries in the books of the bank, with intent to deceive the bank examiner, and the making of false reports, with intent to deceive the comptroller, it is not misleading to thereafter say that defendant is guilty if he made such false entries and report "with the intent mentioned in the statute," although the statute mentions several other intents.

Wilson R. Gay, U. S. Atty.

W. H. Pritchard, W. H. Bogle, and Beverly Waugh Coiner, for defendant.

GILBERT, Circuit Judge. The defendant was indicted upon 46 counts, charging him with violating section 5209 of the Revised Statutes, in making and causing to be made certain false entries in the books of the Columbia National Bank of Tacoma, Wash., and in certain reports and statements of the condition of said banking association to the comptroller of the currency, with intent to deceive the said comptroller of the currency of the United States. Upon a second trial of the cause the defendant was found guilty as charged in the indictment under counts 23 to 46, inclusive. The defendant now moves for a new trial upon several grounds, the first of which is that the court erred in proceeding to the second trial without disposing of a plea of former acquittal which was filed by the defendant after the first trial. Upon the first trial the verdict of the jury was as follows:

"We, the jury impaneled in the above-entitled cause, find the defendant, Williams G. Peters, guilty as charged in the indictment, in falsifying the returns to the comptroller of currency, and also books of the Columbia National Bank; and on balance of counts we do not agree."

The plea of former acquittal set forth this verdict and the proceedings upon the former trial, and alleged that because the jury was discharged by the court from further consideration of the indictment, and from rendering a verdict on all the counts on that trial, the court could not proceed to a second trial, and that, inasmuch as the defendant had once been put in jeopardy upon all the counts of the indictment, the discharge of the jury operated as an acquittal of the defendant upon all said charges. Upon the defendant's motion for a new trial, the first verdict was set aside, and a new trial was ordered. Thereafter the following proceeding was had in reference to the plea of former acquittal:

"This cause coming on to be heard, thereupon the defendant, William G. Peters, moved the court for leave to file his plea of former jeopardy to counts one to twenty-two, both inclusive, of the indictment herein, and his plea of former acquittal to counts twenty-three to forty-six, both inclusive, of said indictment, which leave was given, and said pleas were thereupon filed. And thereupon the district attorney moved the court for leave to enter a nolle prosequi as to counts two to twenty-two, both inclusive, of said indictment, which was granted, and a nolle prosequi was thereupon entered and said defendant discharged as to said counts two to twenty-two. And thereupon, upon the statement by the district attorney that he intended to introduce no evidence touching the matters alleged in count one, except evidence to prove the organization of the Columbia National Bank, its location, and the appointment, qualification, and acting of defendant as its cashier, and to prove venue, the court overruled said pleas as to count one, and also as to counts twenty-three to forty-six, inclusive. To which action of the court in overruling said pleas as to count one and counts twenty-three to forty-six, inclusive, the defendant excepted, and his exception was allowed."

Counsel for the defendant now urge, as ground for setting aside the second verdict, that the special plea was not set down for trial and disposed of before proceeding to trial on the plea of not guilty. It may be said in answer to this that the disposition made of the plea as recited in the order above quoted was at the time considered final by court and counsel, and no objection was made to proceeding to trial on the plea of not guilty upon the ground that further action had not been taken in regard to the plea of former acquittal. There was no occasion to have the plea set for trial, or to adduce evidence upon the issue presented by it. The plea in this case is not like the ordinary plea of a former acquittal. It referred solely to proceedings which had been had in the court in which the cause was pending, and concerning which the court needed no evidence, and could take none. The only question presented by the plea was a question of law. That question was whether or not the verdict rendered upon the first trial operated to acquit the defendant upon all the counts of the indictment. It will be noted that as to the counts on which the former verdict was silent, and on which the jury could not agree, the court, in disposing of the plea, directed that those counts be dismissed. In overruling the plea the court treated the objection of counsel for the government thereto as a demurrer to its sufficiency in point of law, and considered and passed upon the legal question which it presented. If the plea

had been set down by the court for further consideration or trial, nothing more could have been done than was done upon the first hearing thereof. Its sufficiency in law was passed upon and adjudicated, and the defendant's counsel acquiesced therein, so far as they could acquiesce by their failure to object to the subsequent proceedings. I can see no error, therefore, in proceeding to the second trial without having taken further action in regard to the plea of former acquittal.

It is next urged that the counts in the indictment upon which the defendant was tried are radically defective, for the reason that in none of said counts, except the first, was it alleged that the Columbia National Bank was organized under the laws of the United States, and was carrying on business in Tacoma, Pierce county, Wash., at the time when the acts are charged to have been committed by the defendant. The first count alleges all the necessary facts in regard to the incorporation of the bank, and contains the necessary averments that it was carrying on business, and that the defendant was its cashier, at all the dates upon which the alleged offenses were said to have been committed. The subsequent counts refer back to the first, without repeating said averments, and state the offense—as in the second count, for example—by alleging that the defendant “was the cashier of said association at said county on the 2d day of July, 1885, and continuously thereafter until the 24th day of October,” etc. Under the authority of *Blitz v. U. S.*, 153 U. S. 308, 14 Sup. Ct. 924, I think that all the counts of the indictment are made sufficiently explicit by their reference to, and adoption of, the averments of the first count. In the *Blitz* Case the defendant was indicted, under three counts, for violations of the provisions of Rev. St. § 5511,—for knowingly personating and voting under the name of another at an election. In the first count it was charged “that on the 8th day of November, A. D. 1892, at Kansas City, in the county of Jackson and state of Missouri, there was then and there an election duly and in due form of law had and held for choice of representative in the congress of the United States.” In the second count it was charged that “at said election” the defendant voted more than once for representative in congress. The words “at said election” were held a sufficient description of the time, place, and purpose of the election. Under section 1025 of the Revised Statutes, the court is forbidden to quash an indictment for defect of form. In the present case no motion or demurrer was directed against the defect, if any there be, in the form of any of the counts of the indictment. Of the 24 counts under which the defendant was found guilty, 22 refer to two principal transactions: First. It was charged that in order to make a favorable showing of the condition of the bank upon the 11th day of July, 1895, in compliance with a call from the comptroller of the currency for a statement of its condition on that date, false entries were made, so as to cause it to appear that on the 10th day of July, 1895, the German-American Safe-Deposit & Savings Bank deposited \$20,000 with the defendant's bank, and that on the 13th day of July the said sum was paid back to the depositor; and by various counts it was alleged that, in order to make a showing on all the books of the bank that said sum

was added to the cash on hand, alterations, erasures, and entries were made by the defendant in different books, under the head of "Cash," "Gold in Vault," "Gold in Tray," etc. Second. It was charged that in order to make a favorable showing of the condition of the bank on the 28th day of September, 1895, in response to a call of the comptroller, false entries were made, as of the 25th, to show that upon that date J. B. Hedges deposited \$10,000 "special," which was drawn out by him on the 30th of September, 1895, and that on the 26th day of September, 1895, J. W. McAulay deposited \$10,000 "special," which was drawn out by him on the 30th day of September, 1895; and under various counts the defendant was charged with alterations of the books to make it appear that \$20,000 was by such deposits added to the sum total of the cash on hand in the bank, as in the other case. The last two counts charged the defendant with making false reports to the comptroller of the currency of the condition of the bank on the 11th day of July, 1895, and on the 28th day of September, 1895. Evidence was offered to show that the erasures and alterations in the books, as charged in these counts, were made, and that they were made under the direction of the defendant, and evidence was adduced tending strongly to show that none of said sums were ever deposited with the bank, or came into its possession.

It is contended that the court erred in admitting in evidence certain entries in the cash book of J. B. Hedges. Hedges was the treasurer of Pierce county, Wash. Evidence was offered by the government tending to prove that no such deposit as the J. B. Hedges \$10,000 "special" was ever made; that the entry thereof was false. J. B. Hedges was called as a witness for the United States, and testified that he had some recollection of having deposited a large sum at some time near the date of September 25, 1895, of the funds which he held as treasurer of Pierce county. His cash book as such treasurer was produced, and after he had testified that he believed the book to be correct, and that he had had general supervision of it and had checked it up, and had therein kept the transactions of his office, he was allowed, over the objection of the defendant, to testify as to the entries of his books on September 24th to September 30th, inclusive. By the evidence so offered it did not appear that any sum of \$10,000 had been entered upon the treasurer's books, either as deposited in the bank, or as drawn from the cash on hand, or as restored to the cash on hand; but, after so testifying concerning said entries, the witness adhered to his former testimony in regard to having made such deposit, and stated that, if such deposit was made, his testimony concerning the same would be in no way affected by the entries of the book; and he testified more positively than before that he believed that he had made such deposit on or about said date, and that he might have drawn or taken \$10,000 from moneys deposited in other banks with which he had accounts, and transferred it to the defendant's bank. Under these circumstances, I can see no error in admitting in evidence the entries upon the cash book. It cannot be said that the evidence so admitted was open to objection upon the ground that it served to refresh the memory of the witness against the defendant, for his testimony thereon was more favorable to the defendant.

than it was before. Neither can it be said that it tended to impeach his evidence. It was not admitted for that purpose. It was admitted for the purpose of explaining, if possible, his evidence upon the subject of the deposits which he had made. It was evidence which could not in any possible way have prejudiced the defendant's case. It did not tend to contradict the evidence of the witness, or to prove affirmatively that the money which he said he might have deposited with the bank at a time near that date was not so deposited. In addition to this, it may be said that in any view it was evidence which affected one transaction only of those which were made the subject of the indictment, and upon which the defendant was found guilty.

It is urged that the court erroneously instructed the jury concerning the special deposits purported to have been made by Hedges, county treasurer, and McAulay, city treasurer. These deposits, as above indicated, appeared in the names of the depositors, with the word "special" added. The evidence of several witnesses was taken as to the meaning of the word "special," so used; and the substance of the evidence given was in harmony with that of J. B. Hedges, who testified that it was "a deposit to be placed in bank in a sack, to be returned to me in the same condition in which it was placed there, without mingling with the funds of the bank," or, in other words, that it was a bailment of the money with the bank. There was evidence, as we have seen, tending strongly to show that in fact neither of these deposits was made; that the moneys represented thereby were entered upon the books by alteration and erasure of entries. But Hedges gave some testimony tending to show that at some period near that date he had made a large special deposit at the bank at the request of the defendant. He does not say that it was on the 25th of September, or that it was \$10,000, and no entry was produced in any book of his indicating that such money was left there at or near that date. He testified to the effect that, on leaving some such sum, in response to a request from the defendant in a conversation in which the defendant said that he expected to receive funds in a few days from Eastern stockholders, it was understood that the money was not to be used by the defendant unless he needed to use it. Neither Hedges nor McAulay had an account with the bank under the name "special," and these entries appear to have been the only ones with said depositors which were so designated. Concerning the McAulay deposit, there was evidence that the defendant had a similar talk with him as with Hedges, with reference to the bank and what the bank was doing, and that he gave him a slip the same as he gave Hedges, and that both to McAulay and Hedges he returned the identical sacks of money which they had left with him on surrender of the slips,—in Hedges' case five days, and in the McAulay case four days, after the deposit. The court instructed the jury:

"That if either or both the said J. W. McAulay and J. B. Hedges at said dates left with the bank the sum of \$10,000, and received therefor what is called in the evidence a deposit slip or memorandum, with the intention to call for and receive the identical sum so left on the surrender of the slip or memorandum, and if the bank so received the same to be returned on the surrender of the slip or memorandum, then I charge you that the bank was

a bailee or custodian of said money, and had no right to enter the same on its books as money deposited with the bank."

As to the Hedges deposit the jury were further instructed as follows:

"You are to determine from the evidence what was the nature of the use that was so permitted to be made, and if the evidence convinces you, beyond a reasonable doubt, that the use so permitted, and as understood by the defendant, was to make a showing of said money, if necessary, to any bank examiner or officer of the government, as if the same were money belonging to the funds of the bank, then you are instructed that the entry of said money upon the books of the bank as appears in the evidence in this case was a false entry; but if you find that the use so permitted was that the money was to be considered a loan to the bank, or that it might be considered a loan to the bank, or that it should be mingled with the funds of the bank as an ordinary deposit, subject to withdrawal by check in the ordinary course of business, the entry of such item on the books would be lawful and proper."

In view of the evidence, it is not perceived that this charge to the jury was erroneous, or that it could have misled them to the defendant's injury.

Exception is taken to that portion of the charge to the jury in which it was said that, if the jury should find that the defendant made a false entry on the books, from this evidence alone the presumption would arise, not only that the entry was made with the criminal intent charged in the indictment, but that it was made with knowledge of its falsity. If this were the whole of the charge on the subject of false entries, it might be open to the criticism which is suggested by counsel for defendant; but elsewhere in the charge the jury were instructed concerning false entries, and were told that:

"A false entry, punishable under this indictment, must be an entry made in a book or report of the bank by the accused, or by some person under his control, acting under his direction, which was false, and known to be so by the defendant when it was made, and designed and intended by him to deceive the bank examiner."

It is urged, also, that the court erred in charging the jury as follows:

"If the jury believe, beyond a reasonable doubt, from the evidence, that the defendant made or caused to be made false entries in the books and report to the comptroller of the currency, with the intent mentioned in the statute, then he is guilty."

It is argued that several intents are mentioned in the statute, whereas only one is charged in the indictment. But it will be found that the court distinctly charged the jury that the indictment accused the defendant, under Rev. St. § 5209, of making false entries in the books of the bank, with intent to deceive the examiner appointed by the comptroller of the currency, and with making reports to the comptroller with the intent to deceive the comptroller of the currency of the United States, and that elsewhere in the charge the attention of the jury was twice again directed to the fact that the entries must be such as were calculated to deceive an examiner or the comptroller; and when reference was made to the "report to the comptroller of the currency, with the intent mentioned in the statute," it could only mean the intent to deceive an officer appointed to examine the condition of the bank, which is mentioned in the statute,

and the jury could not have been misled into supposing that they might find the defendant guilty of making false entries with intent to deceive any officer of the association, or guilty of any other offense with which he was not charged in the indictment.

It is contended by counsel for the defendant that the evidence in the case was insufficient to justify the verdict. Without reviewing the evidence in detail, it will be sufficient to say that in my judgment the verdicts upon both trials were fully justified. The motion for a new trial will be denied.

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DOIG v. SUTHERLAND et al.

(Circuit Court, S. D. New York. May 18, 1898.)

**1 PATENTS—OPERATIVE DEVICE—RECONSTRUCTION OF CLAIMS.**

If a claim can be interpreted so as to describe a practical device only by striking out a portion thereof and transposing other words, this cannot be done as against the public, especially where it has been allowed to stand for 10 years without taking measures for its correction.

**2. SAME—BOX-NAILING MACHINES.**

The Doig & Smith patents, Nos. 276,639 and 342,268, for box-nailing machines, construed, and the former *held* not infringed as to claims 4 and 7, and the latter *held* valid and infringed as to claims 1, 3, 5, and 6, and void as to claim 2 for want of novelty.

This was a suit in equity by William S. Doig against Eugene Sutherland and the John J. Hayes Machine Company for alleged infringements of certain patents relating to machines for nailing boxes.

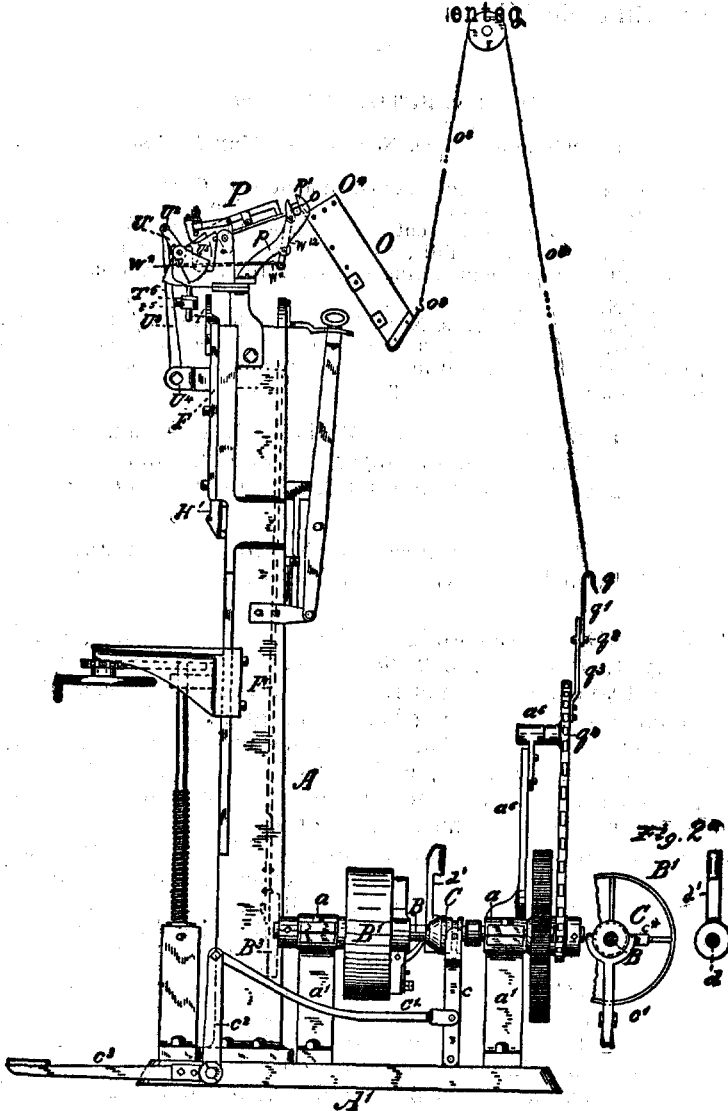
Wilson W. Hoover and Charles G. Coe, for complainant.

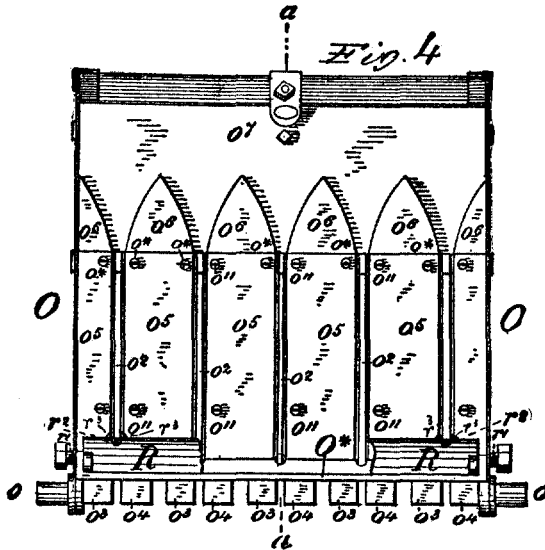
George M. Brooks and Wm. Raimond Baird, for defendants.

TOWNSEND, District Judge. The patents in suit, Nos. 276,639, dated May 1, 1883, and 342,268, dated May 18, 1886, granted to complainant and one Thomas L. Smith, relate to a series of devices used in machines for nailing boxes, the great desideratum therein being economy of time. These machines comprise generally a nail pan for receiving the nails, nail ways for conducting them to the cut-outs, a cut-out so arranged as to separate individual nails and place them in the nail chutes, and other devices not necessary to be here considered. The complainant, by his later patent, No. 342,268, improved on the prior art by introducing into the nail chutes a series of overlapping joints in the nail ways in place of the earlier flush joint, and, in connection therewith, open journals for the bearings of said nail ways, thus insuring better delivery, and obviating the objections of breakage. These two improvements, operating together, were especially useful in enabling the machine to automatically free itself, when it became clogged from damaged nails, thus promoting certainty of operation. This construction is covered by claims 1 and 3 of said patent No. 342,268, which are as follows:

"(1) In a box-nailing machine, substantially as described, a nail-supply pan, as O, arranged in rear of the nail-feeding device, P, and having pivots, o, supported in open journals, p', the said pivots being arranged to rise freely when the nail-feeding device becomes clogged, as herein set forth."

"(3) The combination, with a nail-feeding mechanism provided with plates forming nail ways, of a nail-supply pan, also having plates in its bottom forming nail ways, the said supply pan being pivoted in the automatic vertically adjustable bearings at the rear of the nail-feeding mechanism, substantially as and for the purpose described."





The defendants use overlapping joints, but do not use open journals. Instead thereof, they use conical screws, which, in the jar of the wear of the machine, necessarily loosen, and thus make loose joints, which are then the equivalent in operation of the open journals of complainant. No reason is suggested for this unmechanical and defective construction, and the only effect thereof is to permit this loose motion, and thus to obtain the advantages of the complainant's patent. The defendants' machine infringes said claims 1 and 3.

That the patent to Sullivan does not anticipate complainant's construction, is admitted. That Rogers' patent does not anticipate is satisfactorily proved, because, among other reasons, not only do the drawings and models show that it had no overlap, but, even if it could have had an overlap, it could not have been, in any sense, the overlap of the patent in suit. In complainant's patent, there is no claim which covers the combination of overlapping joint and open journal. Claim 2 of said patent, for the overlapping joint alone, is void for lack of patentable novelty.

Claims 5 and 6 of said later patent cover a construction of way plates so arranged in series as to be adjustable laterally in relation to each other, said way plates being arranged in the form of two frames operated upon laterally by screws in such a way as to adjust said machine to various sizes of nails. By this arrangement each way plate was adjusted to the same size as the others during its entire length by the operation of a pair of screws. Said claims are as follows:

"(5) The combination, in a nail-feeding mechanism, of a frame or support provided with a series of way plates with a second frame or support, also provided with a series of way plates, the way plates of the said frames or supports being arranged to act in pairs to form nail ways, one series being adjustable in relation to the other laterally, substantially as and for the purpose set forth.

"(6) The combination, with the nail-feeding mechanism, of a pair of way plates supporting frames adjustable laterally one in relation to the other, and the frame-adjusting screws, substantially as shown and described."

The defendants' claim that this construction is anticipated by the prior Swan patent is not supported, for the following, among other reasons: The Swan patent was issued in 1876,—10 years before the patent in suit. It was a mere paper patent. It is not capable of successful practical operation. Its specifications and drawings do not correspond, and the model introduced in evidence is neither like the specification nor the drawings, and is not shown to be like the patent-office model. If it had been an easy thing, as defendants' counsel argues, to construct from the Swan device the device of the patent in suit, it would seem, considering the manifest advantages resulting from such construction, that some one would have discovered it during the 10 years before the grant of the later patent in suit. The Swan device does not show a rigid frame. Its screws work separately, and it therefore does not provide the means for simultaneous adjustment of a frame by a single operation, which characterizes the complainant's device.

The defendants use a device patented to one of their officers some 10 years after the issuance of complainant's patent. This device is practically the construction of the complainant's patent plus a cam used in connection with its screws, and is equivalent thereof, or at most an improvement thereon. I find that claims 5 and 6 are valid, and are infringed by defendants.

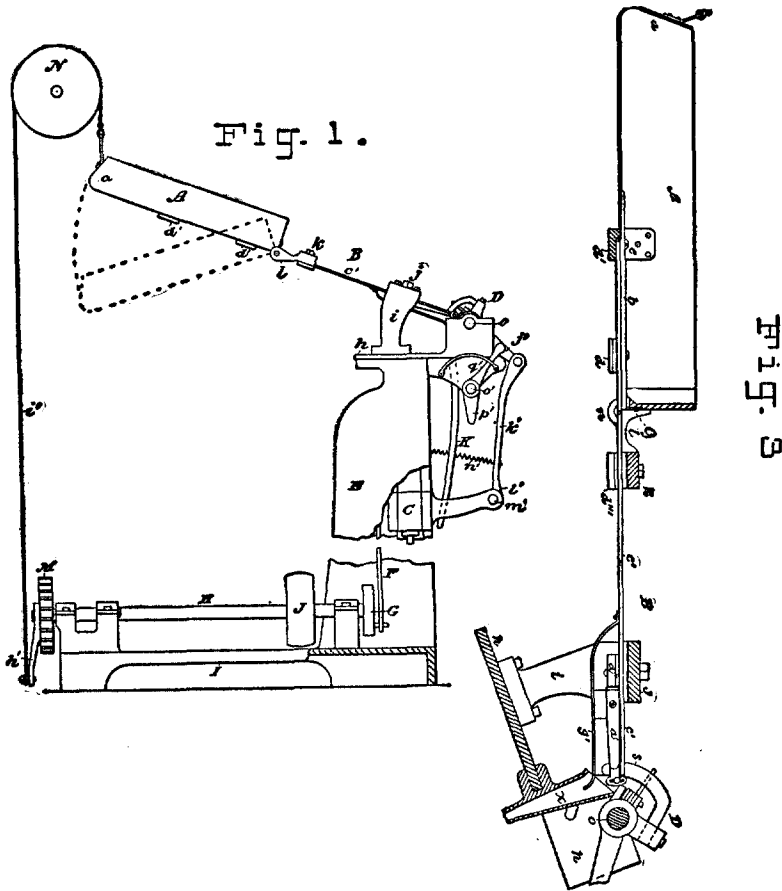
Complainant contends that claims 4 and 7 of the earlier patent of 1883—No. 276,639—are infringed. The fourth claim covers what are known as "supplementary track plates," and is as follows:

"(4) The combination, with the track plates, of the supplementary track plates, g', arranged below them to form a guide track for the bodies of the nails, substantially as and for the purposes set forth."

These track plates are guides fastened below the main nail plates for the purpose of holding the nails in a vertical position in their downward passage towards the nail chutes, and especially of resisting the action of the pin or cut-out when it passes horizontally between the nails. In view of the prior art as shown by the Swan and Rogers patents, I think that this device does not involve invention. In the earlier device there were no supplemental guide plates, but the guide plates themselves were constructed so as to operate on the same principle. All that the complainant did was to fasten a couple of pieces onto the bottom of a guide plate constructed substantially according to the guide plates of the prior art for the purposes above stated. In any event, and as the defendants' construction differs from that of complainant, and in view of the prior art, said fourth claim cannot be so broadened as to embrace the defendants' construction. This claim, therefore, is not infringed.

Claim 7 of said patent is as follows, and is intended to cover a contrivance which defendants admit involved invention, and which they would infringe if said claim were properly worded:

"(7) In a machine for feeding nails to a nailing machine, the tilting hopper, arranged to be lowered at one nailing operation and raised at the next by



means of the cross-head, C, of the nailing machine, and the main shaft and crank which reciprocate it, a crank, h', driven from the main shaft, which drives the cross-heads, C, and at half the speed of said main shaft, and a connector, which couples the hopper with the said crank, h', whereby the said hopper is permitted to stand at rest in each position during the interval between nailing operations, substantially as set forth."

The invention consisted in an arrangement of the machine for so feeding the nails to the nail plates that they would not become clogged, and would not be drawn out. This is accomplished by means of the main shaft and crank and other mechanisms, which the claim states has been accomplished "by means of the cross-head, C, of the nailing machine," etc. The hopper is not raised or lowered by means of said cross-head in either the complainant's or defendant's machine. Complainant's expert admits that said claim can only be interpreted so as to describe a practical device by striking out a portion thereof, and transposing other words therein. It should not be so construed as against the public, especially as com-

plainant has left it for 10 years without taking any measures for its correction. The defendants do not infringe said claim.

Let a decree be entered for an injunction against both defendants, and for an accounting against the defendant corporation as to claims 1, 3, 5, and 6 of patent No. 342,268, and in favor of defendants as to claims 2 of patent No. 342,268, and claims 4 and 7 of patent No. 276,639; without costs to either party.

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CONSOLIDATED CAR HEATING CO. v. GOLD CAR HEATING CO. et al.  
SAME v. GOLD STREET CAR HEATING CO. et al.

(Circuit Court, S. D. New York. May 26, 1898.)

1. PATENTS—PRIOR ADJUDICATIONS IN OTHER CIRCUITS.

An adjudication by a circuit court of appeals sustaining a patent, and construing its claims, will be followed by a circuit court in another circuit, unless some new evidence is presented, of such a character as might fairly be supposed to be calculated to induce a different decision if it had been produced before that court.

2. SAME—VALIDITY—ELECTRIC CAR HEATERS.

The McElroy patent, No. 500,288, for an electrical heater for street-railway cars, held valid and infringed, on motion for preliminary injunction.

These were suits in equity brought by the Consolidated Car Heating Company against the Gold Car Heating Company and others and against the Gold Street Car Heating Company and others, respectively, for alleged infringement of letters patent No. 500,288, issued June 27, 1893, to the complainant, as assignee of James F. McElroy. The causes were heard on motions for preliminary injunction.

Frederick P. Fish, for the motion.

Henry Thompson, opposed.

LACOMBE, Circuit Judge. Well-settled practice in this circuit would seem to leave little doubt as to the proper disposition to be made of these motions. The patent in suit, upon a voluminous record, and after careful argument, has been sustained, and its claims construed, by the circuit court of appeals in the First circuit, in *Consolidated Car Heating Co. v. West End St. Ry. Co.*, 29 C. C. A. 386, 85 Fed. 662. That construction is to be followed here, unless this record presents some new evidence, of such a character as might fairly be supposed to be calculated to induce a different decision, had such evidence been before the court which heard the earlier cause. The only new evidence introduced on this hearing consists of the Joule "demonstration," the Pulvermacher British patent, and the Gold steam heater. None of these seem entitled to any especial consideration. They are clearly not "anticipations," and, considered as "suggestions," they deal rather with form than with substance. The construction which the circuit court of appeals gave to the first claim, therefore, will be followed here. Such construction covers mechanical equivalents which embody the substantial invention of the patent. The device of defendants is obviously a close mechanical

equivalent,—differing in form, but accomplishing the same result in the same way. It seems, however, to be a better arranged and more efficient device, and a distinct improvement upon the patent in suit. In consideration of this latter circumstance, the injunction to which complainant is entitled will be suspended till November 1st, upon defendants giving bonds in the usual form for \$10,000 in each case, and filing sworn accounts of sales monthly. Such suspension, however, to be without prejudice to any future action by complainants to enjoin the use by purchasers of any infringing devices bought during the pendency of such suspension.

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CIMIOTTI UNHAIRING CO. et al. v. DERBOKLOW.

(Circuit Court, E. D. New York. June 27, 1898.)

**1. PATENTS—INFRINGEMENT—EXPERIMENTATION.**

One who used two infringing machines for dehairing pelts for nearly three years cannot escape liability on the ground that he was merely experimenting to see if he could discover improvements on the machines, especially where it appears that the pelts operated upon were not his own, but those of his customers, given to him to dehair in the ordinary course of business.

**2. SAME—MACHINES FOR PLUCKING PELTS.**

The Sutton patent, No. 536,742, for a machine for plucking pelts, construed, and *held* valid and infringed.

Hearing upon pleadings and proofs of bill in equity to restrain infringement of claims 1 and 3 of United States patent No. 536,742, issued April 2, 1895, to complainant John W. Sutton for a machine for plucking pelts. The complainant the Cimiotti Unhairing Company is the exclusive licensee in the United States under said patent.

Goepel & Raegener, for complainants.

York & York, for defendant.

LACOMBE, Circuit Judge. In preparing fur skins for the market it is necessary to remove certain stiff hairs (known as "water hairs"), which project up through the softer fur. Originally these were removed by hand, the fur being parted by blowing upon it, and the water hair appearing in the "part" being snipped off with a pair of scissors. Subsequently machines were devised to do this work, including one invented by Sutton (United States patent No. 383,258, May 28, 1888). The patent in suit is for an improvement on this last-named patent. A description sufficient for the purposes of this suit will be found in the following excerpt from the later patent:

"The invention consists of a machine for removing the water hairs from pelts of all kinds, which comprises a fixed stretcher bar, means for stretching and intermittently feeding a pelt over said stretcher bar, a rotary brush located above the stretcher bar and near the edge of the same, a reciprocating guard comb below the stretcher bar, a rotary separating brush likewise below the stretcher bar, mechanism for moving the said brush and guard comb into a position in upward and forward direction towards the edge of the stretcher bar and over the portion of the pelt below the same, a vertically reciprocating knife, a rotary knife arranged to cut off the projecting water hairs in

conjunction with the vertically reciprocating knife, and a card arranged on the arm of the rotary knife at some distance from the same, so as to pass over the portion of the pelt in position on the stretcher bar."

This description includes the original machine as well as the improvement. The improvement which is covered by the patent in suit, and on which alone infringement is charged, consists in the rotary brush above the stretcher bar. The specification says:

"As compared to my prior patent before mentioned, the novel and important feature of the present construction is the substitution for the stationary card above the stretcher bar of a rotary brush which is placed close to the edge of the stretcher bar, and which serves to brush the fur back from the edge of the bar while it allows the stiff hairs to rise and project above the fur. When the card, which was supported back of the rotary knife in my prior machine, passed the edge of the stretcher bar, it drew out from under the stationary card all the fur and hair on that section of the pelt that were on the edge of the bar. Some of the fur, however, was only partly drawn out, owing to the varying thicknesses of the pelts. This partly drawn out fur lay in the form of a loop, which stood out far enough to be reached by the knives, but not far enough to be reached by the rotary brush below the stretcher bar, and so was cut off by the knives. With the rotary brush in place of the stationary card heretofore used by me, this looped fur is drawn back and laid down before the knives reach it, so that the cutting of the fur is prevented, and only the stiff hairs are removed."

This is a concise and intelligible description. It shows clearly just what it was which Sutton devised to remedy the defect of his earlier machine. It can readily be understood that his device was efficient, and unless it is anticipated in earlier patents, or some prior use is shown, the claims embodying such improvement would seem to be valid. The claims in suit are:

"(1) The combination of a stretcher bar, means for intermittently feeding a pelt over the stretcher bar in one direction, a rotary brush located near the edge of the stretcher bar and in contact with that portion of the pelt moving towards the edge of the stretcher bar, means for continuously rotating said brush reversely to the direction of the movement of the pelt, and means for removing the hairs projecting from the pelt in front of the working edge of the stretcher bar, after the brush has operated on the pelt, substantially as set forth." "(3) The combination of a stretcher bar, means for intermittently feeding a pelt over the stretcher bar in one direction, a rotary brush located near the edge of the stretcher bar and in contact with that portion of the pelt moving towards the edge of the stretcher bar, means for continuously rotating said brush reversely to the direction of movement of the pelt, a rotary separating brush below the stretcher bar, and a mechanism by which the separating brush is moved upward and forward into a position close to the working edge of the stretcher bar, substantially as set forth."

It will be observed that a "parting" of the fur is effected by the operation of two devices, one on each side of the line over which the pelt passes in its progress under the cutting devices. One of these parting devices is located beyond such line, and in complainant's patent is a rotary brush revolving so as to brush the hairs in the same direction in which the pelt is moving. This may be called the "lower parting device." The other, which may be called the "upper parting device," is located just short of the line where the cutting devices operate. In the complainant's patent, also, is a rotary brush, which revolves, however, so as to brush the hairs in a direction contrary to that in which the pelt is moving.

The answer sets up a United States patent to defendant (No. 483,142, September 27, 1892), which has been put in proof. It also rather indistinctly refers to a United States patent to one Anton Hedbavny, in the year 1888, of which the record contains no trace. In the patent to defendant (483,142) the "lower parting device" is a so-called "wiper," which is a hollow sleeve or tube, with hollow vanes held in such tube or sleeve, and communicating with the interior thereof, the vanes being formed with perforations. Steam is driven through the "wiper," dampening the fur, and as the vanes run lengthwise the revolving tube, and therefore across the moving pelt, their faces press down the dampened fur. The revolution of the "wiper" is such as to press or "wipe" down the fur in the direction of the forward movement of the pelt. In the same patent the "upper parting device" is the guard or comb, G, which, motionless itself, serves to retard the fur as the pelt is moved along between the guard or comb and the stretcher bar. This certainly is no anticipation of complainant's upper rotary brush. Indeed, as his specification points out, the brush was devised to correct defects of operation which were found to exist when a comb or guard was used.

Two other United States patents have been put in evidence. Not being pleaded, they could not be availed of as anticipations, but they contain nothing material. In the one to Anton Hedbavny (No. 408,879, August 13, 1889) the "upper parting device" is the guard comb, C, which serves to retain the soft hair or wool of the pelt before the same passes over the edge of the transverse bar (stretcher bar). In the one to H. W. Covert (No. 304,992, September 9, 1884) the "upper parting device" is the cutting blade or shear, C, the cutting edge resting permanently on the fur for the purpose of holding it down in its natural position.

About a month after the patent to complainant was issued defendant filed a caveat for a skin-dehairing machine, which shows the two rotary brushes revolving in opposite directions, as shown and claimed in complainant's patent. The evidence by which defendant sought to carry his use of this device back to January 1, 1894, is conflicting, and not particularly persuasive; while evidence quite as satisfactory carried back the date of Sutton's invention to the early part of 1893. There is evidence showing utility and acceptance by the trade. The patent is therefore sustained as to the claims in suit.

The use of two infringing machines is hardly denied. Defendant admits that for nearly three years he has been using machines for dehairing pelts which contain the combination of brushes shown in his caveat, which is substantially the combination of the patent. It is sought to excuse this use of infringing devices on the theory that defendant was "experimenting" with the machines in order to see if he could not discover some improvement. But his experiments consisted in running pelts through the machines. Apparently he had no pelts of his own, and has used those of his customers, which he was given to dehair, in the ordinary course of business. This is not fairly within any legitimate use for experimental purposes only. *Poppenhusen v. Falke* (1861) 2 Fish. Pat. Cas. 181, Fed. Cas. No.

11,279; *Albright v. Trimming Co.*, 2 Ban. & A. 629, Fed. Cas. No. 147.

Complainants may take the usual decree for injunction and accounting.

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E. INGRAHAM CO. v. E. N. WELCH MFG. CO. et al.

(Circuit Court, D. Connecticut. June 11, 1898.)

No. 943.

1. PATENTS—NOVELTY AND INVENTION—EVIDENCE.

Evidence of reduction in cost, improved appearance, increased strength, large sales, and inequitable conduct by defendants is only relevant where the question of novelty is in doubt.

2. SAME—BASES FOR CLOCKS.

There is no invention in merely cutting the under surface of the old molding section used in forming bases for clocks, so as to drive the nails in from below instead of above.

3. SAME.

The Wright patent, No. 594,309, for a base for clocks, is invalid on its face for want of invention.

This was a suit in equity by the E. Ingraham Company against the E. N. Welch Manufacturing Company and others for infringement of a patent for a base for clocks, granted to William H. Wright, November 23, 1897.

George D. Seymour, for complainant.

W. E. Simonds and Mitchell, Bartlett & Brownell, for defendants.

TOWNSEND, District Judge. To this bill for infringement of patent No. 594,309, for base for clocks, granted November 23, 1897, and assigned to complainant, defendants demur for invalidity appearing on the face of the patent.

The claim is for—

"A framed clock base, consisting of several wooden molding sections framed together, and each provided upon the inner face of its upper edge with an integral, inwardly projecting assembling flange, extending throughout its length, and formed by cutting away a portion of its inner face, a panel placed upon the upper edges of the said framed molding sections so as to rest upon the assembling flanges thereof, and fastening devices passed upward through the said flanges into the lower face of the panel, which they firmly bind to the framed molding sections, substantially as described."

In short, the patentee asserts a monopoly in clock bases provided with such a flange, through which tacks may be driven from underneath. In support of this claim, counsel for the patentee states that he proposes to rely on proof of reduction in cost, improved appearance, increased strength, large sales, and inequitable conduct on the part of defendants. These facts, if shown, would be relevant only where the question of patentable novelty is in doubt. Here it is clear that the flanges, even if they are not the ordinary construction employed in brackets, shelves, and moldings, are, at most, the result of the exercise of the merest mechanical skill.

The patentee, in his specification and drawings, shows that his invention consists in cutting the under surface of the old molding section so as to drive the nails in from below instead of above. It is impossible to conceive of any evidence which would dignify such a manifestly mechanical expedient with the name of invention. The demurrer is sustained.

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THE EUGENE.

(Circuit Court of Appeals, Ninth Circuit. May 12, 1898.)

No. 430.

1. APPEAL AND ERROR—FINALITY OF DECREE.

A decree in admiralty, awarding libelants a definite sum, adjudging that a maritime lien exists therefor, and directing the sale of the vessel and payment of the proceeds into the registry to await the further order of the court, is a final appealable decree.

2. SAME—MARITIME LIENS—BREACH OF CONTRACT.

There can be no maritime lien against a vessel for breach of a contract of carriage where she never in fact entered on the performance thereof, and neither the libelants nor their baggage were ever received on board, or placed in the care or control of the master. 83 Fed. 222, affirmed.

Appeal from the District Court of the United States for the Northern Division of the District of Washington.

Williams, Wood & Linthicum, for appellant.

John C. Hogan and Patterson & Easley, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The appellant is claimant of the steamboat Eugene, and brings this appeal from the decree of the court below against the steamboat and in favor of the libelants and of Walter M. Cary, Fred M. Lyons, and Edward J. Knight, named in the decree as interveners, each in the sum of \$800, and directing that a writ of venditioni exponas issue against the vessel to satisfy the decree, with costs. Exceptions to the original libel having been sustained (83 Fed. 222), the libel was amended. As amended, it alleges, in substance, that the defendant Portland & Alaska Trading & Transportation Company was, during the times therein mentioned, a common carrier by water of passengers, baggage, and freight between the city of Seattle, Wash., and Dawson City, on the Yukon river, one E. B. McFarland being its general manager, and one C. W. Gould its transportation agent; that during all of the times mentioned the trading and transportation company owned and operated, in connection with its said business, the steamboat Eugene, and also operated, in the same connection, a steamship known as the Bristol; that on, prior, and subsequent to August 11, 1897, the Eugene and the respondent company caused it to be publicly and extensively advertised that the Eugene, in tow of the Bristol, would leave Seattle for Dawson August 23, 1897, and would transport passengers to the number of 350, or less, including their baggage and freight, not to

exceed 1,500 pounds each, and would reach Dawson City not later than September 15, 1897; that, relying upon the good faith of those advertisements, and believing those representations, and others of like effect, to be true, the libelants, on or about August 19, 1897, made and entered into a contract with the steamer Eugene, wherein and whereby that boat undertook and agreed to carry the libelants from the city of Seattle to Dawson City, and to leave Seattle on the voyage on the 24th day of August, 1897, and to reach Dawson City not later than September 15th of the same year; that the contract further provided that the Eugene should leave Seattle on the voyage in tow of the steamship Bristol, and should be towed by the Bristol from Seattle to the port of St. Michaels, Alaska, from which place the Eugene should continue the voyage alone up the Yukon river to Dawson City; in consideration of all which each of the libelants paid for passage on said steamer Eugene, with 1,500 pounds of baggage, the sum of \$300, and received tickets for such passage. The amended libel further alleges that on the 24th day of August, 1897, the Eugene entered upon the performance of the alleged contract, and left the city of Seattle in tow of the Bristol, and undertook to carry the libelants and other passengers over the whole of the said voyage, and proceeded thereon 600 or 700 miles on the high seas to the coast of Alaska, where she abandoned the voyage, and refused to proceed further thereon. It is alleged that the libelants were landed at Victoria, B. C., each of whom was thereby damaged in the sum of \$1,000 by reason of the loss of outfit, loss of time, and passage money. After the filing of an answer to the amended libel by the claimant, Walter M. Cary, Fred M. Lyons, and Edward J. Knight served upon the proctors for the claimant a petition in intervention, claiming the same relief against the steamboat Eugene upon a precisely similar state of facts; in respect to which intervention the respective parties stipulated that it should abide the result of the trial of the issues between the libelants and the claimant. One C. Hennigar also intervened in the cause for repairs made upon the Eugene subsequent to the libelants' claims, but afterwards that intervention was, by stipulation of the respective parties, eliminated from consideration. The decree awarded damages in favor of each of the libelants and interveners in the sum of \$800, and further decreed that the vessel libeled be sold, and the proceeds paid into the registry of the court, after deducting the costs of sale, there to await the further order of the court in respect to their distribution.

The appellees, claiming that the decree is not a final one, move to dismiss the appeal on that ground. There is nothing in the point. The decree awards a definite sum to each of the libelants and interveners, decrees that a maritime lien exists therefor upon the Eugene, and directs the execution of the decree by the sale of the boat by the marshal under the admiralty process of the court. Such sale would divest the claimant of all title to the vessel. The direction that the marshal pay the proceeds into the registry of the court, there to await the further order of the court in respect to their disposition, was a mere incident. The merits of the controversy between the parties remained concluded by the decree, from which any dissatisfied

party had the right of appeal. *Whiting v. Bank*, 13 Pet. 6; *Forgay v. Conrad*, 6 How. 204; *Withenbury v. U. S.*, 5 Wall. 819; *Hill v. Railroad Co.*, 140 U. S. 52, 11 Sup. Ct. 690; *The Alert*, 9 C. C. A. 390, 61 Fed. 115. Hennigar was not a party to the proceedings sought to be reviewed. His intervention was, by the stipulation of all of the parties, withdrawn from consideration. See *Gilfillan v. McKee*, 159 U. S. 303, 16 Sup. Ct. 6.

In respect to the merits, but little need be said. The libels are based upon alleged contracts by which, in consideration of the payment of \$300 each, the steamboat *Eugene* undertook and agreed to transport the libelants and interveners, with 1,500 pounds of freight each, from the city of Seattle to Dawson City. The difficulty in the way of affirming the decree (apart from the question raised as to the amount of damages awarded) is that the proof wholly fails to show that the *Eugene* ever undertook or agreed to transport either of the libelants or interveners from Seattle to Dawson City. On the contrary, the proof shows, without conflict, that the *Eugene* was to transport them from St. Michaels, Alaska, to Dawson City only. Upon the performance of that undertaking the *Eugene* never entered, nor did she ever receive on board either of the libelants or interveners, or any of their freight or baggage. We can discover no ground upon which a lien upon that boat can be sustained in favor of the appellees, or either of them. Decree reversed, and cause remanded for further proceedings not inconsistent with this opinion.

## MEMORANDUM DECISIONS.

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**CALIFORNIA REDWOOD CO. v. LITTLE.** (Circuit Court of Appeals, Ninth Circuit. May 3, 1898.) No. 403. Appeal from the Circuit Court of the United States for the Northern District of California. Page, McCutchen & Eells, for appellant. Barclay Henley and S. V. Costello, for appellee. Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This case presents substantially the same questions that were involved in *Mortgage Co. v. Hopper*, 12 C. C. A. 293, 64 Fed. 553, 559. We are asked to review the question relative to the rights of bona fide purchasers, for value, before the issuance of a patent. We adhere to the views expressed upon this point in the *Hopper* Case, repeated and followed by this court in *Diller v. Hawley*, 26 C. C. A. 514, 81 Fed. 651, 655; and, upon the principles therein announced, the judgment of the circuit court is affirmed, with costs.

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**CALIFORNIA REDWOOD CO. v. MAHAN.** (Circuit Court of Appeals, Ninth Circuit. May 3, 1898.) No. 404. Appeal from the Circuit Court of the United States for the Northern District of California. Page, McCutchen & Eells, for appellant. Barclay Henley and S. V. Costello, for appellee. Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is a companion case to that of *California Redwood Co. v. Little*, ubi supra; but the special point relied upon by appellant in this case is that the cancellation of the entry for fraud was made without notice to the claimant or parties interested. The facts are identical with those presented upon this point in *Mortgage Co. v. Hopper*, 12 C. C. A. 293, 64 Fed. 553, 556; and, upon the principles announced in that case and the authorities there cited, the judgment of the circuit court is affirmed, with costs.

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**CALDWELL et al. v. ALLEN et al.** (Circuit Court of Appeals, Fifth Circuit. May 21, 1898.) No. 726. In Error to the Circuit Court of the United States for the Northern District of Alabama. Caldwell & Johnston, in pro. per. Cabiness & Weakley, for defendants in error. Dismissed, per stipulation.

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**CARTTER et al. v. JACKSONVILLE & K. W. RY. CO.** (Circuit Court of Appeals, Fifth Circuit. May 21, 1898.) No. 700. Appeal from the Circuit Court of the United States for the Southern District of Florida. Stephen E. Foster, for appellant. T. M. Day, Jr., J. C. Cooper, and R. H. Liggitt, for appellees. Dismissed, per stipulation of counsel.

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**DUNKLIN TP., GREENVILLE COUNTY, S. C., v. WELLS.** (Circuit Court of Appeals, Fourth Circuit. May 3, 1898.) No. 250. Appeal from the Circuit Court of the United States for the District of South Carolina. B. M. Shuman (J. A. McCullough, on brief), for plaintiff in error. H. J. Haynsworth (of Haynsworth & Parker), for defendant in error. Before GOFF, Circuit Judge, and JACKSON and PAUL, District Judges.

JACKSON, District Judge. The controlling questions presented for the consideration of this court in the record in this case are similar to those presented in the case of *Township of Ninety-Six v. Folsom*, 87 Fed. 304, which have been

maturely considered by the court; and, for the reason assigned in the opinion of the court in that case, the judgment of the court below in this case is without error, the demurrer to the complaint was properly overruled, and we concur fully with the trial judge in his action on the points raised during the trial to the jury. Affirmed.

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**HAWKHURST S. S. CO., Limited, v. KEYSER et al. KEYSER et al. v. HAWKHURST S. S. CO., Limited.** (Circuit Court of Appeals, Fifth Circuit. May 24, 1898.) No. 653. Appeal and Cross Appeal from the District Court of the United States for the Northern District of Florida. J. P. Kirlin and John Eagan, for Hawkhurst S. S. Co. John C. Avery, for W. S. Keyser & Co. Before PARDEE and McCORMICK, Circuit Judges, and PARLANGE, District Judge.

PER CURIAM. The questions raised on this appeal and cross appeal were elaborately considered by the district judge. His written opinion is found in the transcript, as well as reported in 84 Fed. 693; and, as we concur in the conclusions reached by him, the decree appealed from is affirmed.

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**In re HIRSCH.**

(Circuit Court of Appeals, Second Circuit. March 2, 1898.)

No. 68.

**HABEAS CORPUS—WHEN GRANTED.**

Appeal from the Circuit Court of the United States for the District of Connecticut.

This was a petition for a writ of habeas corpus by Heyman J. Hirsch, deputy internal revenue collector, who was committed by a state court of Connecticut for a refusal to produce to such court, in obedience to a subpoena duces tecum, an original application or return of a special taxpayer, to be used as evidence on the prosecution of such taxpayer for selling liquor in violation of the state laws. The writ was discharged by the circuit court on the hearing (74 Fed. 928), and the petitioner appeals.

Charles W. Comstock, U. S. Atty., for appellant. John L. Hunter, for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. We concur in the opinion of the circuit judge dismissing the writ of habeas corpus, and therefore affirm the order appealed from. We do not, however, intend to decide that the writ of habeas corpus is the proper remedy to secure a review of the judgment of the state court in punishing a witness for disobedience of its process of subpoena ad testificandum. See *Ex parte Parks*, 93 U. S. 18; *In re Wood*, 140 U. S. 278, 11 Sup. Ct. 738; *In re Frederick*, 149 U. S. 70, 13 Sup. Ct. 793; *In re Tyler*, 149 U. S. 180, 13 Sup. Ct. 785; *Ex parte Crouch*, 112 U. S. 178, 5 Sup. Ct. 96.

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**HOEFFNER v. UNITED STATES.** (Circuit Court of Appeals, Eighth Circuit. May 9, 1898.) No. 986. In Error to the District Court of the United States for the Eastern District of Missouri. Thomas B. Harvey, for plaintiff in error. Edward A. Rozier, U. S. Atty., and Walter D. Coles, Asst. U. S. Atty., for defendant in error. Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

SHIRAS, District Judge. This case presents the same questions that have been passed upon in case No. 985, just decided (*Hoeffner v. U. S.*, 87 Fed. 185); and, following the conclusions therein reached, the judgment in the trial court is affirmed.

**THE ST. PAUL VANELIUS v. UNITED STATES.** (Circuit Court of Appeals, Ninth Circuit. February 7, 1898.) No. 181. Appeal from the District Court of the United States for the District of Alaska. Warren Gregory, for appellant. Charles A. Garter, for the United States. Before GILBERT, ROSS, and MORROW, Circuit Judges.

PER CURIAM. This case is precisely similar to the case entitled "La Ninfa," heretofore decided by this court, and reported in 44 U. S. App. 648, 21 C. C. A. 434, and 75 Fed. 513. On the authority of that case, the decree appealed from is reversed, and the cause remanded, with instructions to the district court to dismiss the libel.

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**STANDARD OIL CO. v. BELL et al.** (Circuit Court of Appeals, Fifth Circuit. May 24, 1898.) No. 598. In Error to the Circuit Court of the United States for the Southern District of Florida. This is an action brought by William J. Bell and others against the Standard Oil Company to recover possession of land and damages for the occupation and use thereof. Judgment for plaintiffs, and defendant brings error. Affirmed. J. C. Cooper, W. W. Howe, W. B. Spencer, and G. B. Cocke, for plaintiff in error. H. Bisbee, for defendants in error. Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

McCORMICK, Circuit Judge. This case is identical in its substantial issues with the case of Railroad Co. v. Bell (just decided) 87 Fed. 369, the plaintiff in error in this case claiming under the Florida Central & Peninsular Railroad Company; and, on the ground and for the reasons given and suggested in the opinion in that case, the judgment of the circuit court in this case is affirmed.

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**TRUMAN v. DEERE IMPLEMENT CO.** (Circuit Court of Appeals, Ninth Circuit. February 21, 1898.) No. 377. Appeal from the Circuit Court of the United States for the Northern District of California. John L. Boone, for appellant. M. A. Dorn, D. S. Dorn, and Chas. E. Nougues, for appellee. Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This case involves the same questions as were presented and decided in Truman v. Holmes, 87 Fed. 742; and, upon the authority of that case, the judgment of the circuit court is affirmed, with costs.

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**WESTENFELDER v. GREEN et al.**

(Circuit Court of Appeals, Ninth Circuit. May 17, 1898.)

No. 423.

**APPEAL—RECORD.**

Appeal from the Circuit Court of the United States for the District of Oregon.

Before ROSS and MORROW, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This was, apparently, a suit in equity to quiet complainant's alleged title to a lot of land in the city of Portland, Or. See 76 Fed. 925, 78 Fed. 892. It was argued, both orally and by brief, on behalf of the respective parties, as if there was an appeal here from the decree of the court below. An examination of the record, however, fails to disclose any such appeal; and, if it did, there is nothing in the transcript showing the case upon which the decree printed therein was based. Indeed, there is nothing in it properly certified or identified. The pretended appeal, together with all of the proceedings herein, is accordingly dismissed.

WOOD et al. v. KEYSER et al. KEYSER et al. v. WOOD et al. (Circuit Court of Appeals, Fifth Circuit. May 24, 1898.) No. 654. Appeal and Cross Appeal from the District Court of the United States for the Northern District of Florida. J. P. Kirlin and John Eagan, for John Wood & Co. John C. Avery, for W. S. Keyser & Co. Before PARDEE and McCORMICK, Circuit Judges, and PARLANGE, District Judge.

PER CURIAM. The questions raised on this appeal and cross appeal were elaborately considered by the district judge in his written opinion, as found in the transcript, and as reported in 84 Fed. 688; and, as we concur in the conclusions reached by him, the decree appealed from is affirmed.

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HOE et al. v. SCOTT.

(Circuit Court, D. New Jersey. May 20, 1898.)

For opinion, see 87 Fed. 220.

KIRKPATRICK, District Judge. The defendant having moved this court that the depositions of each and every witness taken on the accounting herein before the master, and each and every part thereof, and all exhibits offered in evidence in connection with such deposition, be stricken out, and, in case the court should decline so to do, that defendant should be allowed to put in evidence in defense before the master upon matters relating to the scope of the accounting before the nature and scope of the account which the defendant is to file are passed upon, and for other and further relief; and such motion coming on to be heard, upon the proceedings heretofore had herein, and the filed papers and evidence in this cause, including the evidence heretofore taken before Henry D. Oliphant, Esq., master, etc., and upon the affidavits of Walter Scott and William H. L. Lee, both verified April 1, 1897; and after hearing Benjamin F. Lee, Esq., and William H. L. Lee, Esq., of counsel for defendant, in support of said motion, and Myron H. Phelps, Esq., of counsel for complainant, in opposition thereto, and due deliberation having been had; and it appearing to the court that the motion to strike out said depositions and exhibits should not be allowed or considered on its merits at the present time, and that all matters pertaining to the merits should be deferred until the coming in of the master's report:

It is ordered and adjudged that the motion to strike out the depositions of each and every witness taken on the accounting herein before the master, and each and every part thereof, and all exhibits offered in evidence in connection with said depositions, without passing on the merits thereof, be, and the same is, not allowed at the present time, and that the hearing of said motion, and all matters involved in said motion pertaining to the merits thereof, be, and they hereby are, deferred, and the consideration thereof reserved, until the coming in of the said master's report; and it appearing to the court that there are certain machines manufactured by the defendant which are claimed by the complainants to be within the scope of the decree entered in the cause, and which said machines, it is insisted on the part of the defendant, are not within the scope of said decree, and the court being of the opinion that it is within the province or the duty of the master to determine the question whether said machines contain infringement upon the claims of the complainant's patent as in this cause adjudicated, it is ordered that, before proceeding with the accounting so far as the same relates to said machines which it is claimed are not within the scope of the decree, the said master do first satisfy himself by the evidence produced by both parties of the validity of the complainant's contention.